No.

In the Supreme Court of the United States

ALIXPARTNERS, LLP ET AL.,

Petitioners,

v.

THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 1782(a), district courts may authorize third-party discovery against U.S. persons where the evidence sought is for use in "a foreign or international tribunal." The lower courts are in acknowledged conflict regarding the meaning of the phrase "foreign or international tribunal" and, accordingly, whether Section 1782 reaches non-governmental arbitration proceedings occurring in a foreign country. This Court was set to resolve that conflict in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, but that case was dismissed upon the parties' Rule 46 motion shortly before oral argument had been scheduled to occur. This petition likewise presents the Section 1782 dispute, and in an even more critical context. Whereas the arbitration in *Servotronics* was between two private parties, the arbitration here is between a private party and a foreign state—an application of Section 1782 upon which the United States has expressed "particular concern." The question presented is:

Whether an ad hoc arbitration to resolve a commercial dispute between two parties is a "foreign or international tribunal" under 28 U.S.C. § 1782(a) where the arbitral panel does not exercise any governmental or quasi-governmental authority.

PARTIES TO THE PROCEEDING

Petitioners (third-party defendants-appellants below) are AlixPartners LLP and Mr. Simon Freakley.

Respondent (plaintiff-appellee below) is The Fund for Protection of Investor Rights in Foreign States.

CORPORATE DISCLOSURE STATEMENT

Petitioner AlixPartners LLP states that it is a privately held limited liability partnership with a principal place of business in New York. AlixPartners LLP further states that its corporate parent is AlixPartners Holdings LLP and that no publicly-held corporation owns a 10% or greater interest in AlixPartners LLP.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

In re the Application of the Fund for Protection of Investor Rights in Foreign States Pursuant to 28 U.S.C. § 1782 for an Order Granting Leave to Obtain Discovery for use in a Foreign Proceeding, No. 19-mc-00401-AT (July 8, 2020) (authorizing issuance of subpoenas), *recons. denied* August 25, 2020.

United States Court of Appeals (2d Cir.):

The Application of the Fund for Protection of Investor Rights in Foreign States Pursuant to 28 U.S.C. § 1782 for an Order Granting Leave to Obtain Discovery for use in a Foreign Proceeding v. AlixPartners, LLP, No. 20-2653-cv (July 15, 2021) (affirming district court), *rehearing denied* September 10, 2021.

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Petitioners AlixPartners LLP and Simon Freakley respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) is reported at 5 F.4th 216. The opinion of the district court (App. 41a-51a) is not published in the Federal Supplement but is available at 2020 WL 3833457. The opinion of the district court denying reconsideration (App. 34a-40a) is not published in the Federal Supplement but is available at 2020 WL 5026586.

JURISDICTION

The opinion of the court of appeals was issued on July 15, 2021. The court of appeals denied Petitioners' timely petition for panel rehearing or rehearing *en banc* on September 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1782(a) of Title 28 of the United States Code provides, in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

STATEMENT

Section 1782 allows district courts to authorize third-party discovery against U.S. persons "for use in a proceeding in a foreign or international tribunal." The lower courts are in widespread and acknowledged disagreement over what qualifies as a "foreign or international tribunal," leading those courts to reach conflicting results when applying Section 1782 to foreign, non-governmental arbitration proceedings. This Court was poised to resolve that confusion in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, before that case was voluntarily dismissed at the eleventh hour. *Servotronics* arose from an arbitration between two private parties. This case presents the same question of statutory interpretation—whether an arbitral panel is a "foreign or international tribunal" under Section 1782—but arises from an arbitration between a private party and a foreign state (commonly known as "investor-state arbitration").

The decision below exacerbated the disarray among the lower courts. The court of appeals concluded that, although Second Circuit precedent held that arbitration between two private parties *does not* fall within Section 1782, investor-state arbitration *does*. That conclusion was not based on any feature of the panel's composition, procedures, or independence—all of which the court of appeals acknowledged were no different from other ad hoc arbitrations. Rather, the court of appeals reasoned that this arbitral panel qualified as a "foreign or international tribunal" under Section 1782 because the state party had previously agreed in a treaty with another state

that certain disputes could be pursued via ad hoc arbitration.

This case presents an ideal opportunity to provide the lower courts with much-needed guidance. This case will necessarily answer the fundamental question of what qualifies as a "foreign or international tribunal" under Section 1782, which *Servotronics* would have addressed in the context of arbitration between two private parties. Significantly, however, this case will *also* clarify Section 1782's application to investor-state arbitration. The United States has expressed "particular concern" regarding any reading of Section 1782 that would bring investor-state arbitration within the statute's reach. *Servotronics*, Brief for the United States as *Amicus Curiae* Supporting Respondents at 15 (June 28, 2021) ("U.S. Br."). Indeed, there is no better vehicle to clarify this jumbled landscape than a decision arising from the Second Circuit, which exempts arbitration between two private parties from Section 1782 but reaches the opposite result when an otherwise indistinguishable arbitration is between a private party and a foreign state.

A. Factual Background

Petitioners are AlixPartners LLP, a consulting firm headquartered in New York, and its current CEO, Mr. Simon Freakley. App. 7a, n.11. Respondent is The Fund for Protection of Investors' Rights in Foreign States (the "Fund"), a Russian investment entity. The Fund is an alleged assignee of a former shareholder's claim against Lithuania regarding AB Bankas Snoras ("Snoras"), a failed Lithuanian bank. App. 4a. In late 2011, the Bank of Lithuania appointed Mr. Freakley as the Temporary

Administrator of Snoras. App. 4a, 42a. Lithuania tasked Mr. Freakley with investigating the bank and its solvency. Mr. Freakley was assisted in this work by Zolfo Cooper, a financial advisory firm of which he was then CEO. App. 7a, n.11. Following submission of Mr. Freakley's report, Snoras's activities remained under restriction until January 16, 2012, when it was placed into Lithuanian bankruptcy proceedings and declared insolvent.

Nearly eight years later, in April 2019, respondent initiated an arbitration proceeding against Lithuania, asserting claims arising from Lithuania's actions regarding Snoras. Respondent brought the arbitration pursuant to Article 10(2)(d) of the Agreement Between The Government Of The Russian Federation And The Government Of The Republic Of Lithuania On The Promotion And Reciprocal Protection Of the Investments (the "Treaty"). App. 4a, 42a. The Treaty provides investors the option to raise disputes in one of four ways: (a) any "competent court or court of arbitration" of Lithuania or Russia; (b) "the Arbitration Institute of the Stockholm Chamber of Commerce;" (c) "the Court of Arbitration of the International Chamber of Commerce;" or (d) "an ad hoc arbitration in accordance with [the] Arbitration Rules of the United Nationals Commission on International Trade Law (UNCITRAL)." App. 64a-65a. Respondent elected the fourth option (App. 6a), and delivered a notice of arbitration to Lithuania.[1]

[1] A Protocol annexed to the treaty also allowed respondent to the "right to prompt review of [its] case by the appropriate judicial or administrative authorities" of Lithuania, which respondent did not pursue. App. 69a.

The UNCITRAL Arbitration Rules[2] provide that, "[w]here the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing." UNCITRAL Arbitration Rules, Art. 1. The UNCITRAL Arbitration Rules do not purport to carry the force of law; to the contrary, "where any of [the] Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." *Id.* UNCITRAL does not "become involved in individual cases." The United Nations Commission On International Trade Law, Frequently Asked Questions, https://uncitral.un.org/en/texts/arbitration/faq. Nor does UNCITRAL "nominate arbitrators," "certify arbitral authorities," or "act as an arbitral tribunal, administer arbitration proceedings, or otherwise perform any function related to individual arbitration proceedings."[3]

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[2] Respondent pursued the arbitration in accordance with the UNCITRAL Arbitration Rules of 1976 (the "UNCITRAL Arbitration Rules"). Notice of Arbitration ¶ 1 (Dkt. No. 3-1).

[3] By way of comparison, the International Chamber of Commerce ("ICC") Arbitration Rules, the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association ("AAA"), and the London Court of International Arbitration ("LCIA") Rules provide administrative services for arbitrations conducted pursuant to their respective rules. Such services may range from docketing pleadings, facilitating appointments (including, if necessary, the selection of arbitrators), determination of challenges to or replacements of arbitrators, joinder of parties and consolidation of proceedings, transmission of awards, and management of arbitrator fees and

The arbitral panel here comprises three private individuals—a Swiss practitioner, a Canadian practitioner, and an American law professor—chosen by the parties. App. 20a. The parties, with consultation and approval from the arbitral panel, have agreed upon detailed procedures by which the arbitration will be conducted. Respondent seeks the Section 1782 discovery for the merits phase of the case, which has not yet commenced. App. 24a, n.52.

B. Procedural Background

Shortly after commencing the arbitration, respondent filed an application in the Southern District of New York under Section 1782 seeking leave to serve third-party discovery requests on petitioners. Respondent sought extensive documentary materials and testimony from petitioners relating to Mr. Freakley's work on the Snoras engagement. For example, the subpoenas requested "any and all documents or communications concerning Mr. Freakley's appointment and work as Temporary Administrator" and "any and all reports (including drafts) prepared by Mr. Freakley or individuals acting under" his "direction or supervision." (Dkt. No. 3-11).[4] Respondent also sought the depositions of Mr. Freakley and

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expenses, as well as party deposits. ICC Rules of Arbitration, Arts. 1(2), 3-10, 13-15, 35, 37 (detailing functions of "ICC Court of Arbitration" and "Secretariat"); LCIA Rules, Arts. 1-3, 5, 7-8, 10-11, 22A, 24, 26, 28-29 (detailing functions of "LCIA Court" and "Registrar"); ICDR International Arbitration Rules, Arts. 1(3), 2-5, 8-9, 13, 15-16, 33, 38, 39 (detailing functions of "Administrator").

[4] Citations to "Dkt. No. [#]" refer to documents filed below in *In re the Application of the Fund for Protection of Investor Rights in Foreign States*, No. 1:19-mc-00401-AT (S.D.N.Y). Citations to "CA2 ECF No. [#]" refer to documents filed in *The Application of*

a corporate representative of AlixPartners. App. 7a (*see* Dkt. Nos. 3-13, 3-14). At least some of the information sought by respondent is "not publicly available" and, according to respondent, has "been classified as a State secret by the Lithuanian special services." Notice of Arbitration ¶ 38 (Dkt. No. 3-1).

Petitioners opposed the application, arguing (among other things) that the arbitration is not a "foreign or international tribunal" within the meaning of Section 1782. *See* App. 12a, 35a (Dkt. No. 18). The district court authorized the subpoenas. It reasoned that the arbitration "was convened under the authority of the Treaty"; that the Fund "seeks to enforce rights established by that treaty against Lithuania as a state"; and that the arbitration "will be conducted pursuant to UNCITRAL rules." App. 46a.

The same day the district court issued its decision, the Second Circuit issued *In re Guo for an Order to take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. 1782*, 965 F.3d 96 (2d Cir. 2020), *as amended* (July 9, 2020) ("*Guo*"). *Guo* applied a multi-factor test to hold that commercial arbitration between private parties did not fall within Section 1782's ambit. Petitioners moved for reconsideration in light of *Guo*. *See* App. 37a (Dkt. No. 28). The district court denied the motion, holding that petitioners had "presented arguments based on those same factors" as the Second Circuit considered in *Guo*. App. 39a.

The court of appeals affirmed. App 1a-33a. The court stated that its analysis was governed by the four

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the Fund for Protection of Investor Rights in Foreign States v. AlixPartners, LLP, No. 20-2653-cv (2d Cir.).

factors identified in *Guo*: (1) the "degree of state affiliation and functional independence possessed by the entity"; (2) "the degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision"; (3) the "nature of the jurisdiction possessed by the panel"; and (4) the "ability of the parties to select their own arbitrators." App. 15a-16a.

With regard to the first factor, the court of appeals acknowledged that "the arbitral panel . . . functions independently from the governments of Lithuania and Russia"; that "[t]he members of the arbitral panel (two arbitration lawyers and a law professor) have no official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity and the panel receives zero government funding"; and that the panel's "award may be made public only with the consent of both parties." App. 17a. "Nevertheless," the court of appeals held, "this functional independence of the arbitral panel must be viewed within the context of the Treaty." *Id.* That "context," the court explained, was that the arbitration was "expressly contemplated by the Treaty" and was conducted by rules "developed by UNCITRAL, an international body." *Id.* The court concluded that the arbitral panel "thus retains affiliation with the foreign States, despite its functional independence in other ways," and "[a]ccordingly, this factor weighs in favor" of bringing this arbitration within Section 1782. App. 18a.

Turning to the second factor, the court of appeals acknowledged that a state's authority "to influence or control" the arbitration "is limited, if not non-existent." *Id.* But the panel concluded that this lack of influence was negated by the fact "that an arbitration

against a foreign State, whether conducted pursuant to a bilateral investment treaty like this Treaty or otherwise, necessarily requires that the foreign State consent to subject itself to binding dispute resolution." *Id.* The court deemed this factor "neutral as to whether this arbitral panel qualifies" under Section 1782. App. 19a.

The court of appeals afforded the third *Guo* factor virtually dispositive significance. "Critically," the court concluded, "the arbitral panel in this case derives its adjudicatory authority from the Treaty . . . rather than an agreement between purely private parties or any other species of private contract." App. 19a. The court relied on dicta in *Guo* suggesting that an "'arbitral body under a bilateral investment treaty may be a "foreign or international tribunal" when it derives its adjudicatory authority from the 'intervention or license of any government to adjudicate cases arising from certain varieties of foreign investment.'" App. 19a-20a (quoting *Guo*, 965 F.3d at 108 n.7). The court concluded that "this factor weighs heavily in favor" of authorizing Section 1782 discovery. App. 20a.

As for the fourth factor, the court of appeals acknowledged that "[t]he three arbitrators selected are all private parties" chosen by the parties. App. 20a. The court held that "this factor weigh[ed] against" authorizing discovery under Section 1782, but discounted it as "not determinative." App. 21a.[5]

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[5] The court of appeals briefly noted two "additional 'functional attributes'" of the arbitration that it held were consistent with deeming the arbitral panel a "foreign or international tribunal." App. 21a. The court observed that "Lithuania, in its capacity as

Finally, the court of appeals asserted that reading Section 1782 to reach investor-state arbitration "is consistent with legislative intent." App. 22a. The court of appeals cited the Second Circuit's prior description of the 1964 Senate Report as indicating Congress's intent to "'broaden'" the statute to reach "'intergovernmental tribunals *not* involving the United States.'" App. 23a (quoting *National Broadcasting Co. v. Bear Stearns & Co.,* 165 F.3d 184, 190) (2d Cir. 1999)).

Petitioners filed a timely rehearing petition arguing, among other things, that this case was inextricably bound up with *Servotronics*, in which this Court had scheduled oral argument for October 5. On September 8, petitioner in *Servotronics* filed a letter notifying the Clerk of the parties' intention to move to dismiss the case pursuant to this Court's Rule 46. That same day, this Court removed *Servotronics* from its argument calendar. Two days later, the Second Circuit denied the rehearing petition in this case without comment. App. 52a-53a.[6] This Court dismissed *Servotronics* on September 29.

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a foreign State, is one of the parties," and that "bilateral investment treaties [are] tools of international relations." *Id.*

[6] The parties have stipulated, and the district court so-ordered on September 22, that compliance with the discovery requests here will not be required until *after* this Court disposes of this case. Dkt. No. 39. Moreover, on September 23, the court of appeals recalled and stayed its mandate pending the filing of this petition and this Court's disposition of the case. CA2 ECF No. 94.

REASONS FOR GRANTING THE PETITION

The lower courts are in acknowledged conflict as to whether a foreign arbitration proceeding qualifies as a "foreign or international tribunal" within the meaning of Section 1782. As evidenced by this Court's grant of certiorari in *Servotronics*, this issue is recurring, important, and in urgent need of review. This case is an excellent vehicle to resolve this question following the dismissal of *Servotronics*.

Indeed, the nature and scope of the disagreement surrounding Section 1782 was on full display in the *Servotronics* briefing. Parties and amici on both sides of that case argued for competing bright-line rules governing application of Section 1782 to arbitral proceedings. The United States expressed "particular concern" regarding investor-state arbitration (U.S. Br. at 15), and argued that, "to the extent that any of [the proposed] approaches would sweep investor-state arbitration within Section 1782's scope, they are unsound and should be rejected." U.S. Br. at 33. This case thus presents the question of Section 1782's meaning in a context of paramount importance.

A. The Decision Below Exacerbates A Recognized Conflict Regarding What Constitutes A "Foreign Or International Tribunal" Under Section 1782.

1. Lower courts have adopted two general approaches to determining whether an arbitration is a "foreign or international tribunal" within the meaning of Section 1782, with the decision below further muddying the waters. The Fifth and Seventh Circuits have held that an arbitral body is not a "foreign or international tribunal" unless it actually

wields governmental or quasi-governmental authority. *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694-96 (7th Cir. 2020).[7] The Fourth and Sixth Circuits, by contrast, read Section 1782 to require, at most, that the arbitral body have some governmental origin or endorsement. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 213-15 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. FedEx Corp*, 939 F.3d 710, 722-23 (6th Cir. 2019). The decision below purported to split the difference, applying the Second Circuit's multi-factor *Guo* test, which has been widely maligned and which treats otherwise indistinguishable arbitral panels differently where one party is a state that gave its initial consent to arbitration via a treaty. App. 22a.

a. The Fifth and Seventh Circuits have held that the term "foreign or international tribunal" requires that arbitral bodies actually *wield* some sort of governmental power akin to that exercised by judicial, quasi-judicial, or public entities. In *Biedermann*, the Fifth Circuit held that Section 1782 "was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations." The court accordingly reversed an order granting Section 1782 discovery for use in an arbitration between the Republic of Kazakhstan and a private litigant pending before the Arbitration Institute of the Stockholm Chamber of Commerce. 168 F.3d at 883. As

[7] Servotronics, Inc. was a party in both the Fourth Circuit and Seventh Circuit cases, the latter of which this Court granted certiorari to review. To avoid confusion, this petition refers to the Fourth Circuit case as *Boeing* and the Seventh Circuit case as *Servotronics*.

the Fifth Circuit explained, "not every conceivable fact-finding or adjudicative body is covered" by Section 1782, "*even when the body operates under the imprimatur of a foreign government*." *Id.* at 882 (emphasis added). The court thus rejected the argument that governmental origin or endorsement suffices to bring an arbitral tribunal within Section 1782.[8]

The Seventh Circuit reached the same conclusion in *Servotronics*. The court held there that Section 1782 encompasses only "a governmental, administrative, or quasi-governmental tribunal operating pursuant to a foreign country's 'practice and procedure.'" *Servotronics*, 975 F.3d at 695. The Seventh Circuit acknowledged that "a split has recently emerged" on this question. *Id.* at 692. It rejected as "mistaken" the Fourth Circuit's broad reading in *Boeing*, holding that the arbitral body there did "not exercise governmental or quasi-governmental authority" by virtue of its existence within a statutory arbitration regime. *Id.* at 693, n.2.

b. In *Boeing*, the Fourth Circuit held that a private arbitration seated in England qualified as a "foreign or international tribunal" under Section 1782, acknowledging "a split of authority among the circuits" on the issue. 954 F.3d at 212. The court

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[8] The Treaty here allowed respondent to submit its dispute with Lithuania to "Arbitration Institute of the Stockholm Chamber of Commerce"—the same arbitral body that the Fifth Circuit concluded in *Biedermann* did not qualify as a "foreign or international tribunal" under Section 1782. Moreover, the arbitration in *Biederman* was authorized, in part, under a bilateral investment treaty between Kazakhstan and the United States. Under the reasoning adopted below, that fact would have sufficed to bring the arbitration within Section 1782.

observed that "the UK Arbitration Act of 1996—not unlike the Federal Arbitration Act ('FAA') in the United States—. . . provides procedures for arbitrations and allows awards to be challenged and enforced in court." *Id.* at 211. The Fourth Circuit did not analyze the functional attributes of the arbitral tribunal, such as whether it possessed governmental authority akin to judicial, quasi-judicial, or other public bodies. It was enough, in that court's view, that "UK arbitrations are sanctioned, regulated, and overseen by the government and its courts." *Id.* at 114.

The Sixth Circuit took an even more permissive view in *FedEx*. The court held there that the "ordinary meaning" of the term "foreign or international tribunal" includes *all* arbitral panels that are "established pursuant to contract" and have "the authority to issue decisions that bind the parties." 939 F.3d at 723. It explicitly rejected the argument that Section 1782 reaches only those "arbitral authorities permanently maintained by a national or international government to deal with certain categories of disputes, as opposed to arbitral authorities constituted pursuant to a contract between private parties to deal with particular commercial disputes as they arise." *Id.* at 725. That court also held that *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), supplied "no limiting principle suggesting that the ordinary meaning of 'tribunal' does not apply." 939 F.3d at 726. The Sixth Circuit acknowledged that its decision "is at odds with two other circuits' decisions on this issue." *Id.* (citing *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999),

and *National Broadcasting Co. v. Bear Stearns & Co.,* 165 F.3d 184 (2d Cir. 1999) ("*NBC*")[9]).

c. In the decision below, the Second Circuit purported to adopt neither bright-line rule, instead using the multi-factor approach set forth in *Guo*. In application, however, that test resulted in a similarly expansive reading of Section 1782.

The decision below afforded dispositive significance to the arbitral panel's governmental origins but no weight to its actual operation. The court deemed it "critical[]" that the arbitral body "derives its adjudicatory authority from . . . a bilateral investment treaty." App. 19a. Similarly, the court held that because the arbitration "was contemplated by the Treaty," the arbitral panel "retains affiliation with the foreign States despite its functional independence in other ways." App. 17a-18a. Those "other ways" included that the panel "functions independently from the governments of Lithuania and Russia"; that the arbitrators "have no official affiliation with . . . any other governmental or intergovernmental entity"; and that "the panel receives zero government funding." App. 17a. Even the admittedly "non-existent" ability of a foreign state to "influence or control" the outcome was given zero weight in the court's analysis, solely because "an arbitration against a foreign State . . . necessarily requires that the foreign State consent to subject itself to binding dispute resolution."[10] App.

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[9] The Second Circuit, first in *Guo* and then in the decision below, has not embraced the Sixth Circuit's broad reading of *NBC*. *See infra* at Part B.3.

[10] Because foreign states enjoy sovereign immunity, any commercial arbitration to which a state is a party requires consent. Private parties must likewise consent to binding

18a. The only factor the Second Circuit viewed as weighing against application of Section 1782 was the parties' right to select the arbitrators, but the court discounted that factor as "not determinative." App. 21a. All that mattered was that Lithuania had agreed to ad hoc arbitration via a Treaty.

d. In addition to the conflict among the courts of appeals, there is still further disarray among the district courts. That confusion includes application of Section 1782 to arbitration between two private parties[11] *and* arbitrations between a private party and a foreign state.[12] Indeed, district courts do not agree on the result even when considering arbitral proceedings before the same arbitral body.[13] As these

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arbitration, and respondent here chose binding *ad hoc* arbitration over the several alternatives provided by the Treaty.

[11] *Compare*, *e.g.*, *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1226 (N.D. Ga. 2006) (holding that Section 1782 encompasses private arbitral bodies) *with In re Dubey*, 949 F. Supp. 2d 990, 993-94 (C.D. Cal. 2013) (holding the opposite). *See also In re Storag Etzel GmbH*, 2020 WL 1849714, at *1-2 & n.1 (D. Del. Apr. 13, 2020) ("[c]ourts are about evenly split" on whether Section 1782 covers private arbitral bodies).

[12] *Compare*, *e.g.*, *Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP*, 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) *with In re Mongolia v. Itera International Energy, L.L.C.*, 2009 WL 10712603, at *6-7 (M.D. Fla. Nov. 10, 2009).

[13] For example, district courts are split over whether an International Chamber of Commerce ("ICC") arbitration is a "foreign or international tribunal." *Compare, e.g.*, *In re Rendon*, 519 F. Supp. 3d 1151, 1154-56 (S.D. Fla. 2021) ("pending ICC arbitration is not a foreign or international tribunal for purposes of § 1782") with *In re Grupo Unidos por el Canal, S.A.*, 2014 WL 5456520, at *2 (N.D. Cal. Oct. 27, 2014) ("arbitration pending in a tribunal established by an international treaty"—referring to the ICC—"constitutes a foreign tribunal for purposes of Section 1782.").

numerous recent examples illustrate, this Court's review is urgently needed.

2. The parties' merits briefing in *Servotronics* demonstrates how confusion over the meaning of Section 1782 implicates not only arbitration between private parties, but also investor-state arbitration. For example, the United States argued in *Servotronics* that "the logic of petitioner's argument [there] would appear also to extend to the context of investor-state arbitration," and that "[t]he analytical approaches to Section 1782 followed by some lower courts would likewise appear to encompass investor-state arbitration." U.S. Br. at 28. The United States identified the Second Circuit's "multi-factor inquiry" in *Guo* as representing yet another analytical approach to Section 1782 that could portend a particular result when applied to investor-state arbitration.[14] And the United States observed that "some of petitioner's amici" in *Servotronics* "start from the mistaken assumption that investor-state arbitration is covered by Section 1782 and reason that private commercial arbitration must be covered as well." *Id.* at 33. Thus, as the United States has correctly recognized, it is difficult, if not impossible, to confine the debate over Section 1782's meaning to commercial arbitration between purely private parties.

The petitioner in *Servotronics* agreed, devoting several pages of its merits reply brief to the Second Circuit's decision here. Reply Brief for Petitioner at 9–13, *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, No. 20-

[14] That premonition proved correct. The decision below, which applied the multi-factor *Guo* test to bring investor-state arbitration within Section 1782's ambit, was issued just a few weeks after the United States filed its brief in *Servotronics*.

794 (July 21, 2021). While agreeing with the Second Circuit's ultimate conclusion, petitioner argued that the Second Circuit's "reasoning [was] fraught with inconsistency" and that investor-state arbitration "has virtually all the attributes of a body presiding over any foreign commercial arbitration" except that it was "convened pursuant to a bilateral treaty rather than a contract between the parties." *Id.* at 11.

The fact that this case arises in the context of an investor-state arbitration thus presents the conflict in a particularly compelling posture. If review is granted, this Court will necessarily answer the basic question of statutory interpretation: what does the phrase "foreign or international tribunal" mean as it was used in Section 1782? Moreover, because this case arises in the context of investor-state arbitration, this Court's decision will likewise resolve a specific and highly consequential application of that conflict. As explained below, that opportunity (among other reasons) makes this case an ideal vehicle through which to illuminate the meaning of Section 1782.

B. The Question Presented Is Important, And This Case Presents An Ideal Vehicle To Address It In The Context Of Investor-State Arbitration.

1. The proper construction of Section 1782 is an important question warranting this Court's review. As the United States explained in *Servotronics*, Section 1782 "plays an important role in encouraging international cooperation, facilitating the resolution of foreign disputes, and fostering international comity." *Id.* Engaging the authority of a district court in aid of foreign arbitration is a powerful tool for foreign litigants, and it imposes a correspondingly significant obligation on U.S. persons subject to

Section 1782. Accordingly, respecting congressional intent regarding the proper bounds of Section 1782 is of critical importance. *Id*. at 1, 16, 28.

As documented by the amici participating in *Servotronics*, proper application of Section 1782 is important to a wide range of stakeholders. Most significantly, and as discussed in more detail below, the United States declared its "substantial interest in the proper construction" of Section 1782. U.S. Br. at 1. *Servotronics* also drew widespread interest from trade associations, arbitration organizations, academics, and others. That fact is unsurprising, because use of Section 1782 has "exploded" in recent years (*Servotronics* Prof. Yanbai Andrea Wang Amicus Br. 5) and imposes "tremendous burdens" on parties required to respond to an increasing number of Section 1782 applications (*Servotronics* Inst. of Int'l Bankers Amicus Br. 2). More generally, arbitration organizations confirmed that the current "uncertainty" over Section 1782's reach "leads to extensive, time-consuming and tremendously expensive litigation over [a] threshold issue." *Servotronics* Int'l Inst. for Conflict Prevention & Resolution Amicus Br. 4. It is thus no exaggeration to say that the issue presented here has "significant implications globally," and "the international arbitration community is anxiously awaiting the Supreme Court's definitive resolution of this important issue of federal law." *Id.* at 16.

2. This case presents the Section 1782 question in a particularly important context, because it arises from an investor-state arbitration. Investor-state arbitration is a relatively new device. *See Servotronics* U.S. Br. at 29. Before the advent of this mechanism, an investor seeking relief in a dispute with a "host

state" would request that its home state treat the investor's injury as an injury to the home state itself. *Id.* The resulting method of resolving disputes "consumed significant diplomatic resources, risked politicizing disputes, and was not always peaceful." *Id.* at 30.

Investor-state arbitration often arises from bilateral investment treaties. Because the United States is party to "many bilateral investment treaties and free-trade agreements that provide for such arbitration," it voiced "particular concern" regarding the construction of Section 1782 in that context. U.S. Br. at 15. The United States confirmed that applying Section 1782 to investor-state arbitration would "threaten to jeopardize the advantages that it affords." *Id.* at 32. "[I]njecting broad discovery, aided by the assistance of U.S. courts, in to streamlined investor-state arbitrations," the United States explained, "could undermine the efficiency and cost-effectiveness of those mechanisms." *Id.* That risk "would dissuade investors and foreign states from selecting [the arbitral] model" for resolving disputes. *Id.* Thus, this case implicates not only application of Section 1782 to arbitration generally, but also the viability of an important tool for advancing foreign policy interests and resolving potentially sensitive commercial disputes.

3. This petition presents an ideal vehicle to address the application of Section 1782 to foreign arbitrations. The issue is squarely presented. Moreover, if the Court were to hold that Section 1782 does not reach investor-state arbitration, that reasoning would almost certainly foreclose application of the statute to arbitration between two private parties. At a

minimum, a decision in this case would provide substantial guidance to the lower courts beyond the investor-state arbitration context.

What is more, the "multi-factor" analysis employed by the decision below demonstrates the need for this Court's basic guidance as to what makes something a "foreign or international tribunal" within the meaning of Section 1782. In *Guo,* the Second Circuit applied those factors to hold that arbitration between private parties *does not* fall within Section 1782, but the decision below applied those same factors to reach the opposite result for investor-state arbitration. Should Section 1782 be subject to a multi-factor test at all? If so, are those the right factors to consider? Should lower courts permit the form of a party's consent to arbitration to "weigh heavily"—and, in reality, conclusively—in favor of applying Section 1782? These are crucial subsidiary questions presented by this case.

Even if this case did not implicate that broader context, this Court should not await a later opportunity to address whether the statute extends to investor-state arbitrations. As discussed above, application of Section 1782 to investor-state arbitration casts a long shadow, "rais[ing] significant policy concerns" of the United States. U.S. Br. at 28. Moreover, given New York's role as an international financial center, many targets of Section 1782 applications arising from investor-state arbitrations will have some presence within the Second Circuit. Thus, in the absence of this Court's review, the decision below is likely to control more than its share of potential Section 1782 cases arising in this critical context. Indeed, a recent survey of Section 1782 cases

confirmed that the Southern District of New York is the most popular forum for Section 1782 applications—even before the decision below was announced. Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. R. 2089, App'x C Table 7 (Nov. 2020).

Moreover, many disputes arising under Section 1782 never make it to this Court. Discovery disputes are often time-sensitive because one side seeks to use the disputed material in an ongoing proceeding or, conversely, is hoping that the proceeding will end before discovery is compelled. That appears to have been the case in *Servotronics*, which did not arrive in this Court until after the evidentiary record had closed and ultimately required an eleventh-hour dismissal. *See* Rolls-Royce Br. at 12 ("Servotronics sought evidence for use in an arbitration that is over."); Boeing Br. at 13 ("The arbitral hearing and post-hearing briefing are over.").

This case presents no such risk of mootness, as the merits proceedings are not yet underway (App. 24a n. 52), and this petition was submitted on an expedited timetable to allow this Court to consider it in the ordinary course and, if certiorari is granted, decide the case this Term. Moreover, the parties have stipulated that petitioners need not comply with any discovery requests until after this Court disposes of this case, and the Second Circuit has stayed issuance of its mandate. This case will go the distance.

For that reason alone, this case is a superior vehicle to the recently filed petition in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401 (pet. for cert. filed Sept 14, 2021). As of this filing, petitioners there had yet to obtain a stay of the district court's order

authorizing discovery. *ZF Automotive* Pet. at 11-12; 6th Cir. Docket No. 21-2736. Even if a stay is ultimately granted, *ZF Automotive* presents the Section 1782 question only in the context of arbitration between private parties. As explained above, however, deciding whether Section 1782 applies to investor-state arbitration is more likely to clarify the entire landscape and directly implicates a matter on which the United States has expressed "particular concern." *Servotronics* U.S. Br. at 15.[15] This petition should be granted, and *ZF Automotive* should be held pending disposition of this case on the merits.[16]

C. The Decision Below Is Wrong.

This Court should reverse the decision below for at least three main reasons.

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[15] *ZF Automotive* also arises in the context of a petition for a writ of certiorari before judgment, which requires "a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. Petitioners here, of course, do not question the urgent need for this Court to clarify the meaning of Section 1782, but it is difficult to see how that particular "case"—not merely the question presented—is of national concern. Even if the proper measure is the importance of the question presented, this petition presents the Section 1782 dispute in a context of greater "public importance" than in *ZF Automotive*. This case affects not only disputes between private parties, but also the application of treaties to which the United States and numerous other sovereigns are (or may consider becoming) parties.

[16] Were this Court to grant review only in *ZF Automotive*, this petition should be held. As in *Servotronics*, it is likely that arguments advanced in that case would (wittingly or otherwise) affect application of Section 1782 to investor-state arbitration.

1. First and foremost, the text, purpose, and history of Section 1782 demonstrate that Congress did not intend the phrase "foreign or international tribunal" to include foreign arbitral bodies that do not exercise some measure of governmental or quasi-governmental authority. As the United States has explained, the "most natural reading of that phrase is that it refers to a standing *governmental* body," such as "the judicial or quasi-judicial body of a 'foreign' country or an 'international' state-to-state commission or similar formal entity established by two or more nations." *Servotronics* U.S. Br. at 19 (emphasis in original). That interpretation comports with how the term "foreign or international tribunal" was understood in 1964, when the current version of Section 1782 was adopted. The phrase then "connote[d] a judicial forum" of some sort (*id.* at 17 (recounting contemporaneous dictionary definitions)), not merely any format of dispute resolution.

Equally important, that understanding is confirmed by the context surrounding the statute's enactment, upon which this Court has previously relied. *See Intel*, 542 U.S. at 248–49, 259-61 (recounting and relying on Section 1782's drafting history). As the Rules Commission explained in proposing the 1964 amendments, the goal was to expand Section 1782 beyond merely "conventional courts." 1963 Report 1-52 at 45; U.S. Br. at 21 (discussing same). But it does not follow that expansion reached arbitration of commercial disputes. To the contrary, the Rules Committee illustrated, by way of example, that Section 1782 would reach requests from "investigating magistrates in foreign countries," "a foreign administrative tribunal," or a "quasi-judicial agency." 1963 Report at 45.

There is no indication that the drafters contemplated bringing foreign arbitration generally within Section 1782's reach. To the contrary, the 1964 amendments provided that a district court's order under Section 1782 "may prescribe the practice and procedure" for such discovery, "which may be in whole or part the practice and procedure of the foreign country or the international tribunal" for the taking of discovery. 28 U.S.C. 1782(a). Arbitration generally does not have such "practice and procedure" established in advance. *See* U.S. Br. at 25 (discussing same). Nor could Congress have intended the 1964 amendments to reach investor-state arbitration, because, as the United States has explained, "that form of dispute resolution did not exist in 1964." *Id.* at 31–32.

In any event, the fact that one party to an arbitration is a foreign state does not convert an arbitral panel into a "foreign or international tribunal." Neither the identity of a party nor the manner by which it consented to arbitration (*i.e.,* treaty vs. contract) changes the power that the panel exercises. In operation, as the United States correctly observed, "investor-state arbitration resembles private commercial arbitration in most salient respects." *Id.* at 31. And because "[a]rbitration is strictly a matter of consent," *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (internal quotations omitted), both sides must agree to it. The mode by which *one side* of the dispute consents does not change whether an arbitral panel is a "foreign or international tribunal."

2. The decision below also places Section 1782 in substantial tension (if not outright conflict) with the

Federal Arbitration Act (the "FAA") and other arbitral regimes. There is no reason to believe Congress intended Section 1782 to produce such an anomalous result.

For starters, reading Section 1782 to authorize third-party discovery in aid of foreign arbitrations grants foreign parties *broader* discovery rights than they would enjoy in domestic arbitrations subject to the FAA. In a domestic arbitration, for example, a party generally cannot seek discovery through U.S. courts. Under the rule adopted below, however, parties to foreign arbitrations are not subject to that limitation. *See Biedermann*, 168 F.3d at 882; *Servotronics*, 975 F.3d at 695-96. A party is thus better off commencing arbitration overseas, circumventing the statutory regime Congress aimed directly at arbitration. Likewise, Section 7 of the FAA precludes discovery outside the territorial limits of the arbitral entity's seat, but the decision below imposes no such limitation on foreign arbitrations. *Servotronics*, 975 F.3d at 695.

Moreover, as the Seventh Circuit noted, extending Section 1782 to foreign arbitrations affords broader discovery rights than are available under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208, and the Inter-American Convention on International Commercial Arbitration, 9 U.S.C. §§ 301-307. *Servotronics*, 975 F.3d at 695-96; *see also Biedermann*, 168 F.3d at 883; 9 U.S.C. §§ 208, 307 (providing for the residual application of the FAA, including its Section 7). The decision below thus presents still further sources of tension and opportunities for forum-shopping.

3. Finally, the error of the decision below is further confirmed by the fact that both sides in *Servotronics* rejected the Second Circuit's approach to Section 1782. The United States specifically criticized the Second Circuit's "call[] for a multi-factor inquiry" in *Guo*, and argued that any approach that "would sweep investor-state arbitration within Section 1782's scope"—as the decision below would conclude just weeks after the United States filed its brief—is "unsound and should be rejected." U.S. Br. at 33.

Petitioner in *Servotronics*, while agreeing with the Second Circuit's result, likewise panned the court's analysis. "The reasoning" of the decision below, petitioner observed, was "fraught with inconsistency." Reply Br. at 11. Petitioner acknowledged that "[t]he arbitral body" at issue here "has virtually all the attributes of a body presiding over any foreign commercial arbitration." *Id.* Although the sovereign party consented to arbitration via a treaty "rather than a contract between the parties," the panel's task—namely, "resolving a commercial dispute" between the parties—and corresponding "need for discovery assistance from the district court pursuant to Section 1782" was no different. *Id.*

In sum, the decision below rests on an analytical framework neither side of the Section 1782 debate cared to embrace. That is still further evidence that the decision below will not withstand this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-2653-cv

THE APPLICATION OF THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES PURSUANT TO 28 U.S.C. § 1782 FOR AN ORDER GRANTING LEAVE TO OBTAIN DISCOVERY FOR USE IN A FOREIGN PROCEEDING,

Plaintiff-Appellee,

v.

ALIXPARTNERS, LLP, SIMON FREAKLEY,

Third-Party Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

April 15, 2021, Argued;
July 15, 2021, Decided

Before: CABRANES, POOLER, and BIANCO, *Circuit Judges.*

JOSÉ A. CABRANES, *Circuit Judge*:

We consider here three questions concerning discovery in U.S. courts to assist in an arbitration between an investor and a foreign State that takes place before an arbitral panel established by a bilateral investment treaty to which that foreign State is a party.

Appellants AlixPartners, LLP and Simon Freakley (together, "AlixPartners") appeal from the July 8, 2020 Order of the United States District Court for the Southern District of New York (Analisa Torres, *Judge*) granting an application for discovery assistance pursuant to 28 U.S.C. § 1782, along with the District Court's August 25, 2020 Order denying reconsideration of the same.[1] Under § 1782(a), a district court may grant an application for discovery assistance submitted by an "interested person" for use "in a proceeding in a foreign or international tribunal." Appellee The Fund for Protection of Investor Rights in Foreign States (the "Fund"), a Russian corporation, sought assistance from the District Court to order discovery from Freakley and AlixPartners, LLP, a limited liability partnership with its principal place of business in New York, for use in an arbitration proceeding brought by the Fund against the Republic of Lithuania

1. *In re Fund for Protection of Inv. Rights in Foreign States*, No. 19 Misc. 401 (AT), 2020 U.S. Dist. LEXIS 119816, 2020 WL 3833457 (S.D.N.Y. July 8, 2020). AlixPartners also appeals from the August 25, 2020 order denying reconsideration. *In re Fund for Protection of Inv. Rights in Foreign States*, No. 19 Misc. 401 (AT), 2020 U.S. Dist. LEXIS 153808, 2020 WL 5026586 (S.D.N.Y. Aug. 25, 2020).

("Lithuania")[2] ; that proceeding was before an arbitral panel established by a bilateral investment treaty between Lithuania and the Russian Federation ("Russia").

This case presents three primary issues on appeal: (1) whether an arbitration between a foreign State and an investor, which takes place before an arbitral panel established pursuant to a bilateral investment treaty to which that foreign State is a party, constitutes a "proceeding in a foreign or international tribunal" under § 1782; (2) whether the Fund qualifies as an "interested person" who may seek discovery assistance under § 1782; and (3) whether the District Court erred in finding that the so-called *Intel* factors[3] weigh in favor of granting the Fund's discovery application.

As to the first question presented, because the arbitration is between an investor and foreign State party to a bilateral investment treaty, and because the arbitration takes place before an arbitral panel established by that same treaty, we hold that this arbitration is a "proceeding in a foreign or international tribunal." Second, because the Fund is a party to the arbitration for which it is seeking discovery assistance, it qualifies as an "interested person" under § 1782. Third, we find no abuse of discretion in the District Court's determination that the relevant factors

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2. Ex Parte Application of The Fund at 1, *In re the Application of the Fund for Protection of Investor Rights in Foreign States*, No. 1:19-mc-00401-AT (S.D.N.Y. Aug. 29, 2019), ECF No. 1.

3. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004) (*Intel*).

announced by the Supreme Court in *Intel* weigh in favor of granting the Fund's discovery application. Accordingly, we **AFFIRM** the July 8, 2020 Order and the August 25, 2020 Order of the District Court.

BACKGROUND

In 2011, Lithuania's regulatory authorities conducted an investigation of a private bank located in Lithuania, AB bankas SNORAS ("Snoras"). After finding that Snoras was unable to meet its obligations, the Bank of Lithuania, the central bank, nationalized Snoras and appointed Simon Freakley as its temporary administrator. As administrator, Freakley reported to the Bank of Lithuania that Snoras's liabilities exceeded its assets and shortly thereafter, the authorities commenced bankruptcy proceedings, which resulted in a Lithuanian court declaring Snoras to be bankrupt.

The Fund, a Russian corporation, is the assignee of Vladimir Antonov, a Russian national who sought to recover compensation for Lithuania's expropriation of his controlling share in Snoras by commencing an arbitration proceeding against Lithuania in April 2019. The Fund commenced this particular arbitration pursuant to a bilateral investment treaty to which Lithuania and Russia are parties, titled the Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (the "Treaty"). This Treaty is, according to its terms, an agreement entered for the purpose of establishing favorable conditions made by

investors of one foreign State in the territory of the other, "recognising that the promotion and reciprocal protection of investments, based on the present Agreement, will be conducive to the development of mutually beneficial trade and economic, scientific and technical co-operation."[4]

There are several provisions in the Treaty that are relevant to this appeal. Article 6 of the Treaty provides that investments of one foreign State's nationals made in the territory of the other State "shall not be subject to expropriation, nationalisation or other measures equivalent to expropriation or nationalisation."[5]

Article 10 addresses the procedures by which disputes between one foreign State and an investor of the other State are resolved. In the event that a dispute cannot be settled within six months, either party may elect to submit the dispute to one of four venues:

> a) competent court or court of arbitration of the Contracting Party in which territory the investments are made;
>
> b) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> c) the Court of Arbitration of the International Chamber of Commerce; [or]

4. Joint App'x 70.

5. *Id.* at 72.

> d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[6]

The Treaty also provides that "[t]he arbitral decision shall be final and binding on both parties [to] the dispute."[7]

When the Fund initiated an arbitration pursuant to the Treaty, it elected to resolve the dispute through "an ad hoc arbitration in accordance with Arbitration Rules of [UNCITRAL.]"[8] In August 2019, the Fund filed an application pursuant to 28 U.S.C. § 1782[9] in the United

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6. *Id.* at 74.

7. *Id.*

8. *Id.* at 29.

9. The relevant language of § 1782 is as follows:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may be made pursuant to a letter rogatory issued, or request made . . . upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or

States District Court for the Southern District of New York for an order granting the Fund leave to obtain discovery for use in its arbitration with Lithuania.[10]

In its application the Fund sought discovery from Freakley and AlixPartners, LLP[11] related to the expropriation of Snoras based on Freakley's role as the bank's temporary administrator, including information about: the circumstances of Freakley's appointment as Snoras's temporary administrator; any instructions Freakley received from the Lithuanian government; the nature, scope, and findings of Freakley's investigation at Snoras; the "reception" by Lithuanian officials of those findings; any reports prepared by Freakley for the Bank of Lithuania; and a deposition of Freakley and a representative of AlixPartners, LLP about these events. AlixPartners filed a response in the District Court in opposition to the Fund's § 1782 application in October 2019.

> other thing. . . . A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

28 U.S.C. § 1782(a).

10. The Fund filed this § 1782 application in the Southern District of New York because it is the "district court of the district in which [AlixPartners and Freakley] reside[ ] or [are] found." 28 U.S.C. § 1782(a).

11. Freakley is currently the Chief Executive Officer of AlixPartners, LLP. At the time the Bank of Lithuania appointed Freakley as temporary administrator of Snoras, Freakley worked for a different entity whose assets were later acquired by AlixPartners, LLP. Appellants Br. 6.

In November 2019, Lithuania submitted a letter to the arbitral panel constituted pursuant to the Treaty to arbitrate the dispute between the Fund and Lithuania, in which Lithuania asked the panel "to order the [Fund] to withdraw the [§] 1782 Application" and which the Fund opposed.[12] The arbitral panel issued an order the next month, analyzing the parties' positions and ultimately rejecting Lithuania's request to order the Fund to withdraw its § 1782 application. In its decision, the panel observed that Lithuania did not show that the § 1782 application "would in itself be prejudicial to its rights in this arbitration" and noted that Lithuania would "be able to contest any evidence that might be obtained pursuant to the [Fund's §] 1782 Application, if granted," including objections as to admissibility of materials under Lithuanian law.[13] The arbitral panel declined to decide such possible admissibility issues in its order, finding that "[i]t would be premature to do so."[14]

Back in the United States, on July 8, 2020 the District Court granted the Fund's § 1782 application and authorized the Fund to issue subpoenas to AlixPartners for the requested documents.[15]

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12. Joint App'x 216.

13. *Id.* at 219-20.

14. *Id.* at 220.

15. *In re Fund for Protection of Inv. Rights in Foreign States*, 2020 U.S. Dist. LEXIS 119816, 2020 WL 3833457.

That same day, we held in *Guo* that § 1782 discovery assistance does not extend to private commercial arbitrations,[16] a decision that reaffirmed our prior holding in *NBC*.[17] In *Guo*, we also offered further guidance on the factors to be considered by a court in deciding whether an arbitration is taking place in a "foreign or international tribunal" under § 1782.[18]

AlixPartners timely moved for reconsideration of the District Court's July 8 Order, asserting that the decision could not stand in light of *Guo*'s holding that an arbitral tribunal's status turns not on its origins in governmental action, but instead on whether the tribunal possesses the functional attributes most commonly associated with private arbitration.

On August 25, 2020, the District Court denied the motion for reconsideration, interpreting *Guo* as "suggest[ing] that arbitrations conducted pursuant to a bilateral investment treaty like the [Treaty here] do qualify as '[proceedings in a] foreign or international tribunal' under § 1782."[19] The District Court also explained that it had, consistent with *Guo*, reached its

16. *See In re Guo (Guo)*, 965 F.3d 96 (2d Cir. 2020).

17. *Id.* at 104-05; *see Nat'l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184 (2d Cir. 1999).

18. *See Guo*, 965 F.3d at 107.

19. *In re Fund for Protection of Inv. Rights in Foreign States*, 2020 U.S. Dist. LEXIS 153808, 2020 WL 5026586, at *2 (quoting § 1782).

prior decision by looking to several functional attributes possessed by the arbitral panel that were *not* commonly associated with private arbitration, including:

> the role of bilateral investment arbitration as a tool of international relations, the fact that the Tribunal derives its jurisdiction from the [Treaty], and the fact that the Arbitration is a means by which [the Fund is] bringing claims against the Republic of Lithuania in its capacity as a state.[20]

Thus, according to the District Court, its July 8 Order was not disturbed by this Court's decision in *Guo*. This timely appeal followed.

DISCUSSION

Under 28 U.S.C. § 1782(a), a district court may compel the production of materials "for use in a proceeding in a foreign or international tribunal" upon "the application of any interested person." There are several statutory requirements that must be satisfied for § 1782 discovery assistance to be granted:

> (1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign [or international] tribunal,

20. *Id.*

> and (3) the application is made by a foreign or international tribunal or any interested person.[21]

The issues on appeal are: (1) whether an arbitration between an investor and a foreign State, which takes place before an arbitral panel established by a bilateral investment treaty to which that foreign State is a party, constitutes a "proceeding in a foreign or international tribunal" under § 1782; (2) whether the Fund qualifies as an "interested person" who may seek discovery assistance for such an arbitration under § 1782; and (3) whether the District Court "abused its discretion"[22] in granting discovery to the Fund after weighing the so-called *Intel* factors.

We review *de novo* the District Court's conclusions that this arbitration is a proceeding before an arbitral panel that qualifies as a "foreign or international tribunal"

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21. *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2d Cir. 2012); *see also Guo*, 965 F.3d at 102 n.3 ("[T]he statute also imposes other requirements, including that the discovery not be 'in violation of any legally applicable privilege.'" (quoting 28 U.S.C. § 1782(a))). AlixPartners does not contest that the first § 1782 requirement, that it can be "found" in the Southern District of New York, is satisfied.

22. *See In re The City of New York*, 607 F.3d 923, 943 n.21 (2d Cir. 2010) (explaining that "[t]he word 'abuse' in the 'abuse of discretion' standard is an unfortunate—and inaccurate—term of art. When a district court abuses its discretion, it involves nothing as heinous as *abuse*. Indeed, a so-called abuse of discretion often involves something quite common and unavoidable in a system of adjudication: a 'view of the law' that is simply 'erroneous.'" (quoting *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008)).

and the Fund is an "interested person."[23] We review the District Court's application of the so-called *Intel* factors and its decision to order discovery for abuse of discretion.[24]

I.

Pursuant to the Treaty between Lithuania and Russia, the Fund initiated an arbitration against Lithuania to challenge the expropriation of certain shares of the bank Snoras. In opposition to the Fund's application for discovery assistance, AlixPartners asserts that the arbitration between the Fund and Lithuania is a private commercial arbitration, rather than a "proceeding in a foreign or international tribunal" within the meaning of § 1782.

The seminal Supreme Court case in this area, *Intel*, approached the "foreign or international tribunal" statutory requirement of § 1782 cautiously and flexibly. The Court held that discovery assistance would be used "in a proceeding in a foreign or international tribunal" where a foreign government entity—there, the Directorate General-Competition of the Commission of the European Communities, whose determinations were appealable to the European Court of Justice—exercised "quasi-judicial" powers and acted as a "first-instance decisionmaker."[25]

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23. *Guo*, 965 F.3d at 102.

24. *See Lancaster Factoring Co. v. Mangone*, 90 F.3d 38, 42 (2d Cir. 1996).

25. *Intel*, 542 U.S. at 252, 257-58. The term "court of first instance" is often referred to as a "trial court," defined as "[a] court of original jurisdiction where evidence is first received and considered";

The *Intel* Court also noted that a proceeding abroad may be eligible for § 1782 discovery assistance even when it has no analogous forum in the United States. This was so because, "[i]n light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'"[26] Thus, the *Intel* Court resisted setting firm limits on the arbitral bodies that could qualify for § 1782 discovery assistance as "foreign or international tribunal[s]." Instead, the Court offered the *Intel* factors, discussed below, as "guides for the exercise of district-court discretion."[27]

Our own precedents have likewise made it clear that this statutory requirement of § 1782 is broad, but not boundless. In *NBC*, we held that "when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[28] That said, we also held "international arbitral panels created exclusively by private parties" or "arbitral bod[ies] established by private parties" were not "foreign or international tribunals" for the purposes of § 1782.[29]

"[a]lso termed *court of first instance*[.]" *Trial court*, BLACK'S LAW DICTIONARY (11th ed. 2019).

26. *Intel*, 542 U.S. at 263 n.15 (quoting 28 U.S.C. § 1782(a)).

27. *Id.*

28. *NBC*, 165 F.3d at 190.

29. *Id.* at 190-91.

In our recent decision in *Guo*, we re-affirmed *NBC*'s holding and elaborated on the framework by which a court should determine whether a "foreign or international tribunal" exists for purposes of § 1782. In that case, we determined that, although the administrative entity at issue—the China International Economic and Trade Arbitration Commission ("CIETAC")—"was originally created through state action," the entity had "subsequently evolved such that it arguably no longer qualifie[d] as a 'governmental or intergovernmental arbitral tribunal[,] . . . conventional court[, or] . . . other state-sponsored adjudicatory body."[30] Accordingly, we specified factors to be considered by courts when conducting the "foreign or international tribunal" inquiry, emphasizing that this inquiry "does not turn on the governmental or nongovernmental *origins* of the administrative entity in question."[31] Instead, we adopted a "functional approach" that "consider[s] a range of factors" to answer a key question: "whether the body in question possesses the functional attributes most commonly associated with private arbitration."[32]

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30. *Guo*, 965 F.3d at 107 (quoting *NBC*, 165 F.3d at 190).

31. *Id.* (emphasis in original).

32. *Id.* As we discuss in more detail below, in *Guo* we noted certain distinctions between the body at issue in *Guo*—CIETAC—and an arbitral panel of the kind we consider in this case. Indeed, we noted that "arbitration under bilateral investment treaties is typically between a private party and a state" whereas "the dispute [there was] between two private parties." *Id.* at 108 n.7. We also noted that "[w]hile an arbitral body under a bilateral investment treaty may be a 'foreign or international tribunal,' the arbitration [before CIETAC] derive[d] adjudicatory authority solely from the

In this case, the parties dispute whether this arbitral panel is a private commercial arbitration. Because *Guo* clarified that the "foreign or international tribunal" inquiry does not turn on the governmental origins of the entity in question, we analyze this question under the "functional approach" and factors we laid out in *Guo*,[33] including:

> (1) the "degree of state affiliation and functional independence possessed by the entity";
>
> (2) the "degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision";

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parties' agreement, rather than the intervention or license of any government to adjudicate cases arising from certain varieties of foreign investment." *Id.*

33. The Fund argues that we should not consider the *Guo* factors in this case because *Guo* concerned a tribunal "founded on a private contractual agreement," as opposed to an arbitration involving a foreign State before an arbitral panel established pursuant to a bilateral investment treaty to which that State is a party. Appellee Br. 20. We disagree. In *Guo*, we stated that "[a] closer inquiry is required where . . . the arbitral body was originally created through state action, yet subsequently evolved such that it arguably no longer qualifies as a [foreign or international tribunal]." *Guo*, 965 F.3d at 107. We likewise think that a closer inquiry is required where the arbitral body arguably possesses attributes of both private and governmental arbitration. Our holding in *Guo* that the inquiry "does not turn on the governmental or nongovernmental *origins* of the administrative entity in question," *id.*, reinforces our decision to undertake that inquiry here.

> (3) the "nature of the jurisdiction possessed by the panel"; and
>
> (4) the "ability of the parties to select their own arbitrators."[34]

We consider each of these factors in turn.

1. State Affiliation and Functional Independence.

In looking at the "extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body,"[35] we recall that we found that the arbitral body in *Guo*, CIETAC, "function[ed] essentially independently of the Chinese government in the 'administration of its arbitration cases'"; the administrative entity "maintain[ed] confidentiality from all non-participants during and after arbitration, limiting opportunities for *ex parte* intervention by state officials"; and that CIETAC offered a pool of arbitrators with no affiliation with the Chinese government.[36] We thus held that CIETAC had a "high degree of independence and autonomy, and, conversely, a low degree of state affiliation."[37]

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34. *Guo*, 965 F.3d at 107-08.

35. *Id.* at 107. We consider also any additional "functional attributes" that may suggest that the arbitral tribunal is a "private arbitral body rather than a 'foreign or international tribunal.'" *Id.* at 107-08.

36. *Id.* at 107.

37. *Id.*

Here, the arbitral panel also functions independently from the governments of Lithuania and Russia. The members of the arbitral panel (two arbitration lawyers and a law professor) have no official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity and the panel receives zero government funding. Further, as was the case with proceedings before CIETAC, the proceedings here maintain confidentiality from non-participants; the Treaty provides that "[t]he award may be made public only with the consent of both parties."[38]

Nevertheless, we agree with the Fund that this functional independence of the arbitral panel must be viewed within the context of the Treaty. It is true that this arbitral panel is not internally "directed and governed by a foreign state."[39] But the panel is convened and proceeds in an arbitration format expressly contemplated by the Treaty entered into by Lithuania and Russia in order to create a specific proceeding to resolve investment-related disputes between one foreign State and investors of the other State. And the rules that will govern the dispute were developed by UNCITRAL, an international body.[40]

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38. Joint App'x 126.

39. *Guo*, 965 F.3d at 107.

40. UNCITRAL, established in 1966, "is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade." UNCITRAL texts such as its model arbitration rules are drafted by "the Member States of the Commission and other States (referred to as 'observer States'), as

We conclude that this arbitral panel, convened pursuant to the terms of the Treaty, thus retains affiliation with the foreign States, despite its functional independence in other ways. Accordingly, this factor weighs in favor of finding that this arbitral panel qualifies as a "foreign or international tribunal" within the meaning of § 1782.

2. State Authority to Intervene or Alter Outcome.

State authority to influence or control an arbitration pursued under this Treaty is limited, if not non-existent. Indeed, the Treaty curtails the ability of Lithuania or Russia to intervene in an arbitration under it or alter the outcome after the panel renders a decision. Additionally, the Fund has waived its right to have a Lithuanian court review the result from this arbitration.

We recognize that an arbitration against a foreign State, whether conducted pursuant to a bilateral investment treaty like this Treaty or otherwise, necessarily requires that the foreign State consent to subject itself to binding dispute resolution.[41] That said, if

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well as interested international inter-governmental organizations . . . and non-governmental organizations . . . ." UNITED NATIONS COMM'N ON INTER'L TRADE LAW, *Frequently Asked Questions — Mandate and History* (last visited July 13, 2021), https://uncitral.un.org/en/about/faq/mandate_composition/history .

41. *Cf.* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 458 note 6 (AM. LAW INST. 2018) ("In U.S. practice, bilateral investment treaties . . . may be enforced in courts in the United States and thus operate to remove a foreign state's sovereign immunity in such proceedings." (citing *Schneider v. Kingdom*

a foreign State against whom the arbitration is proceeding was allowed to control the arbitration's outcome, the purpose of a bilateral investment treaty like the Treaty here—which has the aim of encouraging investment between Russia and Lithuania—would be frustrated. In the circumstances presented here, we conclude that this factor—whether there is foreign State authority to intervene or alter the arbitration outcome—is neutral as to whether this arbitral panel qualifies as a "foreign or international tribunal" within the meaning of § 1782.

3. Nature of Jurisdiction Possessed by the Panel.

Critically, the arbitral panel in this case derives its adjudicatory authority from the Treaty, a bilateral investment treaty between foreign States entered into by those States to adjudicate disputes arising from certain varieties of foreign investment, rather than an agreement between purely private parties or any other species of private contract.

In *Guo*, we observed that an "arbitral body under a bilateral investment treaty may be a 'foreign or international tribunal'" when it derives its adjudicatory authority from the "intervention or license of any government to adjudicate cases arising from certain

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of Thailand, 688 F.3d 68 (2d Cir. 2012) (holding that bilateral investment treaties provided conditions for the formation of written agreements to arbitrate under the New York Convention); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (same))).

varieties of foreign investment."[42] The arbitral panel here is authorized to resolve the dispute between the Fund and Lithuania under the terms of the Treaty—a bilateral investment treaty—and thus closely resembles the sort of arbitral body that we anticipated in *Guo* would qualify as a "foreign or international tribunal." Accordingly, this factor weighs heavily in favor of concluding that this arbitral panel qualifies as a "foreign or international tribunal" within the meaning of § 1782.

4. Arbitrator Selection Process.

The process of selecting the members of the arbitral panel was conducted here in accordance with the Treaty. Each party selected one arbitrator and those two arbitrators were required to select a third arbitrator, who would preside. The three arbitrators selected are all private parties—two arbitration lawyers and one law professor—which is suggestive of a "private" arbitration. But, as we noted in *Guo*, "this factor is not determinative, as agreements between countries to arbitrate disputes between their citizens may involve selection of the arbitrators by the parties"—including, of course, a foreign State party—"and such a tribunal may be a 'foreign or international tribunal' [under § 1782] notwithstanding

42. *Guo*, 965 F.3d at 108 n.7; *see also NBC*, 165 F.3d at 190 ("[A]n international tribunal owes both its existence and its powers to an international agreement." (quoting Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264, 1267 (1962))).

this fact."[43] Accordingly, although this factor weighs against concluding that the arbitral panel is a "foreign or international tribunal," it is not determinative.

5. Additional Attributes Suggestive of a "Foreign or International Tribunal"

Consistent with *Guo*, we consider also any additional "functional attributes" that may suggest that the arbitral panel is a "foreign or international tribunal" rather than a "private arbitral body."[44] There are at least two such attributes here.

First, Lithuania, in its capacity as a foreign State, is one of the parties to this arbitration. In *Guo* we observed that the CIETAC arbitration was "between two private parties," thus differentiating it from the sort of arbitration presented here—one between a private party and a foreign State.[45]

Second, the importance of bilateral investment treaties as tools of international relations supports a conclusion that this arbitral panel, convened pursuant to the Treaty, constitutes a "foreign or international tribunal." Russia and Lithuania entered into this Treaty for the purpose of establishing favorable conditions for investments made by investors of one foreign State in the

43. *Guo*, 965 F.3d at 108.

44. *Id.* at 107-08.

45. *Id.* at 108 n.7.

territory of the other, in recognition "that the promotion and reciprocal protection of investments, based on the present Agreement, will be conducive to the development of mutually beneficial trade and economic, scientific and technical co-operation."[46] By its terms, the Treaty serves numerous foreign policy goals. That this arbitral panel was assembled pursuant to this Treaty—as part of this effort to facilitate mutually beneficial relations between Russia and Lithuania—signals that this arbitration differs from a private commercial arbitration.[47]

* * *

In sum, we hold that this arbitration between Lithuania and the Fund, taking place before an arbitral panel convened pursuant to the Treaty, a bilateral investment treaty to which Lithuania is a party, qualifies as a "foreign or international tribunal" under § 1782.

This holding is consistent with legislative intent. Before 1964, an older version of § 1782 provided discovery assistance "only to a tribunal established by a treaty to which the United States was a party and then only in

46. Joint App'x 70.

47. *Cf. BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 32, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) (explaining that the Court granted a petition for certiorari concerning the "local litigation requirement" of a bilateral investment treaty because of "the importance of the matter for international commercial arbitration" and citing K. Vandevelde, *Bilateral Investment Treaties: History, Policy & Interpretation* 430-32 (2010) to explain "that dispute-resolution mechanisms allowing for arbitration are a 'critical element' of modern day bilateral investment treaties").

proceedings involving a claim in which the United States or one of its nationals was interested."[48] In 1964, Congress amended § 1782 to "broaden" its reach beyond its original scope to allow discovery assistance to "intergovernmental tribunals *not* involving the United States."[49] Here, the arbitral panel closely resembles the tribunals included in § 1782's pre-amendment scope, once modified to include intergovernmental tribunals; it is a panel "established by a treaty to which [Lithuania and Russia are parties] . . . in [a] proceeding[ ] involving a claim in which [Russia] or one of its nationals [is] interested."[50] Accordingly, finding that the instant arbitral panel is eligible for § 1782 discovery assistance is consistent with § 1782's modern expansion to include intergovernmental tribunals.

Thus, as the arbitration is a "proceeding in a foreign or international tribunal," the District Court did not err in concluding that the Fund may seek § 1782 discovery assistance.

II.

The second statutory requirement of § 1782 at issue requires that the party seeking discovery assistance be an "interested person." The Fund asserts that it qualifies as

48. *NBC*, 165 F.3d at 190 (citing S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3784 ("Senate Report")).

49. *Id.* (emphasis added). Its scope was broadened because, "[c]learly, the interest of the United States in peaceful settlement of international disputes is not limited to controversies to which it is a formal party." *Id.* (quoting Senate Report at 3785).

50. *See* Senate Report at 3784.

an "interested person" under § 1782 as a litigant because the Fund initiated the arbitration as the assignee of a Snoras bank shareholder. We agree. Under *Intel*, "no doubt litigants are included among, and may be the most common example of, the 'interested person[s]' who may invoke § 1782."[51]

AlixPartners contests the Fund's status as a "litigant" because the Fund has thus far failed to affirmatively submit proof, both in the arbitration and before this Court, that it is the assignee.[52] But AlixPartners's argument overcomplicates a straightforward inquiry. The Fund is plainly an "interested person" because it is a party to the very arbitration under way between the Fund and Lithuania that is the basis of this proceeding in a U.S. court.[53] Accordingly, the District Court did not err in determining that the Fund sufficiently demonstrated that it is an "interested person" for the purpose of § 1782.

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51. *Intel*, 542 U.S. at 256.

52. The arbitration has been bifurcated to first address this issue concerning the Fund's standing before proceeding to the merits.

53. *See Certain Funds, Accts. and/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 119 (2d Cir. 2015) ("[T]he [*Intel*] Court cited with approval the expansive definition [of 'interested persons'] provided by [Professor] Hans Smit, [the] leading academic commentator on the statute [and one who famously] played a role in its drafting. Professor Smit maintained that the phrase 'any interested person' is 'intended to include not only litigants before foreign and international tribunals, but also foreign and international officials as well as any other person . . . [who] merely possess[es] a reasonable interest in obtaining the assistance.' Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1027 (1965).").

III.

Having held that the Fund qualifies as an "interested person" who properly applied for discovery assistance for use in a "proceeding in a foreign or international tribunal," we proceed to review the District Court's decision to grant the Fund's § 1782 discovery application. Finding no abuse of discretion, we affirm.[54]

Under § 1782, a district court may, in its discretion, grant discovery assistance after considering both the "twin aims" of § 1782 and the so-called *Intel* factors. The twin aims of § 1782 are to "provid[e] efficient means of assistance to participants in international litigation in our federal courts" and to "encourag[e] foreign countries by example to provide similar means of assistance to our courts."[55]

AlixPartners argues that discovery assistance would run contrary to the second of those aims because there is

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54. *Lancaster Factoring Co.*, 90 F.3d at 42 ("If the district court has properly interpreted the requirements of § 1782, its decision whether or not to order discovery is reviewed only for abuse of discretion. The court will be found to have abused its discretion only if there was no reasonable basis for its decision.") (internal citation, brackets, and quotation marks omitted).

55. *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004) (citation omitted). § 1782 provides assistance to participants in international litigation by directing that "[t]he district court of the district in which a person resides or is found may order him to give [discovery] for use in a proceeding in a foreign or international tribunal."

no opportunity for reciprocity, inasmuch as the arbitral panel here is composed of non-governmental arbitrators and it exists only temporarily. However, AlixPartners's focus on the *ad hoc* character of the arbitral panel overlooks a more important point: that § 1782 discovery assistance here would aid and enforce the efficacy of the Treaty itself. If the United States or its citizens were involved in such an arbitration, the Congressional policy of providing § 1782 discovery assistance in cases such as this would encourage other countries to provide similar means of assistance. Accordingly, we find no abuse of discretion in the District Court's finding that granting § 1782 discovery assistance is consistent with the statute's twin aims.

Likewise, we find no abuse of discretion in the District Court's consideration of the *Intel* factors. The *Intel* factors to be considered are: (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the request is "unduly intrusive or burdensome."[56]

As to the first *Intel* factor, the Fund asserts that it cannot obtain the same documents and testimony from

56. *Intel*, 542 U.S. at 264-65.

Lithuania as from AlixPartners, LLP, Freakley's current employer, because the Fund seeks responsive documents and communications beyond those accessible through Lithuania. The Fund also seeks to depose Freakley. We agree with the District Court that this factor weighs in favor of granting the discovery request. AlixPartners is not a participant in this arbitration and is otherwise outside the arbitral panel's jurisdictional reach as a third party, and the evidence sought is not otherwise readily discoverable.

Second, the District Court properly found that consideration of "the receptivity of the foreign [tribunal] to U.S. federal-court judicial assistance" weighs in favor of granting the Fund's discovery request. Absent authoritative proof that a foreign tribunal would reject the evidence, we have explained that a court should generally allow discovery if doing so would further § 1782's goals.[57] As emphasized by the Fund here, the arbitral panel declined to bar the Fund from seeking § 1782 discovery, which suggests that the panel would be receptive to such discovery if obtained.[58] In the words of the District Court, "there is no reason to doubt that the [arbitral panel] would be receptive to U.S. federal-court judicial assistance."[59]

Third, although AlixPartners argues that Lithuanian bank secrecy laws prohibit the disclosure of the documents

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57. *See Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995).

58. Joint App'x 219-20.

59. *In re Fund for Protection of Inv. Rights in Foreign States*, 2020 U.S. Dist. LEXIS 119816, 2020 WL 3833457, at *3.

sought by the Fund, the provision of § 1782 that "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege" is not as expansive as it may at first blush appear.

Indeed, in *Intel*, the Supreme Court expressly held that § 1782 does not have a "foreign-discoverability rule" that would "categorically bar a district court from ordering production of documents where the foreign tribunal or 'interested person' would not be able to obtain the documents if they were located in the foreign jurisdiction."[60] Likewise, in *Brandi-Dohrn*, we held that there is no statutory basis for a foreign-*admissibility* requirement.[61] Accordingly, the foreign tribunal is "free to exclude the evidence or place conditions on its admission."[62] When the arbitral panel declined to bar the Fund from pursuing this § 1782 application in its December 2019 order, it stated that it would consider evidence in accord with this concept. The arbitral panel indicated that barring discovery at that stage would be "premature" despite Lithuania's argument that it "should not be receptive to allowing the [§ 1782] evidence."[63] Instead, the arbitral panel determined that

> [Lithuania] will be able to contest any evidence that might be obtained pursuant to the [Fund's

60. *Intel*, 542 U.S. at 259-60.

61. *Brandi-Dohrn*, 673 F.3d at 82.

62. *Id.*

63. Joint App'x 220.

> §] 1782 Application . . . before the Tribunal. In particular, as argued by the [Fund], [Lithuania] will have the opportunity in due course to object to the admissibility of any such evidence at issue-if the [Fund] introduces it into the record - on the basis of privilege allegedly accorded to this evidence by Lithuanian banking law.[64]

Likewise, the District Court observed that the privileges identified by AlixPartners "may regulate conduct in Lithuania and govern proceedings there, but [the Fund] seeks discovery for use in an international proceeding, with its own rules governing discoverability and admissibility of evidence"—and UNCITRAL arbitration rules do not appear to prohibit acquisition or use of the information sought by the Fund.[65] Therefore, the District Court stated, if AlixPartners believes that a privilege under Lithuanian law applies such that it is prevented from disclosing certain documents, AlixPartners may "seek a protective order or otherwise raise objections to the relevant portion of [the Fund's] discovery request."[66]

This approach—to address discoverability and admissibility issues as they arise rather than to impose a categorical bar in the first instance—is in accord with the legislative history of § 1782, which left "the issuance of an

64. *Id.* at 219.

65. *In re Fund for Protection of Inv. Rights in Foreign States*, 2020 U.S. Dist. LEXIS 119816, 2020 WL 3833457, at *3.

66. 2020 U.S. Dist. LEXIS 119816, [WL] at *3.

appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable."[67] A holding to the contrary, as we have observed, would "requir[e] a district court to apply the admissibility laws of the foreign jurisdiction[, which] would require interpretation and analysis of foreign law and such '[c]omparisons of that order can be fraught with danger.'"[68] That danger is apparent in this case—AlixPartners and the Fund disagree as to whether the material sought is privileged under Lithuanian law, and whether such privileges would apply in this treaty arbitration, governed as it is by UNCITRAL rules that make it likely that the arbitral panel would apply Lithuanian law to substantive matters. Accordingly, we find no error in the District Court's determination that it would consider the Lithuanian privilege issue as necessary and appropriate as discovery proceeds, such as by granting protective orders or hearing objections.[69]

Fourth, the District Court did not err in finding that the Fund's request is not "unduly intrusive or burdensome" under Federal Rule of Civil Procedure

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67. *Intel*, 542 U.S. at 260-61 (quoting Senate Report at 3788); *see also Brandi-Dohrn*, 673 F.3d at 81 ("[A]lthough there is no requirement under § 1782 that the type of discovery sought be available in the relevant foreign jurisdiction, a court may look to the nature, attitude and procedures of that jurisdiction as 'useful tool[s]' to inform its discretion.") (quoting *Schmitz*, 376 F.3d at 84).

68. *Brandi-Dohrn*, 673 F.3d at 82 (quoting *Intel*, 542 U.S. at 263).

69. *See, e.g., Mees v. Buiter*, 793 F.3d 291, 303 n.20 (2d Cir. 2015).

26.[70] We agree with the District Court that the Fund's "requests go to the heart of [its] case in the [a]rbitration, and appear to be proportionate to [its] needs."[71] And, as discussed above, AlixPartners "may apply to [the District] Court for a protective order or for other relief as necessary to appropriately limit discovery."[72]

All in all, we cannot conclude that the District Court erred, much less abused its discretion, in weighing the relevant factors and concluding that they favored granting of the Fund's § 1782 application.[73]

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70. *In re Fund for Protection of Inv. Rights in Foreign States*, 2020 U.S. Dist. LEXIS 119816, 2020 WL 3833457, at *4.; *see Mees*, 793 F.3d at 302 ("[A] district court evaluating a § 1782 discovery request should assess whether the discovery sought is overbroad or unduly burdensome by applying the familiar standards of Rule 26 of the Federal Rules of Civil Procedure."); Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

71. *In re Fund for Protection of Inv. Rights in Foreign States*, 2020 U.S. Dist. LEXIS 119816, 2020 WL 3833457, at *4.

72. *Id.* (citing *In re Accent Delight Int'l Ltd.*, 791 F. App'x 247, 252 (2d Cir. 2019) ("[T]he district court did not abuse its discretion by concluding that [p]etitioners' requests would not be unduly burdensome and that, if issues arose, they could be resolved through a protective order.")).

73. *See supra* note 22.

IV.

As a final matter, AlixPartners argues that the District Court abused its discretion in denying AlixPartners's motion for reconsideration. AlixPartners takes issue with what it characterizes as the District Court's "bright-line rule" that "arbitrations conducted pursuant to a bilateral investment treaty like the [Treaty before us here] do qualify as 'foreign or international tribunals' under § 1782."[74]

We disagree with that characterization of the District Court's decision. As the foregoing discussion makes clear, we do not create a "bright-line rule" that all arbitrations conducted pursuant to a bilateral investment treaty qualify as a "foreign or international tribunal," and the District Court likewise created no such rule. Instead, we hold that the features of this particular arbitration, conducted pursuant to this Treaty, are consistent with the functional features of foreign or international arbitral tribunals that, as we emphasized in *Guo*, differentiate such arbitrations from private commercial arbitration. In these circumstances, we find no abuse of discretion in the District Court's denial of reconsideration of its July 8, 2020 Order.

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74. Appellants Br. 54 (quoting *In re Fund for Protection of Inv. Rights in Foreign States*, 2020 U.S. Dist. LEXIS 153808, 2020 WL 5026586, at *2).

CONCLUSION

To summarize, we hold as follows:

(1) After considering the relevant *Guo* factors, this arbitration is between an investor and a foreign State party to a bilateral investment treaty (here, the Treaty), taking place before an arbitral panel established by that Treaty, and therefore it is a "proceeding in a foreign or international tribunal" under § 1782.

(2) The Fund is a party to the arbitration for which it seeks discovery assistance and the Fund is therefore an "interested person" under § 1782.

(3) The District Court did not abuse its discretion or otherwise err in determining that the *Intel* factors weigh in favor of granting the Fund's application for discovery assistance.

For the foregoing reasons, we **AFFIRM** the July 8, 2020 Order and the August 25, 2020 Order of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE THE APPLICATION OF THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES PURSUANT TO 28 U.S.C. § 1782 FOR AN ORDER GRANTING LEAVE TO OBTAIN DISCOVERY FOR USE IN A FOREIGN PROCEEDING.

19 Misc. 401 (AT)

ANALISA TORRES, District Judge:

ORDER

On July 8, 2020, the Court entered an order (the "July Order") granting an application under 28 U.S.C. § 1782 seeking leave to obtain discovery to be used in an international arbitration proceeding, brought by Applicant, The Fund for Protection of Investor Rights in Foreign States, a corporation organized under Russian law. July Order, ECF No. 27.

Applicant sought discovery for use in a proceeding (the "Arbitration") before an arbitral tribunal (the "Tribunal") constituted under a treaty titled the Agreement Between the Government of the Russian Federation

and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (the "Treaty"). Notice of Arbitration ¶ 2, ECF No. 3-1. The Treaty provides that when an investor has a dispute with a state that is a party to the Treaty, the investor may (after following required procedures) bring the dispute before "an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law" ("UNCITRAL"). *Id.* ¶ 63. The targets of Applicant's discovery requests, Simon Freakley and AlixPartners, LLP, opposed the application. ECF No. 18. On July 22, 2020, Freakley and AlixPartners filed a motion for reconsideration of the July Order. ECF No. 28.

For the reasons below, the motion for reconsideration is DENIED.[1]

DISCUSSION

I. Jurisdiction

On August 7, 2020, Freakley and AlixPartners filed a notice of appeal of the July Order. ECF No. 33. "[T]he filing of a notice of appeal typically 'divests the district court of its control over those aspects of the case involved in the appeal.'" *Leeber Realty LLC v. Trustco Bank*, 798 F. App'x 682, 687 (2d Cir. 2019) (quoting *Griggs v. Provident Consumer Disc. Co.* 459 U.S. 56, 58 (1982)). However, "if a

1. Freakley and AlixPartners also seek a stay of the July Order pending resolution of the motion for reconsideration. Because this order denies the motion for reconsideration, that request is moot.

notice of appeal is filed *after* a motion for reconsideration, the district court retains jurisdiction over the motion for reconsideration." *Rich v. Associated Brands, Inc.*, No. 08 Civ. 666S, 2009 WL 236055, at *1 (W.D.N.Y. Jan. 30, 2009); *see also, e.g., United States v. Bohannon*, 247 F. Supp. 3d 189, 193 (D. Conn. 2017) ("[T]he pendency of an appeal does not divest a district court of jurisdiction over [a] motion for reconsideration." (internal quotation marks and citation omitted)); *United States v. Erskine*, No. 05 Cr. 1234, 2014 WL 12862427, at *1 (S.D.N.Y. Apr. 24, 2014) ("As [the defendant] filed his motion for reconsideration before he filed his notice of appeal, however, I retain jurisdiction over [the] motion for reconsideration.").

Accordingly, the Court concludes it has jurisdiction to decide Freakley and AlixPartner's motion.

II. Legal Standard

Motions for reconsideration are governed by Rule 59 of the Federal Rules of Civil Procedure and Local Civil Rule 6.3, and are entrusted to the "sound discretion" of the district court. *Davidson v. Scully*, 172 F. Supp. 2d 458, 462 (S.D.N.Y. 2001) (internal quotation marks and citation omitted). A court may grant a motion for reconsideration "to correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (internal quotation marks and citation omitted). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words,

that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

To that end, a party "may not use a motion under Rule 6.3 to advance new facts, issues or arguments not previously presented to the court." *McGee v. Dunn*, 940 F. Supp. 2d 93, 100 (S.D.N.Y. 2013) (internal quotation marks and citation omitted); *see also Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) ("It is well-settled that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." (internal quotation marks and citation omitted)). The burden rests with the party seeking reconsideration to "demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion." *Davis v. Gap, Inc.*, 186 F.R.D. 322, 324 (S.D.N.Y. 1999).

III. Analysis

Freakley and AlixPartners argue that the July Order should be reconsidered in light of the Second Circuit's holding in *In re Guo*, 965 F.3d 96 (2d Cir. 2020), an opinion issued on the same day as the July Order. Reconsideration Mem. at 5, ECF No. 29. In *Guo*, the Second Circuit held that § 1782(a) does not extend to private international commercial arbitrations, reaffirming its prior holding in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) ("*NBC*"). 965 F.3d at 106–07. The Second Circuit also provided guidance as to the factors

that determine whether an arbitral proceeding constitutes a "foreign or international tribunal" for purposes of § 1782, holding that courts should look to "the degree of state affiliation and functional independence possessed by the entity, as well as the degree to which the parties' contract controls the panel's jurisdiction," and that ultimately "the inquiry is whether the body in question possesses the functional attributes most commonly associated with private arbitration." *Id.* at 107.

Freakley and AlixPartners argue that the July Order cannot stand in light of *Guo* because the July Order focused on the Arbitration's origins in governmental action, rather than its current governmental status. Reconsideration Mem. at 6. Freakley and AlixPartners further argue that application of the *Guo* factors to the Arbitration would indicate that it was a private arbitration. *Id.* at 8.

Contrary to Freakley and AlixPartner's contentions, *Guo* suggests that arbitrations conducted pursuant to a bilateral investment treaty like the Treaty do qualify as "foreign or international tribunals" under § 1782. The applicant in *Guo* argued that the arbitral body at issue was not a typical private arbitration, but instead "most closely resemble[d] arbitration under bilateral investment treaties." *Guo*, 965 F.3d at 108 n.7. The Second Circuit rejected that argument, explaining:

> While an arbitral body under a bilateral investment treaty may be a "foreign or international tribunal," the arbitration here derives adjudicatory authority solely from the

> parties' agreement, rather than the intervention or license of any government to adjudicate cases arising from certain varieties of foreign investment. Additionally, the dispute here is between two private parties, while arbitration under bilateral investment treaties is typically between a private party and a state.

Id.; *see also id.* at 108 ("To be sure, [the ability of the parties to select their own arbitrators] is not determinative, as agreements between countries to arbitrate disputes between their citizens may involve selection of the arbitrators by the parties, and such a tribunal may be a 'foreign or international tribunal' notwithstanding this fact.").

Freakley and AlixPartners point to *Guo*'s enumeration of the particular characteristics of the arbitral body at issue in that case that indicated it was a private arbitration, and assert that the Tribunal shares many of them. Reconsideration Mem. at 9–14; *see Guo*, 965 F.3d at 107–08 (considering "the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body," "the degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision," whether the "panel derives its jurisdiction exclusively from the agreement of the parties and has no jurisdiction except by the parties' consent," and "the ability of the parties to select their own arbitrators"). They presented arguments based on those same factors in their opposition to Applicant's motion, largely relying on the district court

opinion affirmed in *Guo*. Opp. at 10–12, ECF No. 18. The Court nonetheless held that the Arbitration was taking place before a "foreign or international tribunal" within the meaning of § 1782 in light of the role of bilateral investment arbitration as a tool of international relations, the fact that the Tribunal derives its jurisdiction from the Treaty, and the fact that the Arbitration is a means by which Applicants are bringing claims against the Republic of Lithuania in its capacity as a state. July Order at 4–5 & n.1. Those factors indicate that the Tribunal does not "possess[] the functional attributes most commonly associated with private arbitration." *Guo*, 965 F.3d at 107. Thus, nothing in *Guo* requires the Court to disturb its previous conclusion.

CONCLUSION

Accordingly, Freakley and AlixPartner's motion for reconsideration is DENIED. The Clerk of Court is directed to terminate the motion at ECF No. 28.

SO ORDERED.

Dated: August 25, 2020
New York, New York

/s/
ANALISA TORRES
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 Misc. 401 (AT)

IN RE THE APPLICATION OF THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES PURSUANT TO 28 U.S.C. § 1782 FOR AN ORDER GRANTING LEAVE TO OBTAIN DISCOVERY FOR USE IN A FOREIGN PROCEEDING.

July 8, 2020, Filed

ORDER

ANALISA TORRES, District Judge:

Before the Court is an application under 28 U.S.C. § 1782 seeking leave to obtain discovery to be used in an international arbitration proceeding, brought by Applicant, The Fund for Protection of Investor Rights in Foreign States, a corporation organized under Russian law. ECF No. 1. The targets of Applicant's discovery requests, Simon Freakley and AlixPartners, LLP, oppose the application. Opp., ECF No. 18. For the reasons below, the application is GRANTED.

BACKGROUND

Applicant is the claimant in an ongoing international arbitration initiated against the Republic of Lithuania (the "Arbitration"), arising out of Lithuania's nationalization of a bank, AB bankas SNORAS ("Snoras"). Notice of Arbitration, ECF No. 3-1. Applicant claims, among other things, that in 2011 Lithuania's regulatory authorities conducted an investigation of Snoras, announced that the bank was unable to meet its obligations, and appointed Simon Freakley as temporary administrator of the bank. *Id.* ¶¶ 24, 29-33. Applicant further claims that the Lithuanian government directed Freakley to complete his report on a sharply abbreviated timeline, that he submitted a report funding that Snoras' net asset value was lower than the value of its liabilities, and that on the same day as the report was submitted, Lithuanian regulatory authorities revoked Snoras' license and commenced bankruptcy proceedings, which led promptly to a Lithuanian court declaring Snoras to be bankrupt. *Ici.* ¶¶ *37-40*. Applicant alleges that it was assigned any claims arising out of these events. *Id.* ¶ 45.

Applicant commenced the Arbitration on April 29, 2019, pursuant to a treaty titled the Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (the "Treaty"). *Id.* ¶ 2. The Treaty provides that when an investor has a dispute with a state that is a party to the Treaty, the investor may (after following required procedures) bring the dispute before "an ad hoc arbitration

in accordance with Arbitration Rules of the United Nations Commission on International Trade Law" ("UNCITRAL"). *Id.* ¶ 63.

As of October 15, 2019, Applicant and Lithuania had each selected a member of the three-member arbitral tribunal (the "Tribunal"), and were negotiating regarding the third arbitrator. Yanos Decl. If 2, 22. On December 18, 2019, the fully constituted Tribunal denied a request by Lithuania to bar Applicant from pursuing this proceeding. *See* Arbitral Order, Applicant Supp. Ltr. Ann. A., ECF No. 24 at 3-12.

DISCUSSION

I. Legal Standard

28 U.S.C. § 1782(a) provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

"A district court has authority to grant a § 1782 application where: (1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign or international tribunal, and (3) the application is made by a foreign or international tribunal or any interested person." *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015) (internal quotation marks, citation, and alterations omitted).

If those factors are met, the district court may authorize discovery in its discretion. In exercising its discretion, the court must consider four factors laid out by the Supreme Court in *Intel Corporation v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004):

> (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," in which case "the need for § 1782(a) aid generally is not as apparent";
>
> (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";
>
> (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and
>
> (4) whether the request is "unduly intrusive or burdensome."

Mees, 793 F.3d at 298 (quoting *Intel*, 542 U.S. at 264-65).

II. Analysis

Applicant seeks to require Freakley and AlixPartners to produce documents relating to the circumstances

of Freakley's appointment as Snoras' temporary administrator and the instructions he received from the Lithuanian government; the nature, scope, and findings of his investigation of Snoras; the "reception" of those findings by the Bank of Lithuania and other Lithuanian officials; and any and all reports prepared by Freakley and his team for the Bank of Lithuania. App. Mem. at 9-10, ECF No. 2. Applicant also seeks to depose Freakley and a representative of AlixPartners designated pursuant to Federal Rule of Civil Procedure 30(b)(6) about these events. *Id.*

The Court first addresses the statutory requirements, and then turns to the *Intel* factors.

A. Statutory Requirements

All three of the statutory requirements of § 1782(a) are met. First, AlixPartners and Freakley do not contest that they can be "found" in this district. *See* ECF No. 3-2 (indicating that AlixPartners' headquarters is in Manhattan); ECF No. 3-4 (indicating the Freakley works as chief executive officer of AlixPartners in New York City); Opp. at 7 (arguing only that the application does not meet the second and third statutory requirements).

Second, the discovery sought is "for use in a foreign proceeding before a foreign or international tribunal." To be "for use" in a proceeding, information sought need only be "something that will be employed with some advantage or serve some use in the proceeding." *Mees*, 793 F.3d at 298. Documents and testimony from

AlixPartners and Freakley related to Freakley's position as temporary administrator of Snoras could assist Applicant in challenging the process that led to Snoras' nationalization and bankruptcy. AlixPartners and Freakley argue that the discovery is nonetheless not "for use" in a foreign proceeding before a foreign or international tribunal for two reasons: (1) no proceeding is within reasonable contemplation, because the Arbitration is in its preliminary stages, and (2) the Arbitration is not a "foreign or international tribunal" within the meaning of § 1782(a). Opp. at 7-12.

Neither argument has merit. A proceeding is not only contemplated, but actual: Applicant has initiated the Arbitration, and put at issue claims that plainly implicate the discovery it seeks. *See* Notice of Arbitration. And the Arbitration has several characteristics that indicate it should be treated as an international tribunal: it was convened under the authority of the Treaty, a bilateral agreement between the Republic of Lithuania and the Russian Federation; Applicant seeks to enforce rights established by that treaty against Lithuania as a state; and the Arbitration will be conducted pursuant to UNCITRAL rules. *See In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010) (holding that an arbitral tribunal "established by an international treaty," and conducted "pursuant to UNCITRAL rules," constituted a foreign tribunal); *see also OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 Misc. 265, 2009 U.S. Dist. LEXIS 109492, 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) (holding that § 1782's reference to foreign or international tribunals "at minimum, ... include[s] international-government sanctioned tribunals."); *cf.*

Chevron Corp. v. Berlinger, 629 F.3d 297, 310 (2d Cir. 2011) (expressly reserving the question of whether a "treaty arbitration between Chevron and Ecuador is ... a proceeding in a foreign or international tribunal within the meaning of § 1782" (internal quotation marks and citation omitted)).[1]

Third, Applicant is the complaining party in the Arbitration, and falls squarely within the category of an "interested person." "No doubt litigants are included among, and may be the most common example of, the interested persons who may invoke § 1782." *Intel*, 542 U.S. at 256 (internal quotation marks and citation omitted). AlixPartners and Freakley claim that Applicant may not have standing to prosecute, or may not have properly been assigned, the claims it is asserting in the Arbitration. Opp. at 12-13. But that issue is not before this Court. As a matter of fact, Applicant is currently a party to the Arbitration, and is, therefore, an interested person for purposes of § 1782.

Accordingly, the Court holds that it has authority under § 1782 to order the discovery sought by Applicant.

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1. AlixPartners and Freakley argue that in *National Broadcasting Co. v. Bear Stearns & Co.*, the Second Circuit held that "Congress did not intend for [§ 1782] to apply to an arbitral body established by private parties." 165 F.3d 184, 191 (2d Cir. 1999); *see* Opp. at 10-12. The Second Circuit noted, however, that § 1782 did apply to arbitral tribunals "created by intergovernmental agreement" *National Broadcasting Co.*, 165 F.3d at 190. The Court concludes that the Arbitration, which was created by treaty and designed to structure relations between two sovereign nations, falls into that category.

B. *Intel* Factors

The factors laid down by the Supreme Court to guide a district court's discretion also favor granting Applicant's request for discovery.

First, Alix Partners and Freakley are not participants in the Arbitration. This factor, therefore, weighs in favor of granting the request.

Second, there is no reason to doubt that the Tribunal would be receptive to U.S. federal-court judicial assistance. Absent "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782," a court should allow discovery if doing so would further § 1782's "overarching interest in providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (internal quotation marks and citation omitted). Here, the Tribunal has already declined to bar Applicant from seeking discovery in this proceeding. *See* Arbitral Order IT 24. The Tribunal did not address the question of whether any evidence obtained would ultimately be admissible in the Arbitration, or otherwise pass on the merits of this application, but its decision not to preclude Applicant from pursuing this proceeding indicates that the Court need not weigh "heavily" any "concern for trespassing upon the prerogatives of [another jurisdiction's] sovereignty." *Euromepa*, 51 F.3d at 1101.

Third, granting Applicant's request will not allow circumvention of foreign proof-gathering restrictions

or other policies. AlixPartners and Freakley argue that Lithuanian bank secrecy law would prevent disclosure of the information sought, Opp. at 16-17; Applicant disputes that contention, Reply at 10-12, ECF No. 21. The Court need not resolve that issue. The question under the third *Intel* factor is whether Applicant seeks to obtain discovery "in contravention of restrictions in place *in the foreign proceedings.*" *In re del Valle Ruiz*, 939 F.3d 520, 534 (2d Cir. 2019) (emphasis added). The laws on which AlixPartners and Freakley rely may regulate conduct in Lithuania and govern proceedings there, but Applicant seeks discovery for use in an international proceeding, with its own rules governing discovery and admissibility of evidence. *See generally* UNCITRAL Arbitration Rules, ECF No. 3-15. There is no evidence before the Court that the Arbitration's rules would prohibit Applicant's acquisition or use of the information sought. *See Mees*, 793 F.3d at 303 n.20 ("Proof-gathering restrictions are best understood as rules akin to privileges that *prohibit* the acquisition or use of certain materials, rather than as rules that *fail to facilitate* investigation of claims by empowering parties to require their adversarial and non-party witnesses to provide information." (internal quotation marks and citation omitted)). Of course, § 1782(a) provides that "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." To the extent that AlixPartners and Freakley believe that Lithuanian law applies in this proceeding to prevent them from disclosing certain documents, they can seek a protective order or otherwise raise objections to the relevant portion of Applicant's discovery requests.

Fourth, and finally, Applicant's request is not unduly intrusive or burdensome. "[A] district court evaluating a § 1782 discovery request should assess whether the discovery sought is overbroad or unduly burdensome by applying the familiar standards of Rule 26 of the Federal Rules of Civil Procedure." *Mees*, 793 F.3d at 302. Applicant's requests go to the heart of their case in the Arbitration, and appear to be proportionate to their needs. *See* ECF Nos. 3-11, 3-12, 3-13, 3-14. Moreover, "it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *Mees*, 793 F.3d at 302 (internal quotation marks and citation omitted). AlixPartners and Freakley may apply to this Court for a protective order or for other relief as necessary to appropriately limit discovery, consistent with the Federal Rules of Civil Procedure. *See In re Accent Delight Int'l Ltd*, 791 Fed. Appx. 247, 252 (2d Cir. 2019) ("[T]he district court did not abuse its discretion by concluding that [p]etitioners' requests would not be unduly burdensome and that, if issues arose, they could be resolved through a protective order."). On their face, however, the proposed subpoenas do not appear so intrusive or burdensome as to justify denial of the application under § 1782's liberal standard.

Accordingly, the Court holds that it should exercise its discretion to permit the discovery sought by Applicant.

CONCLUSION

For the reasons stated, the application pursuant to § 1782 is GRANTED. It is ORDERED that Applicant may issue subpoenas for documents in substantially the same form as Exhibits 11, 12, 13, and 14 to Alexander Yanos' declaration filed in support of the application. ECF Nos. 3-11, 3-12, 3-13, 3-14.

The Clerk of Court is directed to terminate the motion at ECF No. 1, and close the case.

SO ORDERED.

Dated: July 8,
New York, New York

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of September, two thousand twenty-one.

Docket No: 20-2653

THE APPLICATION OF THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES PURSUANT TO 28 USC 1782 FOR AN ORDER GRANTING LEAVE TO OBTAIN DISCOVERY FOR USE IN A FOREIGN PROCEEDING,

Plaintiff-Appellee,

v.

ALIXPARTNERS, LLP, SIMON FREAKLEY,

Third Party Defendants-Appellants.

ORDER

Appellants, AlixPartners, LLP and Simon Freakley, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX E

28 U.S.C.A. § 1782

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

Effective: February 10, 1996

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

APPENDIX F

AGREEMENT

BETWEEN THE GOVERNMENT OF THE RUSSIAN FEDERATION AND THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA ON THE PROMOTION AND RECIPROCAL PROTECTION OF THE INVESTMENTS

The Government of the Russian Federation and the Government of the Republic of Lithuania, hereinafter referred to as the "Contracting Parties",

- desiring to establish favourable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party,

- recognising that the promotion and reciprocal protection of investments, based on the present Agreement, will be conducive to the development of mutually beneficial trade and economic, scientific and technical co-operation,

have agreed as follows:

Article 1
Definitions

For the purposes of this Agreement:

1. The term "investor" in respect of each Contracting Party shall mean:

a) any natural person who is a national of the state of this Contracting Party according to the legislation of this Contracting Party and authorised to invest in the territory of the other Contracting Party according to the legislation of the latter Contracting Party;

b) in respect of the Russian Federation:

any legal person, constituted or established according to the legislation in force in the territory of the Russian Federation provided this legal person is authorised according to the legislation of the Russian Federation to invest in the territory of the Republic of Lithuania; in respect of the Republic of Lithuania: any entity constituted and registered in the territory of the Republic of Lithuania in conformity with its legislation;

2. The term "investment" shall mean all kinds of assets, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with legislation of the latter Contracting Party, and shall include in particular, though not exclusively:

a) movable and immovable property as well as respective property rights;

b) shares, stocks, bonds and other forms of participation in the enterprises and companies;

c) claims to money, invested to create economic value, and claims to any performance having an economic value and connected with investments;

d) exclusive rights to the objects of the intellectual property (copyrights, patents, industrial designs and models, trade marks, service marks, goodwill and know-how);

e) rights to conduct economic activities conferred by law or under contract, including, in particular, concessions to search for, cultivate, extract and exploit natural resources. Any change of form in which assets are invested or reinvested shall not affect their character as investment provided such change does not contradict the legislation of the Contracting Party in which territory the investments are made.

3. The term "returns" shall mean all amounts produced by an investment in accordance with paragraph 2 of this Article and in particular, though not exclusively, includes profits, capital gains, dividends, interest, licence remunerations, royalties and other fees.

4. The term "territory" shall mean the territory of the Russian Federation or the territory of the Republic of Lithuania, including their respective exclusive economic zone and continental shelf, in which the respective state may exercise sovereign rights and jurisdiction in accordance with international law.

5. The term "legislation of the Contracting Party" shall mean the laws and regulations of the state of the Contracting Party in respect of both Contracting Parties.

Article 2
Promotion and protection of investments

1. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its legislation.

2. Each Contracting Party in accordance with its legislation shall guarantee to the investors of the other Contracting Party full protection and security of the investments made by the investors of the other Contracting Party.

Article 3
Treatment of Investments

1. Each Contracting Party shall accord in its territory to the investors, investments made by investors of the other Contracting Party and activities related to such investments fair and equal treatment, which excludes the application of discriminatory measures impeding management, maintenance, use, enjoyment and disposal of the investment.

2. The treatment, set forth in the paragraph 1 of this Article, shall be at least no less favourable than the treatment accorded by the Contracting Party to the investments and activities related to such investments of its own investors or the investors of third state.

3. Each Contracting Party in accordance with its laws and regulations reserves a right to determine the branches of the national economy and the spheres of activities where the activities of foreign investors are restricted or limited.

4. The most favoured nation treatment, provided in accordance with paragraph 2 of this Article, is not extended to the benefits which are provided or will be provided in the future by the Contracting Party:

a) by virtue of any existing or future customs, monetary and payment union, free trade and common tariff areas, common market or other forms of regional economic integration agreements, to which the Contracting Party is a party or may become a party in the future;

b) on the basis of the treaties on the avoidance of double taxation or other agreements on taxation.

Article 4
Key personnel

1. The Contracting Party in accordance with its legislation regarding entry, temporary stay and work of natural persons non-citizens, shall permit natural persons, who are the investors of the other Contracting Party and key personnel (executives, managers as well as specialists, who are essential to the functioning of the enterprise), employed by the investor of this Contracting Party, to enter and remain in its territory for the purpose of engaging in activities, related to investments.

2. The Contracting Party, in accordance with its legislation, shall permit the investors of the other Contracting Party, who have made investments in the territory of the first Contracting Party, to employ any employee of the category of key personnel of their choice regardless of citizenship, provided this employee of the category of key personnel was granted permit to enter, temporary stay and work in the territory of the first Contracting Party, and this work meets the conditions and temporary limitations set forth in the permit issued to this employee of the category of key personnel.

Article 5
Transparency of legislation

Each Contracting Party shall, with a view to promoting the understanding of its legislation that pertain to or affect investments made in its territory by the investors of other Contracting Party, make such legislation public and accessible.

The Contracting Parties, if necessary, shall exchange information on the legislation, pertaining to the field of application of this Agreement.

Article 6
Expropriation and compensation

l. The investments of the investors of one Contracting Party made in the territory of the other Contracting Party shall not be subject to expropriation, nationalisation or other measures equivalent to expropriation or nationalisation

(hereinafter referred to as "expropriation") unless these measures are carried out in the public interest and under due process of law, are carried out without discrimination and are accompanied by the payment of prompt, adequate and effective compensation.

2. The compensation shall be equivalent to the market value of the expropriated investments immediately before the expropriation in fact occurred or the impending expropriation became public knowledge. The compensation shall be paid without undue delay in a convertible currency and shall be freely transferable from the territory of one Contracting Party to the territory of the other Contracting Party. The compensation shall include interest calculated until the date of payment of the compensation at the LIBOR rate.

Article 7
Compensation of losses

Investors of one Contracting Party, who suffer losses in respect of their investments in the territory of the other Contracting Party due to war, civil disturbance, a state of national emergency, insurrection, riot or other similar events, shall be accorded the treatment no less favourable than that accorded by the latter Contracting Party to its own investors or to investors of any third State in respect of any measures taken by it in accordance with such loss.

Article 8
Transfers of payments

1. Each Contracting Party shall guarantee to investors of the other Contracting Party, after the completion of all tax obligations, free transfer abroad of payments in connection with the investments, in particular:

a) the initial capital and additional amounts for the maintenance or increase of the investment;

b) returns;

c) funds in repayment of loans, directly related to the investment;

d) the proceeds from the total or partial liquidation or sale of the investments;

e) compensation referred to in the Article 6 of this Agreement;

f) the earnings and other remuneration of the investor of the other Contracting Party and key personnel authorised to work in connection with investments in the territory of the first Contracting Party.

2. Transfers shall be made without undue delay in a freely convertible currency at the exchange rate applying on the date of transfer in accordance with currency regulations in force of the Contracting Party in whose territory the investment was made.

Article 9
Subrogation

The Contracting Party or its designated Agency which made a payment to an investor under an indemnity against non-commercial risks given in, respect of an investment in the territory of the other Contracting Party, shall exercise by the virtue of subrogation the rights of the investor to the same extent as the investor. The rights are exercised in accordance with legislation of the latter Contracting Party.

Article 10
Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party

1. In a case of any dispute between one Contracting Party and the investor of the other Contracting Party concerning the investments, including the disputes regarding amount, conditions or procedure of payment of the compensation, and the procedure of transfers, referred to respectively in the Articles 6 and 8 of this Agreement, a written notification, which includes detailed explanation, is submitted by the investor to the Contracting Party, which is a party of the dispute. The parties of the dispute shall endeavour to settle such dispute, if possible, by the way of negotiations.

2. If such dispute can not be settled amicably within six months from the date of the written notification referred to in paragraph 1 of this Article, the dispute, at the request of either party and at the choice of an investor, shall be submitted to:

a) competent court or court of arbitration of the Contracting Party in which territory the investments are made;

b) the Arbitration Institute of the Stockholm Chamber of Commerce;

c) the Court of Arbitration of the International Chamber of Commerce;

d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. The arbitral decision shall be final and binding on both parties of the dispute. Each Contracting Party shall undertake to execute such decision in accordance with its legislation.

Article 11
Settlement of disputes between the Contracting Parties

1. The disputes between the Contracting Parties concerning the interpretation and application of this Agreement shall be settled by negotiations, if possible, through diplomatic channels.

2. If the dispute is not settled in such way within six months from the beginning of the negotiations, the dispute shall, upon the request of either Contracting Party, be submitted to an Arbitral Tribunal.

3. Such an Arbitral Tribunal shall be constituted for each case in the following way. Within two months from the date on which either Contracting Party receives a notification of arbitration each Contracting Party shall appoint one arbitrator. These two arbitrators, within two months period from the appointment of these arbitrators, shall select the national of the third state, who, upon approval of both Contracting Parties, shall be elected the Chairman of the Arbitral Tribunal.

4. If the necessary appointments were not made in the periods, referred to in the paragraph 3 of this Article, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make such appointments. If the President of the International Court of Justice is a national of one of the Contracting Parties or is otherwise unable to carry out the specified request, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President of the International Court of Justice is a national of one of the Contracting Parties or is otherwise unable to carry out the specified request, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. The Arbitral Tribunal shall reach its decision award by the majority of votes. Such decision award of the Arbitral Tribunal is final and binding upon each Contracting Party. The Arbitral Tribunal shall determine the procedures of its work independently.

6. Each Contracting Party shall bear the costs connected with the activities the member of the Arbitral Tribunal, appointed by this Contracting Party, and of its representation in the arbitration proceedings; the cost of the Chairman of the Arbitral Tribunal and remaining costs shall be borne in equal parts by the Contracting Parties. The Arbitral Tribunal may, however, decide that a higher proportion of costs shall be borne by one of the two Contracting Parties, and such award shall be binding on both Contracting Parties.

Article 12
Consultations

The Contracting Parties shall consult at the, request of either of them on matters concerning the interpretation and application of this Agreement.

Article 13
Application of the Agreement

This Agreement shall apply to investments made in the territory of one Contracting Party by the investors of the other Contracting Party as from January 1, 1992.

The provisions of this Agreement shall apply to the disputes, referred to in the Articles 10 and 11 of this Agreement, from the date of its entry into force.

Article 14
Entry into force and Duration of the Agreement

1. Each Contracting Party shall notify the other Contracting Party in a written form that all internal procedures for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force from the date of the latter of the two notifications.

2. The Agreement shall remain in force for the period of fifteen years. It shall continue to be in force thereafter until the expiration of twelve months from the date on which, either Contracting Party shall have given the other Contracting Party written notice concerning the termination of this Agreement.

3. The Protocol, annexed hereto, shall form an integral part of the Agreement.

4. This Agreement may be amended by the mutual written consent of the both Contracting Parties. Any such amendment shall enter into force when each Contracting Party have notified the other Contracting Party that all internal procedures for the entry into force of such amendment have been fulfilled.

5. The provisions of the other Articles of this Agreement shall continue to be effective for a further period of ten-years from the date of its termination in respect of investments made before the termination of and covered by this Agreement.

Done in duplicate in Moscow on the 29th of June, 1999, in the Russian, Lithuanian and English languages, all texts being equally authentic. In case of divergence, the English text shall be operative.

For the Government of the Russian Federation	For the Government of the Republic of Lithuania

PROTOCOL

At the signing of the Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on the promotion and reciprocal protection of investments (hereinafter referred to as "the Agreement"), the Contracting Parties have agreed upon the following provisions, that shall form the integral part of the Agreement:

l. Notwithstanding the provisions of the Article 10 of the Agreement, the investors, whose investments are being expropriated, shall have a right to prompt review of their case by the appropriate judicial or administrative authorities of the expropriating Contracting Party to determine whether such expropriation, and any compensation therefore, conforms to the principles set forth in the Article 6 of the Agreement and the legislation of the expropriating Contracting Party.

2. Notwithstanding the provisions of the Article 13 of the Agreement, in respect of the Republic of Lithuania:

a) the provisions of the Agreement shall not apply to the matters relating to acquisition, possession, use, disposal and other rights to land plots;

b) the matters referred to in subparagraph a) of the paragraph 2 of this Protocol shall be regulated by the legislation of the Republic of Lithuania.

Done in duplicate in Moscow on the 29th of June 1999, in the Russian, Lithuanian and English languages, all texts being equally authentic. In case of divergence, the English text shall be operative.

For the Government of the Russian Federation

For the Government of the Republic of Lithuania