No. 21-518

IN THE SUPREME COURT OF THE UNITED STATES

ALIXPARTNERS, LLP ET AL.,

Petitioners,

v.

THE FUND FOR PROTECTION OF INVESTORS' RIGHTS IN FOREIGN STATES,

Respondent.

On Petition for a Writ of Certiorari to the United State Court of Appeals for the Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the phrase "foreign or international tribunal" in 28 U.S.C. § 1782(a) includes international arbitral tribunals constituted pursuant to a treaty signed by two or more sovereign States.

PARTIES TO THE PROCEEDINGS

Petitioners are AlixPartners LLP and Mr. Simon Freakley, defendants and appellant below.

Respondent is the The Fund for Protection of Investors' Rights in Foreign States, plaintiff and appellee below.

CORPORATE DISCLOSURE STATEMENT

The Fund for Protection of Investors' Rights in Foreign States hereby certifies that there are no corporate parents, affiliates and/or subsidiaries that are publicly held.

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INTRODUCTION

Petitioners AlixPartners LLP and Mr. Simon Freakley (collectively, "AlixPartners" or "Petitioners") ask this Court to grant certiorari based on a misrepresentation of the issue presented by this case. This case involves a finding by the District Court for the Southern District of New York, confirmed by the Second Circuit Court of Appeals, that an *ad hoc* arbitral tribunal constituted pursuant to 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, signed on June 29, 1999 ("the Treaty") presiding over an arbitration governed by the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules constitutes an international tribunal within the meaning of 28 U.S.C. § 1782(a) ("Section 1782"). The Second Circuit's decision is consistent with the treatment of similar tribunals, constituted pursuant to other intergovernmental treaties, in other circuits. As a result, this case has nothing to do with the circuit split involving the applicability of Section 1782 to arbitration tribunals constituted pursuant to private law contracts—the actual split which Petitioners pretend is relevant to this case. As such, the petition should be denied.

The absence of any split in the circuits is hardly surprising. "Section 1782(a) provides that a federal district court 'may order' a person 'resid[ing]' or 'found' in the district to give testimony or produce documents 'for use in a proceeding in *a foreign or international tribunal* . . . upon the application of any interested person.'" *Intel Corp. v. Advanced Micro Devices, Inc.*,

542 U.S. 241, 246 (2004) (emphasis added). As such, it is entirely reasonable that the Second Circuit, which has found that Section 1782 does not apply arbitration tribunals constituted pursuant to private law contracts, would nevertheless find that an *ad hoc* arbitral tribunal constituted pursuant to the Treaty fell within phrase "foreign or international tribunal."

The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

The Fund is the Claimant in an arbitration it commenced against the Republic of Lithuania alleging breaches of the Treaty by Lithuania. In particular, the Fund, as the assignee of certain claims and in its own right as well, claims that Lithuania expropriated the investments of Mr. Vladimir Antonov, a Russian national who held a controlling interest in AB bankas SNORAS ("Snoras"), a private bank located in Lithuania without due process or compensation. *See* Petition Appendix at 4a ("App."). As such, the Fund seeks damages for Lithuania's breach of Article 6 of the Treaty, which memorializes a reciprocal promise between Lithuania and Russia not to expropriate or nationalize investments made by qualifying investors from the other States without due process and "payment of prompt, adequate and effective compensation." *See id.* at 61-62a.

The Fund commenced the arbitration in April 2019 pursuant to Article 10 of the Treaty, which provides that both States' consent to arbitrate the claims of the others' qualifying nationals in the event of alleged breaches of the Treaty. *See id.* at 64a.

In particular, the Fund instituted an *ad hoc* arbitration ("the Arbitration") in accordance with [the] Arbitration Rules of UNICTRAL pursuant to Article 10 of the Treaty in April of 2019 and a tribunal was subsequently constituted in accordance with the Treaty and UNCITRAL Rules. *See id.* at 42a. That arbitration is ongoing.

The Fund seeks discovery related to Mr. Freakley's role in the expropriation, including the circumstances behind his appointment as Snoras's temporary administrator, any instructions Lithuania gave Mr. Freakley, the nature and conclusions of Mr. Freakley's confidential report on Snoras, Lithuania's "reception" of Mr. Freakley's report, and any other investigations and reports Mr. Freakley prepared for the Bank of Lithuania. *Id.* at 7a. The Fund filed an application pursuant to Section 1782 for leave to obtain this discovery against AlixPartners before the United States District Court for the Southern District of New York in August of 2019. *Id.* at 6a-7a. The application includes requests for permission to depose Mr. Freakley and a representative of AlixPartners, LLP about the expropriation. *See id.* In response, Lithuania asked the Tribunal to enjoin the Fund from pursuing discovery. *Id.* at 43a. The Tribunal rejected Lithuania's application. *Id.*

II. Procedural History

On July 8, 2020, the District Court of the Southern District of New York granted the Fund's application. In particular, the District Court found, that the Tribunal constituted a "foreign or international tribunal" under Section 1782. *Id.* at 46a. The District Court reasoned that the Tribunal,

constituted to hear the Fund's claims against Lithuania, is an international tribunal because: "it was convened under the authority of the Treaty, a bilateral agreement between the Republic of Lithuania and the Russian Federation; [the Fund] seeks to enforce rights established by that treaty against Lithuania as a state; and the Arbitration will be conducted pursuant to UNCITRAL rules." *Id.* That same day, the Second Circuit Court of Appeals published its decision in *Hanwei Guo v. Deutsche Bank Securities*, 965 F.3d 96 (2d Cir. 2020) ("*Guo*"), in which it affirmed its prior decision in *National Broadcasting Company, Inc. v. Bear Stearns & Company, Inc.*, 165 F.3d 184 (2d Cir. 1999) ("*NBC*"), that arbitration tribunals constituted pursuant to a private law contract are *not* eligible for judicial discovery assistance under Section 1782 as they do not qualify as "foreign or international tribunals." *Guo*, 965 F.3d at 106-07.

Citing *Guo*, AlixPartners filed a motion on July 22, 2020, requesting the District Court reconsider its order granting the Fund's application. *See* App. at 35a. While that motion was pending, AlixPartners filed a notice appealing the District Court's July order on August 7, 2020. *Id.* On August 25, 2020, the District Court denied AlixPartners' motion to reconsider, finding that its July order comported with *Guo* and noting that the Second Circuit's decision specifically differentiated bilateral investment treaty arbitrations from those arbitrations whose "adjudicative authority [derives][solely] from the parties' agreement." *Id.* at 39a (quoting *Guo*, 965 F.3d at 108 n.7).

On July 15, 2021, the Second Circuit affirmed

both of the District Court's orders. *See id.* at 1a-33a. Relevant to AlixPartners's petition, the Second Circuit affirmed that neither *Guo*, *NBC*, nor this Court's opinion in *Intel* are inconsistent with the District Court's finding that an arbitration tribunal constituted pursuant to a bilateral investment treaty is an international tribunal within the meaning of Section 1782. *See id.* at 12a-22a. In doings so, the Second Circuit engaged in the factors it established in *Guo* and found that the arbitral tribunal in this case is an "international tribunal" since, among other things, the arbitral tribunal derives its adjudicatory authority from the Treaty—an agreement made between two States. *See id.* at 16a-22a. In response, AlixPartners requested *en banc* review. *See* Petition for Rehearing or Rehearing *en Banc*, *In re Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP*, No. 20-2653 (2d Cir. July 29, 2021), ECF No. 84. That request was denied without argument. *See* Order Denying Petition for Panel Rehearing, or, in the alternative, for Rehearing *en Banc*, *In re Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP*, No. 20-2653 (2d Cir. Sept. 10, 2021), ECF No. 88.

While this matter was before the Second Circuit, this Court granted a writ of certiorari to review the *Servotronics* case. *See* Order Granting Petition of Certiorari, *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, No. 20-794 (Mar. 22, 2021) ("*Servotronics*"). That case involved an arbitration tribunal constituted pursuant to the terms of a private law contract[1]—the very type of arbitration that the Second Circuit addressed in *NBC* and *Guo* and

[1] *See* Petition at 2.

differentiated from this case in its July 2021 decision. However, *Servotronics* was voluntarily dismissed before this Court ruled on the appeal. *See* Joint Stipulation to Dismiss Pursuant to Rule 46.1, *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, No. 20-794 (Sept. 24, 2021). On September 14, 2021, however, another petition was filed involving an arbitration tribunal constituted pursuant to a private law contract in *ZF Automotive US, Inc. v. Luxshare, Ltd*. *See* Petition for Writ of Certiorari, *ZF Automotive US, Inc. v. Luxshare, Ltd*, No. 21-401 (Sept. 10, 2021) ("The question presented in this case is substantively identical to the question presented in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794").

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between Courts With Respect To The Application Of Section 1782 To Arbitration Tribunals Constituted Pursuant To Bilateral Investment Treaties.

AlixPartners' petition requests the Court to grant certiorari predominantly on the basis of the schism in the lower courts' application of Section 1782 at issue in *Servotronics*. But the facts of this case do not relate to the subject causing the split among the lower courts at issue in that case.

In particular, *Servotronics* concerned the application of Section 1782 to arbitral tribunals constituted pursuant to private law contracts. In contrast, this case concerns the application of Section 1782 to tribunals constituted pursuant to treaties signed by two or more sovereign nations. The difference is material. Courts have uniformly agreed

that international arbitration tribunals that derive their authority from intergovernmental agreements are international tribunals within the meaning of the statute. *See* LUCAS V. M. BENTO, THE GLOBALIZATION OF DISCOVERY: THE LAW AND PRACTICE UNDER 29 U.S.C. § 1782, §6.01[C], at 109 (2019); *see also Islamic Republic of Pak. v. Arnold & Porter Kaye Scholer LLP,* No. 18-103, 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) (noting that courts "have regularly found that arbitrations conducted pursuant to Bilateral Investment Treaties, and specifically by the ICSID, qualify as international tribunals under the statute.").[2]

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[2] *See*, *e.g.*, *In re Ex Parte Warren,* No. 20 Misc. 208 (PGG), 2020 WL 6162214, at *5 (S.D.N.Y. Oct. 21, 2020); *In re Chevron Corp.,* 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff'd sub nom by Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.,* No. 3:09 Misc. 265, 2009 WL 2877156, at *2-4 (D. Conn. Aug. 27, 2009); *In re Chevron Corp.,* 633 F.3d 153, 161 (3d Cir. 2011); *In re Republic of Turkey,* No. 19-20107 (ES) (SCM), 2020 WL 4035499, at *3 (D.N.J. July 17, 2020); *Islamic Republic of Pak.,* 2019 WL 1559433, at *6-7; *In re Gov't of the Lao People's Democratic Republic,* No. 1:15-MC-00018, 2016 WL 1389764, at *6 (D. N. Mar. I. Apr. 7, 2016); *Republic of Ecuador v. Stratus Consulting, Inc.,* No. 13-cv-01112-REB-KLM, 2013 WL 2352425, at *2 (D. Colo. May 29, 2013); *In re Mesa Power Grp., LLC,* No. 2:11-mc-280-ES, 2012 WL 6060941, at *5 (D.N.J. Nov. 20, 2012); *Republic of Ecuador v. Bjorkman,* 801 F. Supp. 2d 1121, 1124 (D. Colo. 2011), *aff'd*, 735 F.3d 1179 (10th Cir. 2013); *In re Republic of Ecuador,* No. 1:10-MC-00040 GSA, 2010 WL 4027740, at *1-2 (E.D. Cal. Oct. 13, 2010); *In re Veiga,* 746 F. Supp. 2d 8, 23 (D.D.C. 2010); *In re Chevron Corp.,* 753 F. Supp. 2d 536, 539 (D. Md. 2010); *In re Oxus Gold PLC,* No. MISC: 06-82, 2006 WL 2927615, at *5–6 (D.N.J.

There is a decided split in the circuits with respect to the question of whether arbitration tribunals constituted pursuant to private law agreements are foreign or international tribunals within the meaning of Section 1782. However, resolving the appeal raised by AlixPartners will not assist the circuit courts considering the issues raised in *Servotronics* and similar cases arising out of private law arbitration agreements. This is apparent in the fact that the Second Circuit Court of Appeals has consistently held that arbitration tribunals constituted pursuant to private law agreements are not foreign or international tribunals while also affirming orders granting discovery pursuant to Section 1782 in support of arbitration tribunals constituted pursuant to intergovernmental treaties . *Compare NBC*, 165 F.3d 184; *Guo*, 965 F.3d 96, *with In re Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir. July 15, 2021); *In re del Valle Ruiz,* 939 F.3d 520 (2d Cir. 2019). *See also, Chevron Corp. v. Berlinger,* 629 F.3d 297 (2d Cir. 2011).

As already stated, *Servotronics* did not concern arbitration tribunals constituted pursuant to intergovernmental treaties. Rather, that case arose in relation to an arbitration tribunal constituted pursuant to a private law contract between Rolls-Royce and Servotronics. *See Servotronics*, Petition at 3, 4. Rolls-Royce, the manufacturer of an engine damaged by a fire, commenced arbitration proceedings against Servotronics, which

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Oct. 10, 2006); *In re Ex Parte Eni S.P.A.*, No. 20-mc-334-MN, 2021 WL 1063390, at *3 (D. Del. Mar. 19, 2021); *Republic of Kaz. v. Lawler*, No. MC-19-00035-PHX-DWL, 2019 WL 5558997, at *2 (D. Ariz. Oct. 28, 2019).

manufactured a "Metering Valve Servo Vale component" used in the engine. *Id.*

The Fourth and Seventh Circuits assessed the facts of *Servotronics* and published contrary opinions as to whether Section 1782 allowed discovery assistance to arbitration tribunals constituted pursuant to private law arbitration agreements. On one side, the Fourth Circuit found that "the UK arbitral panel convened to address the dispute between Servotronics and Rolls-Royce *is* a 'foreign or international tribunal' under § 1782(a)." *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020) (emphasis added). In doing so, the Fourth Circuit drew upon this Court's opinion in *Intel* describing Congress's intent to expand the scope of Section 1972 in 1964 as international commerce blossomed between nations. *Id.* at 213. On the other hand, the Seventh Circuit held that Section 1782 *did not* apply to the UK arbitral panel. *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 696 (7th Cir. 2020) ("[Section] 1782(a) does not authorize the district courts to compel discovery for use in private foreign arbitrations."). While quoting the same legislative history upon which the Fourth Circuit relied, the Seventh Circuit did not believe that "the phrase 'arbitral tribunals' includes *private* arbitral tribunals." *Id.* (emphasis in original). Neither Circuit, however, had any reason to address the question raised by this case: whether arbitration tribunals constituted pursuant to an intergovernmental treaty fall within the ambit of Section 1782.

As this Court is well aware, other courts have fallen on both sides of the disagreement over arbitration tribunals constituted pursuant to private

law agreements. However, this Court's analysis of the issues arising in this case would not assist those courts in their analysis of whether Section 1782 applies to arbitration tribunals constituted pursuant to private law agreements. For example, in *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, the Sixth Circuit applied Section 1782 to an arbitration tribunal constituted pursuant to a private law contract. 939 F.3d 710 (6th Cir. 2019) ("*FedEx*"). AlixPartners even admits *FedEx* falls far afield of the facts in this case, stating that the Sixth Circuit "held 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.'" Petition at 14 (quoting *FedEx*, 939 F.3d at 723) (emphasis added). Again, the Tribunal in this case was not constituted pursuant to a private law contract.

The Second Circuit's analysis of the application of Section 1782 to arbitration tribunals constituted pursuant to private law contracts also illustrates why granting certiorari would not be of any assistance to the circuits on the *Servotronics* question. In both *NBC* and *Guo*, the Second Circuit held that Section 1782 does *not* apply to arbitration tribunals constituted pursuant to private law contracts. *NBC*, for example, involved a private law contract between NBC and a then-privately-held television broadcasting company for the provision of programming and other services in return for the purchase of shares. 165 F.3d at 186. The agreement in question allowed for "private commercial arbitration administered by the International Chamber of Commerce." *Id.* The Second Circuit found that Section 1782 does not apply

to "an arbitral body established by *private* parties." *Id.* at 191 (emphasis added).

In *Guo* the Second Circuit concluded that this Court's opinion in *Intel* did not overturn *NBC*'s prohibition from applying Section 1782 to arbitration tribunals constituted pursuant to private law contracts. *Guo*, 965 F.3d at 105-07. Then, it found that an arbitral tribunal constituted pursuant to a private law contract was *not* a foreign or international tribunal under Section 1782, even if the arbitration was administered by CIETAC. *Id.* at 101, 108-09.[3] While the Second Circuit took sides (whether rightly or wrongly) in the split that affected private arbitrations, it recognized in a footnote that arbitration tribunals constituted pursuant to intergovernmental treaties are distinct:

> 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. at 108 n.7. This footnote is not surprising. After

[3] This was despite the fact that CIETAC as an institution had origins in the Chinese government. *Id.* at 100-01. The Second Circuit cast aside any notion that the origins of the arbitral institution is controlling, favoring instead a functional analysis which gives weight to whether the arbitration was created by way of a private agreement made between private parties.

all, the Second Circuit, like most other courts, had already allowed Section 1782 to apply to arbitration tribunals constituted pursuant to treaties. *See In re del Valle Ruiz,* 939 F.3d 520; *Chevron Corp.,* 629 F.3d 297.[4]

Thus, granting certiorari in this case would not assist in the resolution of the split with respect to arbitration tribunals constituted pursuant to private law contracts and lays bare AlixPartners' improper use of *Servotronics* as a reason for granting the petition. *See* Petition at 11 (claiming that this case is "inextricably bound up with *Servotronics*").

As noted, unlike *Servotronics*, the Fund seeks discovery assistance in relation to an arbitration tribunal constituted pursuant to an intergovernmental treaty. This case therefore does

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[4] AlixPartners also cites the Fifth Circuit's opinion in *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999), but that opinion hardly illustrates a split of authority in relation to public arbitrations pursuant to intergovernmental agreements. There, the Fifth Circuit simply purported to follow the Second Circuit's (then) recent decision in *NBC* that Section 1782 "does not apply to private international arbitrations." *Id.* at 881. The Fifth Circuit otherwise failed to engage in any analysis of the difference between private contract-based arbitrations and those rooted in treaties. *Id.* While unfortunate in its summary analysis, *Biedermann* does not alone justify triggering this Court's review. It's impact on Section 1782 litigation involving bilateral investment treaties has been minimal. Indeed, the Fund's review has only shown one case, *In re Government of Mongolia v. Itera International Engergy, LLC*, that found an *ad hoc* arbitration pursuant to a bilateral investment treaty constitutes a "private" proceeding. No. 3:08-MC-46-J-32MCR, 2009 WL 10712603, at *6 (M.D. Fla. Nov. 10, 2009). This lone, unpublished, outlier decision from a Magistrate Judge hardly constitutes a great difference amongst lower courts necessitating the Court's review.

not fall within the category of cases in which courts have struggled to come to a consensus. It exists in the uncontroversial category of cases that have applied Section 1782 to investment treaty arbitrations specifically. *See* cases cited *supra* note 2.[5]

Indeed, it is only the United States' *amicus* brief in *Servotronics* that implicates this case. *See* Brief for the United States as Amicus Curiae Supporting Respondents*, Servotronics, Inc. v. Rolls-Royce PLC, et al.*, No.20-794 (June 28, 2021) ("U.S. Br."). While commenting on arbitration tribunals constituted pursuant to private law contracts, the United States also took the opportunity to brief the tangential subject of arbitration tribunals constituted pursuant to intergovernmental agreements. *See Id.* at 28-34. The United States argued that arbitration tribunals constituted pursuant to bilateral investment treaties are *not* "foreign or international tribunals" under Section 1782. It supports this argument in part by raising the concern that "injecting broad discovery, aided by the assistance of U.S. courts, into streamlined investor-state arbitrations could undermine the efficiency and cost-

[5] AlixPartners's citation to *In re Rendon*, 519 F. Supp. 3d 1151 (S.D. Fla. 2021), and *In re Grupo Unidos Por El Canal*, S.A., No. 14-mc-80277-JST (DMR), 2014 WL 5456520 (N.D. Cal. Oct. 27, 2014), for the statement that "district courts do not agree on the result even when considering arbitral proceedings before the same arbitral body" only proves the Fund's point. *See* Petition at 16 n. 13. *In re Rendon* featured a private international commercial arbitration derived from a contract between individuals while *In re Grupo Unidos Pro El Canal* featured an arbitral tribunal established by an international treaty. *See In re Rendon*, 519 F. Supp. 3d at 1154-55; *In re Grupo Unidos Por El Canal*, S.A., 2014 WL 5456520, at *2. It is of no surprise that *In re Rendon* did not apply Section 1782 while *In re Grupo Unidos Pro El Canal* did.

effectiveness of those mechanisms." *Id.* at 34. But, crucially, the United States did not identify any circuit court decisions that agreed with its conclusion and did not explain why its concern vitiated the plain language of a duly enacted statute.

II. The Plain Language of Section 1782 Dictates That It Apply To Arbitration Tribunals Constituted Pursuant To Bilateral Investment Treaties.

"As 'in all statutory construction cases, we begin [our examination of § 1782] with the language of the statute.'" *Intel Corp.*, 542 U.S. at 255 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). Section 1782 plainly states that it applies to "foreign or international tribunals." The arbitration tribunal in this case, constituted pursuant to a treaty, is an international tribunal. In particular, it is a tribunal constituted pursuant to an intergovernmental agreement (a treaty between two sovereign states) for the resolution of disputes involving nationals of one of the two states and the other state.

As this Court recognized, "Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals." *Id.* at 247. That effort evolved over time and broadened in scope. In 1948, Congress broadened federal courts' power to assist by passing Section 1782.[6] *Id.* at 247-

[6] In 1855, Congress first empowered federal courts to render discovery assistance to foreign proceedings, though requests for assistance were received through diplomatic channels. *Id.* at 247.

28. In this first iteration of the statute, Section 1782 eliminated a prior requirement that a foreign government be a party or have an interest in the proceedings. *Id.* This original statute also applied to "any civil action pending in any court in a foreign country." *Id.* (quoting Act of June 25, 1948, ch 646, § 1782, 62 Stat 949) (emphasis omitted).

The expansion of Section 1782 was almost immediate. Not a year after its enactment, Congress amended the statute by replacing "civil action" with "judicial proceeding." *Id.* (quoting Act of May 24, 1949, ch 139, § 93, 63 Stat 103). Then, in 1958, Congress created a Commission on International Rules of Judicial Procedure to investigate improving Section 1782 so that federal courts could provide further assistance to foreign proceedings. *Id.* The results of the Commission came to fruition in 1964 when Congress again expanded the Section 1782's confines, replacing "judicial proceedings" with "proceeding[s] in [] foreign or international tribunal[s]." *Id.* at 248-49. The cumulative effect of Section 1782's new language was simple: to ensure that United States federal courts' discovery assistance was not "confined to the proceedings before conventional courts." *Id.* at 249 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess., 7 (1964)).

When wondering how far Congress desired to expand the confines of Section 1782, we need look no further than purposeful meaning of the statute's new language. Inserting the term "international tribunal" was not coincidental; it did not appear in a vacuum. "International tribunal" is a term that "derives directly" from 22 U.S.C. §§ 270-270g—a predecessor statute "which authorized commissioners or members of international tribunals to administer oaths, to

subpoena witnesses or records, and to charge contempt." *NBC*, 165 F.3d at 189. Crucially, Sections 270-270g applied solely to *intergovernmental* agreements. *Id.* (noting Congress enacted §§ 270-270c in response to an arbitration proceeding between the United States and Canada). "International tribunals," as used in Section 1782 therefore, encompasses "intergovernmental . . . arbitrations." *Id.*

Bilateral investment treaties are, of course, intergovernmental agreements. Therefore, tribunals constituted pursuant to such intergovernmental agreements clearly fall within the definition of "international tribunal." AlixPartners, relying upon the United States' *amicus* filings from *Servotronics*, argues that the conception of bilateral investment treaties post-date the 1964 amendments to Section 1972. Petitions at 19-20. This is immaterial. To begin with, the concept of investor-state disputes was not likely an alien one in 1964. One of the landmark investor-state arbitration institutions, the International Centre for Settlement of Investment Disputes ("ICSID"), was formally created in 1965—just one year after Congress expanded the statue and international negotiations concerning its creation were on going at that time. *See Servotronics*, U.S. Br. at 30.

However, evening assuming, *arguendo*, that Congress had no indication that investor dispute mechanisms would appear in the years after amending Section 1782, the statute was nonetheless drafted to account for undefined tribunal proceedings in the years to come. As this Court noted in *Intel*, "[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.'" *Intel Corp.*, 542 U.S. at 263 n.15. Built into Section 1782 is the flexibility for courts to decide what constitutes a "foreign or international tribunal" as time evolves and new types of proceedings come to light. AlixPartners is therefore mistaken to apply Section 1782's definition of "foreign and international tribunals" only in the context of those proceedings in existence in 1964. The key question is still the one posed by the statute itself: is the tribunal in question an international or foreign tribunal within the meaning of the statute? Here, where the tribunal was constituted pursuant to an intergovernmental agreement, the answer is unquestionably yes.

III. The Present Case Is Not Well Suited to Resolve The Conflict Between Lower Courts

Because this case does not address the split of authority amongst the lower courts, it does not present a good case for the Court to resolve the existing split in relation to arbitration tribunals constituted pursuant to private law contracts. AlixPartners admits this in its petition. In fact, AlixPartners acknowledges that the Court already has before it a petition *directly addressing* the split of authority described above in *ZF Automotive US, Inc. v. Luxshare, Ltd*, No. 21-401 (pet. for cert. filed Sep. 14, 2021). *See* Petition at 22. While AlixPartners believes that the Court should grant its petition because *ZF Automotive*, like *Servotronics*,[7] may be

[7] *Servotronics* arrived on this Court's docket after the evidentiary record of the underlying arbitration closed, requiring the case's

voluntarily dismissed prior to an opinion on the merits, the Court already has the ability to prevent mootness in such circumstances. In particular, there exists an exception to the mootness doctrine for cases "capable of repetition, yet evading review." *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016).[8] AlixPartners has done nothing more than prove why the Court should consider the evading review exception in *ZF Automotive* so that it may finally resolve the conflict in applying Section 1782 to private arbitration cases.

Despite a proper case already seeking review from the Court, AlixPartners nonetheless pitches for this Court's attention by stating that the repercussions of this case could implicate the resolution of the split affecting arbitration tribunals constituted pursuant to private law contracts. *See* Petition at 20. That is incorrect. According to the reasoning of AlixPartners, any case is ripe for certiorari because this Court might feel inclined to comment on unrelated topics in *dicta*.

But that is obviously incorrect and granting AlixPartners's petition here is a poor substitute to addressing the true circuit split head on. Of note, if the Court decides in the Fund's favor, the decision would in no way move the needle on how courts should consider private arbitrations instituted from

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dismissal prior to the Court's consideration of the merits. *See* Petition at 22.

[8] The Court may apply the exception where: "(1) 'the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

commercial contracts. There is no arbitration tribunal constituted pursuant to a private law contract in the facts of this case. *See Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969) ("Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court.").

On the other hand, if the Court were to grant the petition and decide in favor of AlixPartners, there still would be no guidance for the lower courts on the existing circuit split. In short, granting the petition is not a route to assist the circuits in relation to their split.

IV. The Second Circuit's Decision Is Correct

A. Bilateral Investment Treaty Arbitration Tribunals Are International Tribunals Based On Intergovernmental Agreements

The Second Circuit's decision is well-reasoned and correctly decided. After acknowledging that Section 1782's application to various foreign and international proceedings "is broad, but not boundless," the court implemented the functional inquiry it developed in *Guo* to determine that bilateral investment treaty arbitration tribunals are international tribunals. App. at 13a.

To reach its conclusion, the Second Circuit detailed how the crucial differences that have historically set bilateral investment arbitration agreements apart from other private agreements influenced its functional analysis from *Guo*. Most

notably, bilateral investment arbitration tribunals are creatures of intergovernmental agreements—precisely the types of agreements that Section 1782 sought to include in the 1964 amendments. *See* App. at 19a. If elements of investor-state disputes resemble private arbitrations, they do so out of the States' exercise of authority under the applicable treaty.

Applying the *Guo* factors in the proper framework, the Second Circuit's holding comports with both its own precedent, as well as this Court's broad interpretation of Section 1782 in *Intel*. Yes, under the first factor, the arbitral tribunal in this case retains independence from both Russia and Lithuania, but its affiliation with two sovereigns is preserved since the tribunal's existence depends on the Treaty.[9] *See id.* at 18a. Similarly, under the second factor, the Tribunal's decision is not susceptible to a State's authority or ability to alter the outcome of the proceedings. *Id.* But this is only true by virtue of the foreign States' consent to be bound by the dispute resolution.[10] *See id.* at 18a-19a. As recognized most clearly in the third *Guo* factor

[9] "It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord." *United States v. Bekins*, 304 U.S. 27, 51-52 (1938).

[10] AlixPartners attempts to undermine the effect of the States' consent by stating that "[p]rivate parties must likewise consent to binding arbitration. . . ." Petition at 15-16 n.10. But a State's consent to confer authority hardly compares to a private individual's consent to arbitrate. The former infuses sovereign authority of the State while the latter simply defines the rights of a single private individual.

analyzing the nature of the tribunal's jurisdiction, the Treaty inextricably infuses States' authority into the arbitral tribunal. *Id.* at 19a. The only factor that the Treaty does not impact is the fourth *Guo* factor, which looks to how the arbitrators are selected. *Id.* at 20a. But there exists no reason why States cannot consent to the appointment of private parties to wield power bestowed by the State's government.

Finally, the fifth *Guo* factor presents a catch-all for the Court to consider any other elements that may make an arbitral tribunal more or less private. *Id.* at 21a. Here, the Second Circuit correctly gave great weight to the fact that Lithuania, a sovereign state, is a party to the Arbitration. *Id.*

AlixPartners do not and cannot refute these points. Instead, Petitioners critique rests on whether the Second Circuit gave certain *Guo* factors greater weight than others. Petition at 21. But this is hardly a critique worthy of the Court's attention. First, *Guo*'s functional analysis was purposefully fact based. The Second Circuit did not state that all factors must be weighed the same. Second, the organic, flexible nature of the factors matches the breadth of discretion Congress afforded to courts under Section 1782. As already stated, Congress intended to keep Section 1782 broad, acknowledging that Court will likely face evolving types of proceedings as time progresses. *See supra,* Section II.

B. AlixPartners' Remaining Critiques Lack Merit

AlixPartners attacks the decision on three additional fronts. The Court should find none of them persuasive.

First, AlixPartners argues that the "text, purpose, and history of Section 1782" does not define "foreign or international tribunals" to include arbitration tribunals constituted pursuant to bilateral investment treaties. Petition at 24. As already demonstrated, this is not correct. *See supra,* Section II.

Second, AlixPartners argues that that applying Section 1782 to arbitration tribunals constituted pursuant to bilateral investment treaties would conflict with the Federal Arbitration Act ("FAA"). Petition at 26. But this Court has already advised courts to divorce Section 1782's analysis with comparisons to United States domestic law. In *Intel*, the petitioner advocated that district courts cannot invoke Section 1782 unless there was some proof that the same discovery is available under the rules and procedures of the foreign jurisdiction. *Intel*, 542 U.S. at 260-61. This Court rejected that argument, stating along the way that it "reject[s] [the] suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding." *Id.* at 261-63. The Court reasoned that the discretion of the district court, as governed through the guidance provided in *Intel*, could account for any unjust results, including attempts to "circumvent foreign proof-gathering restrictions or other policies of . . . the United States." *Id.* at 264-65. So, even if there is a conflict in the discovery powers under Section 1782 in comparison to the FAA, district courts are well equipped to take such factors into consideration when tailoring the discovery assistance.

Third, AlixPartners argues that this Court should discard the Second Circuit's decision because

both parties in the *Servotronics* litigation disagreed with it as well. Petition at 27. This position is irrelevant. The position of two private litigants advocating on an issue tangential to their case—that is, the application of Section 1782 to arbitral tribunals constituted to contracts—has no persuasive value to this Court.

CONCLUSION

The Petition asks the Court to weigh in on a non-controversial question. This case is simply one of many that have found that arbitral tribunals constituted pursuant to treaties qualify as "foreign or international tribunals" under Section 1782. The true conflict deserving this Court's attention relates to an entirely different category of cases involving arbitration tribunals constituted pursuant to private law contracts. The Court has on its docket a petition for certiorari that better addresses that conflict. As a result, the Court should deny AlixPartners' petition.

Respectfully submitted,

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