UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

In re 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. 00401 (AT)

ALIXPARTNERS LLP AND SIMON FREAKLEY'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND A STAY

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AlixPartners LLP and Mr. Simon Freakley ("**Respondents**") respectfully submit this Memorandum of Law in support of their motion (the "**Motion**") for reconsideration and a stay of the Court's July 8, 2020 Order [ECF No. 27] (the "**Order**") granting the *ex parte* application pursuant to 28 U.S.C. § 1782 (the "**Application**") filed by The Fund for Protection of Investor Rights in Foreign States (the "**Fund**").

PRELIMINARY STATEMENT

Respondents move for reconsideration of the Order based upon recently-issued binding precedent from the Second Circuit on the scope of 28 U.S.C. § 1782 ("**Section 1782**"). On the same day that the Order was entered, a panel of the Second Circuit issued a decision (1) clarifying that Section 1782 discovery may not be obtained for use in a "private international commercial arbitration," and (2) articulating a new, multifactor test for determining whether a foreign proceeding is before a "foreign or international tribunal" for Section 1782 purposes. *In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782*, No. 19-0781, slip op. at 15, 20–21 (2d Cir. July 8, 2020) ("***In re Guo***"). The Order neither cited *In re Guo* nor applied its test. We therefore respectfully submit that reconsideration is appropriate to account for an intervening change of controlling law.

Upon reconsideration, the Application for leave to obtain discovery pursuant to 28 U.S.C. § 1782 should be denied. The Fund chose to initiate an *ad hoc* arbitration before a panel selected by the parties, that is not directed or controlled by any governmental or intergovernmental body, and that is empowered to render a final and binding decision. In fact, in its Notice of Arbitration, the Fund expressly *waived* its right to litigate its dispute "before any administrative tribunal or court in Lithuania." Having done so, under the controlling precedent established in *In Re Guo*, the Fund cannot now avail itself of Section 1782. That relief is available only in connection with "a proceeding in a foreign or international tribunal." Applying the *In re Guo* test, the arbitration

panel lacks the characteristics of a state-sponsored proceeding as envisioned by Section 1782, and should be treated as a private international commercial arbitration, for which Section 1782 discovery is not available.

BACKGROUND

On April 29, 2019, the Fund initiated an *ad hoc* arbitration (the "**Arbitration**") against the Republic of Lithuania regarding the Bank of Lithuania's 2011 nationalization of Bank Snoras AB ("**Snoras**"), a failed Lithuanian bank. (ECF No. 3-1.)[1] It did so 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 "**Agreement**"), which permits Russian investors[2] in Lithuanian assets to settle disputes with Lithuania concerning those investments. (ECF No. 3-1, ¶ 2; ECF No. 3-8, Article 10.)

The Agreement gives investors the option to resolve disputes through one of four dispute resolution processes, including before:

(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 Nations Commission on International Trade Law (UNCITRAL)."[3]

(ECF No. 3-8, Article 10(2)(a)-(d).)

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1 Citations to "ECF No." are to the filings in this action, No. 1:19-mc-00401-AT.

2 The Fund is the purported assignee of "all rights, claims and remedies" of Mr. Vladimir Antonov, a shareholder of Snoras. (ECF No. 2 at 8.)

3 The 1976 UNCITRAL Arbitration Rules, which govern the Arbitration, "provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations." The United Nations Commission On International Trade Law, *UNCITRAL Arbitration Rules*, http:// https://uncitral.un.org/en (follow "Home" hyperlink, then "Texts and Status"; then "International Commercial Arbitration"; then "UNCITRAL Arbitration Rules").

The Fund chose the fourth option, an "ad hoc arbitration" before a panel of private arbitrators selected by agreement of the Fund and Lithuania, which would in turn apply the 1976 UNCITRAL Arbitration Rules. (ECF No. 3-1, ¶¶ 66–68.) In so doing, the Fund expressly waived the "right to prompt review of [its] case by the appropriate judicial or administrative authorities" of Lithuania. (ECF No. 3-1, ¶ 4 ("the Fund has waived its right to initiate or continue proceedings with respect to the impugned measures before any administrative tribunal or court in Lithuania in accordance with Article 1 of the Protocol to the Treaty").) The Agreement further provides that any award issued by an arbitral panel under its Article 10 "shall be final and binding on both parties of the dispute." (ECF No. 3-8, Art. 10(3).)

Following agreement by the Fund and Lithuania on the selection and appointment of the arbitrators, the arbitration panel now consists of three arbitrators: one chosen by the Fund, another by Lithuania, and the third (and presiding) arbitrator chosen by the first two party-appointed arbitrators. (ECF No. 3-1, ¶¶ 66–67; *id.*, ECF No. 24 ¶ 9.) The arbitrators are among the most well-known and established in their field: Dr. Laurent Lévy, the name partner at a Geneva-based law firm specializing in international arbitration (Lévy Kaufman Kohler), Christopher Thomas, QC, a Canadian arbitration lawyer, and Professor William Park, a Professor at Boston University School of Law and former President of the London Court of International Arbitration. (ECF No. 24, ¶ 5.)

On August 29, 2019, the Fund filed its Application in this Court seeking leave to obtain discovery under Section 1782 from Mr. Freakley and AlixPartners. Neither Mr. Freakley nor AlixPartners is party to the arbitration. In connection with the 2011 nationalization, the Bank of Lithuania appointed Mr. Freakley "Temporary Administrator" of Snoras and tasked him with investigating the bank. Zolfo Cooper, of which Mr. Freakley was then CEO, assisted him in that

engagement. Several years later, long after the engagement ended, AlixPartners hired Mr. Freakley, and certain of its affiliates acquired the assets of two Zolfo Cooper entities. Through its Application, the Fund now seeks information and documents from the Respondents regarding Mr. Freakley's work in connection with Snoras nearly a decade ago and at a prior employer.

On October 1, 2019, AlixPartners and Mr. Freakley opposed the Application on numerous grounds, including that the arbitration is a private arbitration and not a "foreign or international tribunal" subject to Section 1782. On October 15, 2019, the Fund filed a Reply in further support of its Application.

On July 8, 2020, this Court issued an Order granting the Application. That same day, in *In re Guo*, the Second Circuit (1) confirmed that private arbitrations do not qualify for Section 1782 and (2) articulated a new, multifactor test for determining whether an arbitration is in fact private. This Court's Order neither cited nor applied *In re Guo*.

ARGUMENT

I. RECONSIDERATION SHOULD BE GRANTED AND THE APPLICATION DENIED.

A motion for reconsideration should be granted if the movant identifies "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YYL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013). Reconsideration is also appropriate where "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); *see also Was. Nat'l Ins. Co. v. OBEX Grp. LLC*, No. 18-CV-9693, 2019 WL 266681, at *2 (S.D.N.Y. Jan. 18, 2019) (reconsideration "should be granted . . . when the Court has overlooked facts or precedent that might have altered

the conclusion reached in the earlier decision"); *Scarsdale Cent. Serv. v. Cumberland Farms, Inc.*, No. 13-CV-8730, 2014 WL 2870283, at *1 (S.D.N.Y. June 24, 2014) ("controlling decisions . . . [that] the court overlooked"); *see also* Fed. R. Civ. P. 60; S.D.N.Y. Local Civ. Rule 6.3.

Two weeks ago, writing in *In re Guo*, a panel of the Second Circuit addressed whether Section 1782 discovery may be obtained in aid of "a private international commercial arbitration" and, if not, whether the proceeding at issue was such a private arbitration. *In re Guo*, No. 19-781, slip op. at 1–2. Confirming that its decision in *National Broadcasting Co. v. Bear Stearns & Co*., 165 F.3d 184 (2d Cir. 1999) ("*NBC*") remains good law, and that Section 1782 may not be used to obtain discovery in aid of a private international commercial arbitration, the Second Circuit went on to affirm that the proceeding at issue did not constitute "a foreign or international tribunal" for Section 1782 purposes. *Id*. at 15, 20–21. In so doing, the Second Circuit articulated a new multifactor test for distinguishing between a private arbitration and a "foreign or international tribunal." *Id.* at 20-21. We respectfully submit that this Court's Order did not apply the test established in *In re Guo*, which decision was issued on the same day as the Order. Because application of the multifactor test announced in *In re Guo* may alter the Order's conclusion, the instant Motion should be granted.

A. No Single Factor Distinguishes A Private International Commercial Arbitration From A State-Sponsored One.

In *In re Guo*, the Second Circuit clarified that the "'foreign or international tribunal' inquiry does not turn on the governmental or nongovernmental *origins* of the administrative entity in question." Slip op. at 21 (emphasis in original). The Court further held that "[n]o single factor clearly distinguishes a private international commercial arbitration from a state-sponsored one." *Id*.

Here, the Order appears not to have addressed *In re Guo*, as it applied bright-line rules of the sort rejected in that decision. The Order concludes that the Arbitration is before a "foreign or international tribunal" under Section 1782 because (1) it was "created by intergovernmental agreement" that is "designed to structure relations between two sovereign nations," ECF No. 27 at 5 n.1, (2) the "Applicant seeks to enforce rights established by that treaty against Lithuania as a state," and (3) "the Arbitration will be conducted pursuant to UNCITRAL rules," *id.* at 4–5. This analysis appears to give primacy to the supposed governmental origins of the Arbitration.[4] This approach is not consistent with *In re Guo*.

First, *In re Guo* observed that "an arbitral body under a bilateral investment treaty *may* be a 'foreign or international tribunal,'" but is not necessarily so. *In re Guo*, slip op. at 24 n.7 (emphasis added)*; cf. id.* at 25 ("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" (emphasis added)). This accords with the Fifth Circuit's analysis in *Republic of Kazakhstan v. Biedermann, Int'l*, 168 F.3d 880, 881 (5th Cir. 1999), which *In re Guo* cited for support. Slip op. at 11-12. In *Biedermann*, the Fifth Circuit held that an arbitration against a country pursuant to a bilateral investment treaty was *private* and therefore not subject to Section 1782. *Biedermann*, 168 F.3d at 881, 883 (finding arbitration against Kazakhstan pursuant to bilateral investment treaty private and citing the Second Circuit's analysis in *NBC*); *Republic of Kazakhstan v. Biedermann, Int'l*, No. 4:98-mc-00425 (S.D. Tex. Nov. 4, 1998), ECF No. 1 at 15 (Request for Arbitration, demanding arbitration pursuant to contract and the Treaty Between The United States Of America And The Republic Of Kazakhstan Concerning The Reciprocal Encouragement And Protection Of

[4] As noted below, Movants dispute that the Arbitration was "created by intergovernmental agreement" and argue rather that the proceeding is merely permitted by intergovernmental action. *See* Part I.B.3, *infra*.

Investment). In the *Biedermann* arbitration, the investor alleged that Kazakhstan "wrongful[ly] and illegal[ly] expropriate[ed]" its investment. *Id.* at 17. *Biedermann* thus addressed an arbitration by a private investor against a country pursuant to a bilateral investment treaty alleging that the country wrongfully and illegally expropriated the investor's assets—just like the Fund's Arbitration against Lithuania.

Second, *In re Guo* does not create a bright-line rule that all arbitrations against a country are subject to 1782. Courts have found arbitrations involving countries to be private and beyond the scope of 1782. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 32–33 (5th Cir. 2009) (arbitration against a state-owned utility); *Biedermann Int'l*, 168 F.3d at 881, 883 (arbitration against the Republic of Kazakhstan).

Third, that the Arbitration's *ad hoc* panel applies UNCITRAL rules does not make the Arbitration a proceeding before a "foreign or international tribunal" under the *In re Guo* test. The UNCITRAL rules are a model set of rules that can apply to public or private arbitrations. *See, e.g.*, UNCITRAL website[5] (rules "provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations"). The rules even contain a "model arbitration clause" for inclusion in contracts. (ECF No. 3-15, Article 1.) Thus, although an arbitration applying the UNCITRAL rules *may* constitute a "foreign or international tribunal" for Section 1782's purposes, UNCITRAL rules routinely are adopted for private commercial arbitrations as well. *See, e.g.*, *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 32–33 (5th Cir. 2009) (affirming that

[5] The United Nations Commission On International Trade Law, *UNCITRAL Arbitration Rules*, http:// https://uncitral.un.org/en (follow "Home" hyperlink, then "Texts and Status"; then "International Commercial Arbitration"; then "UNCITRAL Arbitration Rules").

an arbitration between a state-owned utility and a private party applying UNCITRAL rules was a "private" arbitration beyond the reach of Section 1782).

B. The Arbitration Has Attributes More Commonly Associated With A Private International Commercial Arbitration Than A State-Sponsored One.

In *In re Guo*, the Second Circuit held that courts must "consider a range of factors" to decide whether an arbitration is a "foreign or international tribunal" for Section 1782 purposes. Slip op. at 21. "In short, the inquiry is whether the body in question possesses the functional attributes most commonly associated with private arbitration." *Id*. The factors the panel articulated include: (1) the "degree of state affiliation" of the arbitral body, *id.*, such as (a) the "extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body," *id*., (b) whether the proceeding "maintains confidentiality from all non-participants during and after arbitration, limiting opportunities for *ex parte* intervention by state officials," *id.* at 22, and (c) whether the arbitrators "purport to act on behalf of, or have any mandatory affiliation with" a state, *id.*; (2) the "functional independence possessed" by the arbitral body, as measured by 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," *id*. at 21–22; and (3) the "degree to which the parties' contract controls the panel's jurisdiction," as measured by "the nature of the jurisdiction possessed by the panel," *id*. at 21, 24.

Taking each factor in turn, the Arbitration here is similar to the proceeding at issue in *In re Guo*, which the Second Circuit affirmed was "best categorized as a private commercial arbitration for which § 1782 assistance is unavailable." *Id.* at 25. And where the Arbitration differs from the proceeding in *In re Guo*, it does so in ways more akin to a private international commercial arbitration than to a state-sponsored proceeding.

1. The arbitration panel lacks any affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity.

In *In re Guo*, the district court found below that the arbitral body at issue had a "low degree of state affiliation," noting that proceedings were confidential (limiting opportunities for *ex parte* intervention by state officials) and that arbitrators were not selected by or affiliated with the government. *In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782*, No. 18-MC-561 (JMF), 2019 WL 917076, at *1-2 (S.D.N.Y. Feb. 25, 2019), *aff'd*, No. 19-781, slip op. at 21-22 (2d Cir. Jul. 8, 2020). This was true even though the arbitral body itself—the China International Economic and Trade Arbitration Commission ("CIETAC")—was "*founded* by the Chinese government." *Id*. at 21 (emphasis added). The analysis, the court explained, turned not on the "*origins*" of the body, but rather its present-day affiliation. *Id*. at 21–22 (emphasis in original).

The arbitration panel at issue here is even less affiliated with any government. No external governmental or quasi-governmental entity has any authority or control over the panel; Lithuania's rights in connection with the arbitration, like the Fund's, are limited to its role as a party. And the arbitral body—the panel—was not founded as a standing body by any government. Further, because the Fund elected to pursue the Arbitration as an *ad hoc* proceeding under the UNCITRAL rules—*i.e.*, a proceeding that is not administered by any institution, state-sponsored or otherwise, but rather by a panel of private arbitrators selected by the parties—there is even less cause or opportunity for state intervention. (ECF No. 3-1 at 2, ¶ 2.)[6] The Fund also expressly waived the "right to prompt review of [its] case by the appropriate

[6] Notably, under the Agreement, the Fund could have pursued a dispute proceeding administered by any number of governmental or intergovernmental entities, including any "competent court or court of arbitration of" Lithuania or Russia, the "Arbitration Institute of the Stockholm Chamber of Commerce," or the "Court of Arbitration of the International Chamber of Commerce." (Treaty, Art. 10(2)(a)-(c), ECF No. 3-8 at 5.) It chose not to.

judicial or administrative authorities" of Lithuania. (*Compare* ECF No. 3-8 at 7, Protocol ¶ 1 ("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…."); *with* ECF No. 3-1 at 2, ¶ 4 ("Furthermore, the Fund has waived its right to initiate or continue proceedings with respect to the impugned measures before any administrative tribunal or court in Lithuania in accordance with Article 1 of the Protocol to the Treaty.").) In short, the Arbitration is governed primarily by the *agreement* of the parties to the dispute, as is typical in private commercial arbitrations.

Two more sub-factors in *In re Guo*—confidentiality and the arbitrators' affiliation—also support the conclusion that the Arbitration is a private commercial arbitration rather than a state-sponsored one. For instance, the 1976 UNCITRAL Arbitration Rules protect the confidentiality of any award issued in the Arbitration. (ECF No. 3-15, Art. 32 ("5. The award may be made public only with the consent of both parties.").) Such protections maintaining "confidentiality from all non-participants during and after arbitration" serve to "limit[] opportunities for *ex parte* intervention by state officials." *In re Guo*, slip op. at 22.

Further, the Fund's and the Republic's agreement on the selection and appointment of arbitrators demonstrates the absence of government affiliation. In *In re Guo*, the Second Circuit observed that "CIETAC offers parties a pool of arbitrators who are not selected by any entity other than CIETAC and who do not purport to act on behalf of, or have any mandatory affiliation with, the Chinese government," which suggested that "CIETAC possesses a high degree of independence and autonomy, and, conversely, a low degree of state affiliation." Slip op. at 22. Likewise, here the *parties* agreed upon a method of selecting and appointing the arbitrators in

which each party appointed one arbitrator out of three, with the third (and presiding arbitrator) selected by the two party-appointees. (ECF No. 24 (Tribunal's December 18, 2019 Order), ¶ 9.) No external governmental entity, nor any other institution, had a hand in the selection of these arbitrators. Further, the arbitrators—Messrs. Dr. Laurent Lévy, Christopher Thomas QC, and Professor William Park (*id*. ¶ 5)—are well-known and established arbitrators, with no known affiliation with either Russia or Lithuania, and do not otherwise "purport to act on behalf of, or have any mandatory affiliation with" any other government. *In re Guo*, slip op. at 22. As arbitrators, they are "subject to important requirements of independence and impartiality" that "are fundamental to the arbitral process."[7]

2. The arbitration panel is functionally independent from any governmental entity and its decision will be final and binding.

In addition to its lack of state affiliation, the Arbitration is also functionally independent. The key question for this factor is whether any states possess "the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision." *In re Guo,* slip op. at 22. None do. That is because both the 1976 UNCITRAL Arbitration Rules and the Agreement provide that awards shall be "final and binding" upon the parties. 1976 UNCITRAL Arbitration Rules (ECF No. 3-15 at 20, Art. 32 ("The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.")); Agreement (ECF No. 3-8 at 5, Art. 10(3) ("The arbitral decision shall be final and binding on both parties to the dispute.")). Neither the 1976 UNCITRAL Arbitration Rules nor the Agreement provides any country an opportunity to intervene in the Arbitration or challenge the award. The Second Circuit found similar protections in *In re Guo* indicated that the arbitration was private. *In re Guo*, slip op. at 22–23.

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[7] Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION 1760–61 (Second ed. 2014).

3. The nature of the panel's jurisdiction is similar to other private arbitrations.

The final factor that the Second Circuit identified is the "degree to which the parties' contract controls the panel's jurisdiction" or "the nature of the jurisdiction possessed by the panel." *In re Guo*, slip op. at 21, 24. Here, Article 10 of the Agreement permits the existence of the Arbitration, but it did not create the proceeding or give form to its panel. As noted above, the Arbitration possesses qualities more akin to a private international commercial arbitration; it does not lose these qualities simply because the Agreement itself is state-sponsored. In almost identical procedural circumstances involving a conflict between Russian investors and a sovereign government that were to be adjudicated before an "ad hoc arbitration tribunal in accordance with UNCITRAL," the district court in *In re Mongolia v. Itera International Energy, L.L.C.* rejected the assumption that the arbitration there had the characteristics of a state-sponsored proceeding merely because a bilateral investment treaty permitted its existence. No. 08-mc-46-J-32MCR, 2009 WL 10712603, at *6-7 (M.D. Fla. Nov. 10, 2009). The district court held:

> Although the bilateral investment treaty may be state-sponsored, that does not mean the arbitration tribunal's existence is as well. Here, in commencing the arbitration proceedings, both parties named an arbitrator who then collectively selected a third. These three arbitrators, constituting a "tribunal", are private individuals, none of whom are judicial, administrative, or quasi-administrative officers. . . . Furthermore, as suggested by the term *ad hoc*, the arbitration panel was created for the sole purpose of resolving this dispute and is not state-sponsored merely because a state-sponsored treaty dictates it is an available option for investment dispute resolution.

Id. at *6.

The analysis in *In re Mongolia* aligns with the Second Circuit's analysis in *NBC*, as well as *In re Guo*, which affirmed that *NBC* remains the binding law of this Circuit. *In re Guo*, slip

op. at 3, 20. In *NBC*, the Second Circuit "held that the phrase 'foreign or international tribunal' does not encompass 'arbitral bod[ies] established by private parties.'" *Id*. at 2 (quoting *NBC*, 165 F.3d at 191). Further, the legislative history of Section 1782 indicates that Congress intended it to extend only to "intergovernmental tribunals," such as standing tribunals established by countries to arbitrate disputes between or against member countries, like the standing United States-German Mixed Claims Commission of 1933. *NBC*, 165 F.3d at 189.

By contrast, the Arbitration was not established by intergovernmental action, even if intergovernmental action (in the form of the Agreement) permits its existence, and it has no independent existence outside of the parties' dispute. Rather, the Arbitration was created by election of the Fund, a purely private party, which chose, from among four dispute resolution processes under the Agreement,[8] an *ad hoc* arbitration to resolve its dispute with Lithuania. As the district court in *In re Mongolia* observed, the mere fact that the Agreement permits arbitration does not establish or imply that the resulting arbitration possesses the judicial, administrative, or quasi-administrative qualities of the intergovernmental tribunals envisioned by the drafters of Section 1782. The Agreement provides for Lithuania's and Russia's prospective consent to arbitration (or some other dispute proceeding) against them,[9] but does not otherwise affect the procedure of the arbitration, including the affiliation of any arbitrators, the finality of any award issued, or the confidentiality of the proceedings. The Arbitration is thus undeniably

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[8] *See supra* note 6.

[9] Born, *supra* note 7, at 124–25 ("BITs also very frequently (but not always) contain dispute resolution provisions which permit investors from one Contracting State to submit 'investment disputes' with the other Contracting State to arbitration . . . . [T]hese provisions provide each state's binding consent to arbitration of investment disputes; this permits investors to demand arbitration of covered disputes against the host state without a traditional contractual arbitration agreement with the host state or other separate consent to arbitration by the host state (so-called 'arbitration without privity'). [FN849] A few BITs do not include the Contracting States' consent to arbitration, requiring foreign investors to conclude a separate arbitration agreement with the host state in order to arbitrate an investment dispute under the treaty, but this is unusual.")

more similar to a private international commercial arbitration than to, for instance, the Iran-U.S. Claims Tribunal.

That the parties were able to select their arbitrators is, although not determinative, further evidence that the arbitration is more akin to a private international commercial arbitration. *In re Guo*, slip op. at 24–25.

II. A STAY IS WARRANTED PENDING RECONSIDERATION.

Respondents respectfully request that this Court enter a stay of discovery pending resolution of this Motion. Courts consider four factors in determining whether to grant a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors—likelihood of success on the merits and irreparable harm—"are the most critical." *Id.* Here, each of the four factors weighs in favor of staying the Order.

First, for the same reasons that the Motion should be granted and the Application denied, the Respondents have shown a substantial possibility of success on the merits. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (holding that movant need only show "a substantial possibility, although less than a likelihood, of success"); *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010) (holding that a movant need not show that she "is 'more likely than not' to succeed on the merits").

Second, Respondents would be irreparably harmed absent a stay because post-discovery relief would not make them whole. For Section 1782 applications, where "the proverbial bell cannot be unrung" following the production of documents, this factor weighs in favor of granting a stay. *In re Accent Delight Int'l Ltd.*, No. 16-MC-125 (JMF), 2018 WL 7473109, at *1

(S.D.N.Y. June 27, 2018) ("Given . . . the potential burdens on Sotheby's in complying with the Court's [Section 1782] Opinion and Order, and the fact that the proverbial bell cannot be unrung once Sotheby's discloses the information at issue, the Court concludes that a stay is warranted to maintain the status quo while Sotheby's seeks a definitive ruling on that issue from the Second Circuit.").

Third, the prejudice to the Fund of a stay, if any exists, is slight. When the Fund filed its Application, the arbitration had barely begun, and the Fund has offered no indication since then that the need for discovery is urgent.

Fourth, the public interest weighs in favor of staying discovery to preserve the status quo pending resolution of this Motion. This is particularly true where, as here, the case involves important issues such as international discovery. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 131 F. Supp. 2d 540, 543 (S.D.N.Y. 2001) (public interest served by staying discovery where "the duty of non-party foreign instrumentalities to supply discovery" was at issue).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court stay the July 8, 2020 Order pending resolution of this Motion, grant reconsideration of the Order, and deny the Application in its entirety upon reconsideration.

Dated: New York, New York
July 22, 2020

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Certification

I, Jordan C. Wall, attorney for Respondents AlixPartners LLP and Mr. Simon Freakley, hereby certify that this brief is in compliance with Your Honor's Individual Rules of Practice. The typeface is Times New Roman and the font of the main body of the brief is in 12 point, and double-spaced.

Dated: July 22, 2020