IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF ESTHER KIOBEL, *Petitioner,* For an Order Granting Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for Production of Documents Pursuant to 28 U.S.C. § 1782	Civil Action No. 1:16-cv-07992.

MEMORANDUM OF LAW IN SUPPORT OF THE PETITION OF ESTHER KIOBEL, PURSUANT TO 28 U.S.C. § 1782, FOR LEAVE TO ISSUE SUBPOENAS TO CRAVATH, SWAINE & MOORE LLP FOR THE PRODUCTION OF DOCUMENTS FOR USE IN A FOREIGN PROCEEDING

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Applicant Esther Kiobel, through her Dutch counsel and attorney-in-fact Channa Samkalden, respectfully submits this Memorandum of Law in support of her application pursuant to 28 U.S.C. § 1782 to obtain discovery from Respondent Cravath, Swaine & Moore LLP ("Cravath").[1] Applicant seeks this discovery for use in contemplated proceedings in the Netherlands to which Applicant will be a party. The discovery sought is limited to information that was previously produced by Cravath's clients in prior litigation, and should require very little effort or burden to produce.

I. JURISDICTION AND VENUE

This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 in that this matter arises under 28 U.S.C. § 1782. Respondent Cravath maintains its corporate headquarters and principal place of business at 825 Eighth Avenue in New York, New York, and resides in this District.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Applicant Esther Kiobel was the lead Plaintiff in a civil tort lawsuit originating in this court, *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), which eventually reached the Supreme Court of the United States but was dismissed on extraterritoriality grounds in 2013. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Ms. Kiobel is preparing to file a civil action in the Netherlands against Royal Dutch Shell, its predecessors Shell Petroleum NV and Shell Transport & Trading Company Ltd., and its subsidiary Shell Petroleum Development Company of Nigeria ("SPDC") for the same tortious conduct alleged in *Kiobel v. Royal Dutch Petroleum Co.* This action (the "Dutch Kiobel Case") will pertain in particular to Shell's involvement in the criminal trial leading to the 1995 execution of Ms. Kiobel's husband, Dr. Barinem Kiobel.

[1] Section 1782(a) provides: "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 …upon the application of any interested person…" 28 U.S.C. § 1782.

The Dutch Kiobel Case, like *Kiobel*, will allege that Netherlands-based Royal Dutch Shell and its predecessors (hereinafter collectively "Shell") and SPDC were complicit in gross violations of civil liberties and human rights directed at Dr. Kiobel and Esther Kiobel, including arbitrary detention and arrest; attempted rape; cruel, inhuman, and degrading treatment; and violations of the right to a fair trial and the right to life. The lawsuit, which will be filed by Ms. Samkalden, will allege that the Kiobels, among others, were targeted for their opposition to Shell and SPDC's operations in Ogoni territory in Nigeria.

This Application is in support of the Dutch Kiobel Case, which Ms. Samkalden intends to file in the Netherlands before the end of 2016. Ms. Kiobel will demonstrate that Shell encouraged, facilitated, and conspired with the Nigerian government to commit human rights violations against the Ogoni people. To do this, Ms. Kiobel will need to provide, *inter alia*: (1) evidence of cooperation of the Nigerian junta and Shell in committing human rights violations; (2) evidence of close cooperation between Shell and SPDC.

The evidence Applicant seeks to obtain "for use" in the Dutch actions is limited to documents, deposition transcripts, and other discovery that was already gathered and produced during the course of four civil actions filed in this district: the abovementioned *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618; *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386; *Wiwa v. Brian Anderson*, No. 01 Civ. 1909; and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, No. 04 Civ. 2665. As defense counsel in these lawsuits and given its continued representation of Shell during recent business developments, Respondent Cravath, Swaine & Moore LLP ("Cravath") likely retains possession, custody, or control of these materials. However, as a U.S.-based law firm with no known presence in the Netherlands, Respondent lies outside the jurisdictional reach and thus subpoena powers of the Dutch judiciary. Applicants therefore properly invoke 28 U.S.C. § 1782 to obtain discovery from Respondent in the form of production of documents.

Applicant does not seek any privileged communications between Cravath and its clients, or its work product relating to these cases. Instead, Applicant seeks only discovery that was already produced to the plaintiffs in these cases. Although some of this discovery was produced to Ms. Kiobel herself, a stipulated confidentiality agreement required the *Kiobel* parties to return or destroy any material designated confidential and copies after dismissal or judgment of the litigation, so that much of the material produced is no longer available to Ms. Kiobel.[2]

This Application adequately satisfies each of 28 U.S.C. § 1782's three statutory prerequisites. Respondent Cravath resides and may be found in this District, the requested discovery is "for use" in foreign proceedings, and Applicant, as a party or prospective party in said proceedings, is the ideal "interested person" entitled to seek assistance from this Court. 28 U.S.C. § 1782. Applicant seeks discovery that falls squarely in the purview of the statute.

Furthermore, the discretionary factors enumerated by the United States Supreme Court also favor granting this Application: (1) Cravath is not a named or contemplated party in the Dutch proceeding; (2) the Dutch courts resolving the proceeding will be receptive to evidence obtained through Section 1782 discovery; (3) this Application does not conceal an attempt to circumvent foreign proof-gathering restrictions but is a good-faith effort to obtain highly probative and relevant information; and (4) the discovery sought is not unduly intrusive or burdensome. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255-56 (2004).

Accordingly, Applicant respectfully requests that this Court grant this Section 1782 application as expeditiously as possible.

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[2] During the course of production in *Kiobel* and the *Wiwa* cases, the parties in both actions submitted a Stipulation and Order Regarding the Confidentiality of Discovery Materials to this Court. Simons Decl. Ex. 3. Apart from party names, the Stipulation and Orders in the two cases contained duplicate language and terms. Simons Decl. Ex. 4. The document merely constituted an agreement between the parties to maintain the confidentiality of certain designated materials produced in *Kiobel* and the *Wiwa* cases, but did not amount to a protective order. Accordingly, this Court's Orders approving the confidentiality agreements did not expressly make any judgments that the materials designated "confidential" in *Kiobel* and the *Wiwa* cases actually met the requirements of a protective order.

III. FACTUAL BACKGROUND

A. The *Kiobel* litigation in this District.

In 2002, Esther Kiobel and eleven other Nigerian plaintiffs, representing a putative class, filed a complaint against Royal Dutch Shell and Shell Transport and Trading Company in this District. *See* Exhibit B, Declaration of Marco Simons ("Simons Decl.") ¶ 2. Two years later, the plaintiffs filed an amended complaint adding SPDC as a defendant. Simons Decl. Ex. 1. They asserted claims under the federal Alien Tort Statute, 28 U.S.C. 1350. *Id* at ¶ 5. The facts recited below are taken from the amended complaint in that case, *Kiobel v. Royal Dutch Petroleum Co.*

The *Kiobel* plaintiffs alleged that Shell and SPDC's operations in Ogoni led to widespread devastation of property, agricultural lands, and natural resources. Simons Decl. Ex. 1 ¶¶ 1-4. In the early 1990s, the Ogoni people protested in opposition to Shell's and SPDC's operations, forming an organization called the Movement for the Survival of the Ogoni People (MOSOP). *Id.* at ¶¶ 2, 37. The Nigerian military responded with a campaign of violence and oppression, aided and abetted by Shell. *Id.* at ¶¶ 45-57. In an effort to quell the widespread public outcry with brute force and intimidation, Nigerian military units subjected peaceful protestors and community organizers to egregious violations of basic human rights and civil liberties, including arbitrary arrest and detention; rape; massacres and other extrajudicial killings; cruel, inhumane, and degrading treatment; torture; forced exile; restrictions on assembly; and destruction of private property. *Id.* This campaign of terror culminated in the 1995 arrest and military trial of nine Ogoni men – known as the "Ogoni Nine" – which included MOSOP leader and acclaimed writer Ken Saro-Wiwa as well as Ms. Kiobel's husband, Dr. Barinem Kiobel. Simons Decl. Ex. 1 ¶¶ 61, 65-74. Ms. Kiobel herself was whipped, sexually assaulted, and detained without food, water, or other basic necessities for three weeks when she tried to bring food to her husband at the detention camp in January 1995. *Id.* at ¶ 6(c). Finally, the Ogoni Nine were sentenced to death. *Id.* at ¶ 74. Despite widespread international

condemnation, on November 10, 1995, they were executed. *Id.*

The *Kiobel* plaintiffs alleged that Shell and SPDC had conspired with the Nigerian junta before and during the sham trial leading to Dr. Kiobel's execution, which was: "1) in retaliation for his outspoken objection within policy making circles in the Nigerian government to . . . the plan to support Shell and SPDC's operations in Ogoniland by means of violent military suppression of the popular opposition; and 2) to prevent him from revealing to the public Shell's conspiracy and cooperation with the Nigerian government in the acts set forth herein." Simons Decl. Ex. 1 ¶ 6(b).

Three other lawsuits filed in the Southern District of New York on behalf of other plaintiffs, including Ken Saro-Wiwa's family, likewise alleged Shell's complicity in the Nigerian government's bloody campaign against the Ogoni people: *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386; *Wiwa v. Brian Anderson*, No. 01 Civ. 1909; and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, No. 04 Civ. 2665. In 2002, about a month after *Kiobel* was filed, the *Wiwa* and *Kiobel* actions were consolidated exclusively for pre-trial discovery proceedings. Simons Decl. Ex. 4 at 1-2. Shortly before trial in 2009, the *Wiwa* cases ended in a settlement. Simons Decl. ¶ 1. The *Kiobel* case, meanwhile, proceeded on interlocutory appeal to the Second Circuit and ultimately to the U.S. Supreme Court. Simons Decl. ¶ 2. The Supreme Court dismissed the case in 2013, ruling that the Alien Tort Statute could not be applied to extraterritorial injuries where the only connection to the United States was the defendant corporations' "mere presence" here. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

After the U.S. courts denied her a remedy, Ms. Kiobel turned to the courts of the Netherlands, Shell's home country. Ms. Kiobel is currently preparing to file a human rights civil action against Shell and SPDC in the Netherlands that will be similar in substance to *Kiobel.* Samkalden Decl. ¶ 4. This case will likely be filed before the end of 2016. Samkalden Decl. ¶ 5.

B. The *Kiobel* and *Wiwa* discovery and Cravath's role.

The *Kiobel* and *Wiwa* cases resulted in a large volume of document discovery and depositions, as well as other written discovery such as interrogatory responses and admissions. Simons Decl. ¶ 3. Throughout these proceedings, Shell – which was at the time jointly headed by the British company Shell Transport & Trading Co., as well as the Netherlands-based Royal Dutch Petroleum Co. – and SPDC were represented by Respondent Cravath, which directly produced the discovery from its clients to the plaintiffs. *Id.* at ¶ 4. Although the documents were initially produced on paper, the deposition transcripts were generally available in electronic form. *Id.* Additionally, by the time of the *Wiwa* settlement, the *Wiwa* plaintiffs' counsel had digitized all documents into a database for trial, and it appears highly likely that Cravath did so as well. *Id.* Cravath has continued to serve as counsel for Shell in various capacities, suggesting that Cravath may well have retained this discovery. Simons Decl. ¶ 6; *see also* Simons Decl. Ex. 2. To Applicant and her counsel's knowledge, Cravath does not have offices in the Netherlands. Simons Decl. ¶ 7.

Although Ms. Kiobel was a plaintiff in the *Kiobel* action, and therefore had access to much of this discovery, she does not still have most of this material and cannot use some of it. Pursuant to a stipulated confidentiality agreement entered in that case, some of the discovery documents and deposition transcripts were designated confidential, and cannot be disclosed – even to a Dutch court. Simons Decl. Ex. 3 at ¶ 2. In fact, Ms. Kiobel was not allowed to retain such confidential materials following the dismissal of her case, to the extent that it was not incorporated into attorney work product or court filings. *Id.* ¶ 20.

IV. NATURE OF INFORMATION AND DOCUMENTS SOUGHT

Applicant seeks the categories of information or documentation from Respondent Cravath listed in the Request for Production of Documents, attached as Exhibit A to this Application. Specifically, Applicants request access to the various documents, deposition transcripts, and other

evidence produced by Respondent Cravath on behalf of its clients during the discovery proceedings of the *Wiwa* and *Kiobel* cases in this District.

Because all of this evidence was produced based on its relevance to substantially the same underlying events at issue in the Dutch Kiobel Case, it is all relevant to the foreign proceedings. Since all of this evidence was already produced, it should prove to be a relatively straightforward task to produce it again.

V. ARGUMENT

Congress fashioned Section 1782 to provide "broad assistance" to foreign tribunals. *United States v. Global Fishing, Inc.*, 634 F.3d 557, 563 (9th Cir. 2011). In order to obtain discovery under Section 1782, Applicant must first establish three basic statutory prerequisites. If these prerequisites are satisfied, the court shall consider several discretionary factors. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255-56 (2004).

Here, Applicant easily satisfies both the statutory prerequisites and the discretionary *Intel* prongs. The discovery Applicant requests is exactly the type that Congress contemplated when passing 28 U.S.C. § 1782. This Application therefore should be granted.

A. Applicant satisfies Section 1782's three statutory prerequisites.

Discovery pursuant to 28 U.S.C. § 1782 has three statutory prerequisites. The statute may be properly invoked where (1) the discovery is sought from persons residing in the district of the court to which the application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the applicant is a foreign or international tribunal or an "interested person." *See Esses v. Hanania* (*In re Esses*), 101 F.3d 873, 875 (2d Cir. 1996). Applicant satisfies all three requirements.

First, Cravath resides in this District. Second, Applicants seek discovery for use in proceedings before foreign tribunals, specifically, in a human rights lawsuit that Applicant and her

Dutch counsel intend to file within the year. *See* Exhibit C, Decl. of Channa Samkalden ("Samkalden Decl.") ¶¶ 1, 4-5. Although the Dutch Kiobel Case has yet to be filed, that makes no difference to Applicant's ability to seek this discovery. In the Netherlands, parties must present sufficient evidence at the outset of a case, rather than relying on discovery during the course of proceedings. *Id.* at ¶ 6. Thus, the Second Circuit recently ruled – with respect to another section 1782 application seeking discovery for use in Dutch courts – that the fact that the suit in the Netherlands had not yet been filed does not disqualify an application for discovery; such an application is still "for use" in proceedings before a foreign tribunal. *Mees v. Buiter*, 793 F.3d 291, 295 (2d Cir. 2015). Third, as a party to the Dutch proceedings, Applicant is clearly an "interested person" within the meaning of 28 U.S.C. § 1782. *See Intel Corp.,* 542 U.S. at 256 ("No doubt litigants are included among, and may be the most common example of, the "interested person[s]" who may invoke § 1782…"); *accord In re Mare Shipping Inc.*, 2013 U.S. Dist. LEXIS 152337, *9 (S.D.N.Y. 2013). Although the Applicant appears here through her counsel, Ms. Samkalden, she carries power of attorney to file this Application on Ms. Kiobel's behalf, and so stands in her shoes. Samkalden Decl. ¶ 1. The three requisite prongs are therefore satisfied.

B. The discretionary factors favor granting discovery.

Once the statutory requirements are met, "a district court may grant discovery under § 1782 in its discretion." *Mees*, 793 F.3d at 298. This discretion "must" be exercised in light of 28 U.S.C. § 1782's twin aims of "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Id.* (quoting *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83-84 (2d Cir. 2004); *see also Metallgesellschaft v. Hodapp* (*In re An Order Permitting Metallgesellschaft Ag to Take Discovery*), 121 F.3d 77, 79 (2d Cir. 1997) (finding district court abused its discretion where its reason for denying Section 1782 discovery "ran counter to the statute's expressed purposes").

In *Intel Corp.*, the U.S. Supreme Court identified four factors that "bear consideration" by district courts in exercising their discretion to grant a Section 1782 discovery application: (1) whether the person from whom discovery is sought is a party in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the foreign proceedings, and the receptivity of the foreign tribunal to federal-court assistance; (3) whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country of the United States"; and (4) whether the request is unduly intrusive or burdensome. *Intel Corp.,* 542 U.S. at 264-65.

In this case, all four *Intel* factors weigh in favor of granting Section 1782 discovery. Nonetheless, as a general rule, a failure to meet any of them does not preclude discovery. For example, in *Intel Corp.*, the Supreme Court held that the need for Section 1782 discovery was less apparent when the discovery target was a participant in the foreign proceeding. 542 U.S. at 264. Nevertheless, even though the respondent was a party to the underlying case, the Supreme Court refused to preclude Section 1782 discovery, instead remanding to the lower courts to determine if judicial assistance to the foreign tribunal was appropriate. *Id.* at 246, 264, 266.

Here, the *Intel* factors strongly favor granting the requested discovery.

1. Respondent is not a party or contemplated party to any Dutch proceedings involving Applicant, and is not subject to the jurisdiction of Dutch courts.

Discovery under 28 U.S.C. § 1782 is especially warranted where the respondent is not a party in the foreign litigation and is outside the foreign tribunal's jurisdictional reach, as evidence from nonparticipants might be "unobtainable absent § 1782(a) aid." *See Intel*, 542 U.S. at 264; *see also Metallgesellschaft*, 121 F.3d at 80 ("[T]hrough § 1782 Congress has seen fit to authorize discovery which, in some cases, would not be available in foreign jurisdictions, as a means of improving assistance by our courts to participants in international litigation and encouraging foreign countries by example to provide similar means of assistance to our courts.").

Respondent Cravath is outside the foreign jurisdiction; it resides in New York City, the

location of its headquarters and main office, and apparently only has another office in London; to Applicant's knowledge, it does not have a presence in the Netherlands. Simons Decl. ¶ 7. Moreover, Cravath is not a Defendant in the Netherlands; Applicant has not filed any type of legal proceeding against Cravath in the Netherlands, nor does she have plans to initiate any in the future. Samkalden Decl**.** ¶ 10. Accordingly, the Dutch judiciary lacks the authority to compel Cravath to provide evidence under its control that is demonstrative of Shell's liability for egregious human rights abuses and large-scale ecological harm for use in proceedings in the Netherlands. In fact, Cravath's status as a nonparty alone constitutes sufficient grounds for satisfying the first *Intel* factor. *See In re ROZ Trading Ltd.*, 2007 U.S. Dist. LEXIS 2112, *6 (N.D. Ga. Jan. 11, 2007).

Additionally, while one of the defendants in the original *Wiwa* and *Kiobel* actions was a Dutch company (Royal Dutch Petroleum Co.), the three other defendants – Shell's other parent company at the time, U.K.-based Shell Transport & Trading Co.; Shell's Nigerian subsidiary, Shell Petroleum Development Co. of Nigeria; and the individual defendant Brian Anderson – have no obvious presence in the Netherlands. The discovery presumably contained a mix of materials originating in the Netherlands, the United Kingdom, and Nigeria, and there is no reason to believe that any entity has any more complete collection of this material than Respondent Cravath.

2. The Dutch courts presiding over the foreign proceedings would accept federal court assistance under Section 1782.

It is highly likely that the civil court in which the Dutch Kiobel Case will be filed will accept evidence produced through discovery in the United States. Samkalden Decl. ¶¶ 6, 8-9. In *Mees v. Buiter*, which again also involved an application for Section 1782 discovery to assist Dutch proceedings, the Second Circuit observed that courts may consider whether the "nature, attitude and procedures" of the foreign tribunal indicate that it is receptive to Section 1782 assistance, even if it does not provide a process for similar discovery itself. 793 F.3d at 303 n.20 (internal quotation marks omitted). Conversely, "authoritative proof" that the foreign tribunal in question would reject

evidence obtained with Section 1782 aid "would provide helpful and appropriate guidance to a district court in the exercise of its discretion." *Metallgesellschaft*, 121 F.3d at 80 (2d Cir. 1997) (*citing Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995)); *see also Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 377 (5th Cir. 2010) (absent a "clear directive" from the Ecuadorian court that it "would reject evidence" produced in the United States, there was no reason to find district court had abused its discretion in granting Section 1782 request); *In re Bayer AG*, 146 F.3d 188, 196 (3d Cir. 1998) (where relevant evidence is presumptively discoverable, respondents have burden to show that foreign tribunal would not be receptive).

There is every reason to believe that Dutch courts would accept evidence produced through Section 1782 discovery in the United States, and certainly no "authoritative proof" that it would not. Dutch law has no procedural bar to the submission or use of evidence that has been or is being used in a foreign lawsuit; such evidence may be considered as long as it is relevant for the domestic case. In fact, the Dutch judiciary has expressly held that the use of evidence collected through discovery procedures in the U.S. is permitted in domestic courts. Samkalden Decl. ¶ 8. The Second Circuit recognized as much in *Mees*. 793 F.3d at 296.

3. This Application does not conceal an attempt to circumvent foreign proof-gathering restrictions.

This application is not an attempt to "circumvent foreign proof-gathering restrictions" or other policies of the Netherlands or the U.S.; it is a good faith effort to access probative and highly relevant evidence for use in anticipated Dutch proceedings. Judges in this district and elsewhere have interpreted this *Intel* factor to turn on whether applicants are seeking discovery in bad faith. *See In re Auto-Guadeloupe Investissement S.A.*, 2012 U.S. Dist. LEXIS 147379, *23 (S.D.N.Y. Oct. 10, 2012) (applicant's characterization of foreign proceedings was misleading and inaccurate); *see also Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 262 (D. Mass. 2010). Where, as here, the foreign tribunal simply lacks jurisdiction to compel the respondent to provide evidence and applicants are not seeking to

use Section 1782 for abusive purposes, the third *Intel* prong is satisfied.

In the Second Circuit, this inquiry *does not* require a showing that applicants have attempted to obtain the requested information from the foreign tribunal. *E.g. Mees,* 793 F.3d at 303 (rejecting a "quasi-exhaustion requirement," reasoning that it "finds no support in the plain language of the statute and runs counter to its express purposes") (quoting and citing *Metallgesellschaft*, 121 F.3d at 79); *accord In re Bloomfield Inv. Res. Corp.*, 2016 U.S. Dist. LEXIS 25821, *6-7 (S.D.N.Y. Feb. 25, 2016). Applicant therefore does not need to first attempt to obtain these materials through the Dutch courts prior to filing a Section 1782 discovery request. *Id.*; *accord In re Bloomfield Inv. Res. Corp.*, 2016 U.S. Dist. LEXIS at *6-7 (rejecting respondent's argument that the Section 1782 application at issue was "merely an end run around Netherlands discovery rules").

Nor must an applicant wait until the evidentiary stage of the foreign proceeding. *In re Servicio Pan Americano*, 354 F. Supp. 2d 269, 273 (S.D.N.Y. 2004) (pointing out that "Section 1782 may be invoked even where foreign legal proceedings are not even underway") (internal citations and quotation marks omitted). In fact, interested parties may seek discovery pursuant to Section 1782 regardless of the status of the foreign proceedings. *In re Gorsoan Ltd.*, 2014 U.S. Dist. LEXIS 175613, *23-25 (S.D.N.Y. Dec. 10, 2014).

Moreover, even if Applicant *had* first sought to discover the requested information in the Netherlands and been denied, that would not bar Section 1782 discovery now. First, as explained above, Dutch courts would consider the evidence even if Applicant has acquired it outside the Netherlands. Samkalden Decl. ¶ 8. Second, Section 1782(a) does not require that evidence sought in the U.S. under the statute be discoverable in the foreign tribunal. *Intel*, 542 U.S. at 247, 253, 259-62 (rejecting a foreign discoverability prerequisite); *accord Mees*, 793 F.3d at 303; *In re Chevron Corp.* (*Uhl, Baron, Rana & Associates*), 633 F.3d 153, 163 (3d Cir. 2011). This is the case because "[a] foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture,

or traditions – reasons that do not necessarily signal objection to aid from United States federal courts." *Intel*, 542 U.S. at 261. "That a country does not enable broad discovery within a litigation does not mean that it has a policy that restricts parties from obtaining evidence through other lawful means." *Mees*, 793 F.3d at 303 (clarifying, in the context of Dutch courts, that a policy only qualifies as a proof-gathering restriction if it *prohibits* the acquisition or use of certain evidence, rather than merely *fails to facilitate* parties' access to information).

Applicant will be the plaintiff in a civil action for equitable relief and damages and has fully and accurately disclosed the nature of the proceedings. Information that is in the hands of parties located in the United States is directly relevant to the Dutch Kiobel Case and will be important for determining, quantifying and apportioning liability. Because the Dutch judiciary has no procedure of discovery during the preparatory stages of a case, unlike in the United States, applicants would be unable to access highly probative and relevant evidence that they will need to present alongside a writ of summons in order to sustain their human rights action. Samkalden Decl. ¶ 6. But while Dutch courts lack jurisdiction to compel Respondent to provide the requested information, they would readily accept it if Applicant acquires it by other channels. Applicant therefore satisfies the third *Intel* prong. Indeed, the reason Applicant seeks Section 1782 discovery here is precisely in line with Congress's goals in enacting Section 1782: "[T]o assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws[.]" *Intel*, 542 U.S. at 262.

4. The discovery sought is narrowly tailored to the needs of the Dutch litigation, and is neither burdensome nor intrusive.

Like all federal discovery, the proper scope of discovery under Section 1782 is governed by Federal Rule of Civil Procedure 26(b). *Mees*, 793 F.3d at 302; *In re 28 U.S.C. § 1782*, 249 F.R.D. 96, 106 (S.D.N.Y. 2008). Accordingly, district courts retain "broad authority…to fashion discovery orders issued pursuant to section 1782." *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 102

(2d. Cir. 1992). Here, Applicant's discovery requests are narrowly tailored both in time and scope to include only information likely to be relevant to the Dutch action Applicants will initiate shortly.

Applicant seeks only previously-produced discovery materials and transcripts. There is no question of privilege over these materials or their relevance, because they were *already* produced to the plaintiffs in the *Kiobel* and *Wiwa* cases, based on their relevance to the same course of events at issue in the Dutch Kiobel Case.

While this discovery may be somewhat voluminous, it is not burdensome, because the task of culling relevant from irrelevant materials – by far the most time-consuming element of the discovery process – has already been done. Indeed, the materials sought are materials that Ms. Kiobel already had access to during the litigation of the *Kiobel* case. It should be a relatively trivial matter for Cravath to produce these materials again. Applicant does not seek any new searches or privileged material or documents from any other engagement between Cravath and Shell – only the discovery from the *Kiobel* and *Wiwa* cases.

This clearly limited universe of information sought from Cravath is therefore neither unduly intrusive nor burdensome, and falls well within the broad scope of discovery permitted under the Federal Rules. Applicant satisfies this fourth and final *Intel* prong.

VI. CONCLUSION

The information sought by this Application is essential to the full and fair adjudication of the Dutch proceedings. For the foregoing reasons, Applicant respectfully requests that the Court enter an Order granting leave to serve Cravath with the discovery attached to this Application as Exhibit A.

Dated: October 12, 2016

Respectfully submitted,

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