Review Of The Brussels I Regulation (EC 44/2001)

1. This submission is made on behalf of the following organisations:

   - Leigh Day & Co, a London-based law firm specialising in representing individuals from all over the world in personal injury, human rights, environmental damage and discrimination claims;[1]
   - The Corporate Responsibility ("CORE") Coalition[2] a coalition of 130 NGOs, trade unions, academics, responsible businesses and individuals, including Action Aid, Amnesty International (UK), Christian Aid, Friends of the Earth, The Schumacher College, Traidcraft, War on Want, The Women's Institute, WWF-UK, UNISON and Unity Trust Bank. CORE was founded in 2001 to provide policy leadership and coordinate campaign efforts to improve the environmental and human rights impacts of UK companies.
   - the TUC (Trades Union Congress), the UK's national trade union centre whose member unions represent over 6.5 million workers;
   - Amnesty International, a worldwide human rights campaigning movement that works to promote all the rights enshrined in the Universal Declaration of Human Rights and other international standards. Amnesty International's work is supported by a base of over two million members and supporters in more than 150 countries and regions.
   - Rights & Accountability in Development, a research and advocacy NGO that promotes respect for human rights and responsible conduct by companies abroad;[3]
   - One World Action, an NGO providing funding, expertise and practical support to partner organisations committed to strengthening the

[1] www.leighday.co.uk

2 http://corporate-responsibility.org/

[3] www.raid-uk.org

democratic process and improving people's lives in poor and developing countries;[4]

- Global Witness[5], an NGO dedicated to exposing the corrupt exploitation of natural resources and international trade systems and to driving campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses and
- Corner House[6] an NGO that conducts analyses, research and advocacy aimed at supporting movements for environmental and social justice and encouraging broad alliances to tackle them.

2. By way of backgound, in March 2007, the European Parliament passed a resolution on Corporate Social Responsibility. In February 2009, Günther Verheugen, Vice-President of the European Commission and Commissioner for Industry and Enterprise stated: *"It is in our interest and in the interest of obtaining a level-playing field for our businesses to remind each and everybody that human rights are universal and should be globally respected"*. An important aspect in meeting this objective must be that individuals and communities whose human rights are affected by the operations of multinational companies can access justice before fair and impartial judicial bodies. Frequently however, because of the governance gaps that Professor John Ruggie (Special Representative of the United Nations Secretary-General on Business & Human Rights) has identified, meaningful access to justice is not possible.

3. This submission is confined to one point which arises under section 2 of the Green Paper, relating to the operation of the Brussels I Regulation in the international legal order. It is prompted in particular by the submission of the Ministry of Justice of the United Kingdom which suggests, in paras. 12 to 15, that a mechanism should be introduced into the Brussels I Regulation to enable proceedings to be transferred to the courts of third countries, even if

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4 www.oneworldaction.org

5 http://www.globalwitness.org/

6 http://www.thecornerhouse.org.uk/

the proceedings have been duly and properly started within a Member State and even if the Defendant is domiciled in that Member State.

4. The Ministry of Justice's proposal is, in effect, an attempt to turn back the clock and to re-introduce into the Brussels I Regulation the doctrine of *forum non conveniens,* or some equivalent mechanism, effectively reversing the decision of the European Court of Justice in *Owusu v. Jackson*. The Ministry's suggestion that such a mechanism has already found a place in the preliminary draft Hague Judgments Convention is misleading, as we explain in more detail below.

5. Our experience in respect of the operation of the *forum non conveniens* doctrine in the United Kingdom before the ECJ's decision in *Owusu* leads us vigorously to oppose the Ministry's suggestion, at least as regards claims made by weaker parties in third countries against stronger defendants in Member States.[7] The principles of legal certainty and access to justice strongly underpin the *Owusu* decision, and a reversal of that decision or a weakening of the protection which it affords would lead in many cases to a denial of justice. It would, in particular, seriously impact on the ability of overseas human rights victims to obtain access to justice in the European Union against multinationals domiciled in the EU.

The position pre-*Owusu v Jackson*

6. The dangers of restoring the doctrine of *forum non conveniens* – or even of permitting Member States the freedom to do so – is well illustrated by the problems which arose in the UK before the *Owusu* decision. There was an inconsistency between the approach of the UK courts, which applied *forum non conveniens* in cases involving UK-domiciled defendants where the more appropriate forum was thought to be in a non-contracting state, and that of the courts of other EU states which did not apply the doctrine and applied Article 2 strictly.

7 The cases we refer to in this submission are cases, often involving numerous claimants, in which multi-national corporations are held to account for wrongs committed in non-Member States, often less developed countries. The considerations which apply to these cases may not apply to purely business-to-business transactions, in particular as regards the effect of prorogation agreements in commercial contracts in favour of third states, which are outside the scope of our submission

7. In the UK, cases against multi-national corporations were subjected to protracted and costly "satellite" litigation in an attempt to have the proceedings stayed on the grounds of *forum non conveniens* : *Connelly v RTZ Corporation Plc* [1997] 3 WLR 373[8]; *Ngcobo v Thor Chemicals* TLR 10 November 1995[9]; *Sithole v Thor Chemicals* TLR 15 February 1999[10]; *Lubbe & Others v Cape Plc* 2000 1 WLR 1545[11]. In all these cases, the defendant was a multi-national corporation which contended that the "connecting factors" made the third state the "clearly and distinctly more appropriate forum" (Stage 1 of the *Spiliada* test, *Spiliada Maritime Corp v Cansulex Ltd* being the leading case on *forum non conveniens*: [1987] A.C. 460). The claimants contended that Namibia and South Africa were not clearly more appropriate fora but that, even if they were, the "interests of justice" required that the English court should retain jurisdiction (Stage 2 of the *Spiliada* test).

8. Classic examples of factors which concerned the interests of justice at stage 2 of this test were cases where, in the allegedly more appropriate forum, there was a real risk of persecution, corruption or delay (of a magnitude that amounted to a denial of justice).

9. In *Connelly v RTZ*, the House Of Lords laid down the principle that in complex cases where the inability to fund lawyers and experts in the "more appropriate forum" (in that case Namibia) would result in a denial of "substantial justice" to the claimant, the court should refuse to stay the proceedings on *forum non conveniens* grounds.

10. Notwithstanding the *Connelly* decision, lengthy disputes about the application of the *forum non conveniens* doctrine still arose in the *Cape Plc* and second *Thor Chemicals* case (*Sithole*). Hearings on this aspect in *Cape Plc* occupied three High Court, two Court of Appeal and two House of Lords hearings over a period of four years, during which time approximately 1,000 out of 7,500 claimants died.

8 Claim by a throat cancer victim employed at a uranium mine in Namibia

9 Claim by 20 South African workers poisoned by mercury at a factory in Natal

10 Second wave of 20 claims by South African workers poisoned by mercury at a factory in Natal

11 Claim by 7,500 South African asbestos miners

11. In the *Cape PLC* case, Cape's *forum non conveniens* argument focused on all the investigations that needed to be made and witnesses that needed to be interviewed in South Africa. Cape claimed that it intended to fight the case on its merits fully at trial, and that this would be infinitely more convenient in South Africa. Cape even suggested that they intended to re-create the conditions of an asbestos mine, an exercise that would obviously have to be undertaken in South Africa. Very little if any of this work is believed to have actually been undertaken. Cape settled long before the case got near trial, for an amount which reflected its ability to pay rather than being related to the merits.

12. Thor Chemicals also claimed, in its *forum non conveniens* applications in both sets of litigation against it, that it intended to fully contest the merits at trial, but Thor settled both cases without contesting the merits. A few months before the trial of the second set of litigation, Thor had written to Leigh Day and the Legal Services Commission ("LSC", the body which administers legal aid), informing them of a demerger of the group, which had rendered the defendant corporate entity worthless, and urging the LSC to withdraw funding for the case. The case was settled after the Court of Appeal indicated that there were strong prima facie grounds for declaring the demerger unlawful.

13. Consequently, the UK experience is that forum non conveniens was utilised tactically by multinational defendants and frequently had the effect of obstructing, delaying and denying justice to human rights victims.

Impact on business and human rights of reviving *forum non conveniens*

14. If the Ministry of Justice proposal to revive *forum non conveniens* were to be adopted in the Brussels I Regulation it would become EU law and not just the law of one or two Member States. But in view of their different legal traditions and approaches of their different legal systems the courts of Member States would inevitably apply it very differently, leading to a lack of uniformity across the EU and a consequent lack of legal certainty, re-introducing the very inconsistency referred to in paragraph 6 above. If Member States were to be

free to apply *forum non conveniens* if they wished to do so, the same problem would be multiplied.

15. Again, British experience emphasises the benefits of not having a "flexible" mechanism for dis-seising courts in EU Member States in favour of third states in cases involving weak claimants against multi-national corporations. Had it not been for the *Owusu* decision:

    (a) The *Trafigura* case for 30,000 Ivorians – which was resolved in 3 years – would still be oscillating within the court system on *forum non conveniens* applications;[12]

    (b) BP subsidiaries would not have agreed to mediate the first Colombian *campesinos* case, and a second group of cases, which are now well advanced, would almost certainly be in the midst of a *forum non conveniens* dispute;[13]

    (c) The trial of the Peruvian torture victims' case against mining company, Monterrico Metals – which is scheduled for trial at the start of 2011 – would be years away from trial.

16. Moreover, due to the increasing restrictions on public funding, such cases will only be possible if lawyers agree to act on a "no win no fee" basis. Whether or not lawyers are willing to accept this risk is critically dependent on their assessment of the risk of winning/losing and the cash flow implications. The prospect of having to fight lengthy satellite disputes about *forum non conveniens*, before the merits are even litigated, will constitute a powerful deterrent against lawyers taking on such cases. Since the multi-national defendant would be likely to make a *forum non conveniens* application, even in cases where the connections with the Member State of forum were extensive and compelling (eg as in the *Thor Chemicals* case), this disincentive would apply to cases by overseas claimants against multi-national corporations generally.

12 A claim for injuries allegedly arising from the dumping of toxic waste

13 Claims by Colombian farmers for environmental damage claimed to be caused by oil pipelines

17. The above submissions are based on the assumption that what is proposed is a return to application of the *forum non conveniens* principle. As indicated above, this allows for retention of jurisdiction in circumstances where, despite concluding that there is a more appropriate forum elsewhere, justice requires that the case be allowed to continue (Stage 2 of the *Spiliada* test). Most obviously, if a complicated claim cannot be funded locally it will deny overseas claimants the opportunity to sue in the multi-national defendant in the latter's home courts, and will result in a denial of access to justice.

Article 22 of the preliminary draft Hague Judgments Convention

18. The principle established in *Connelly v RTZ*, under Stage 2 of the *Spiliada* test, was what enabled the South African asbestos miners to obtain justice in the English courts against Cape Plc. It is therefore of further concern that the UK Ministry's comments refer not to a return to *forum non conveniens* as such, but rather advocate an analogous provisions to Article 22 of the preliminary draft Hague Judgments Convention 1999.[14], This draft makes no

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[14] Article 22 of the preliminary draft Hague Judgments Convention 1999

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular -

   a) any inconvenience to the parties in view of their habitual residence;

   b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;

   c) applicable limitation or prescription periods;

   d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

reference to the interests of justice or to any provision for refusing a stay of proceedings on the grounds of injustice). If that is what is proposed, the position for overseas claimants would be significantly worse as a result of the UK Government's proposal than it was even prior to *Owusu*.

Conclusion

19. Whatever may be the merits or disadvantages of a "flexible" means of disseising courts of EU Member States in a purely commercial context, it would be a very retrograde step to introduce such a test into the Brussels I Regulation (or even to allow Member States to adopt such a mechanism where their jurisdiction is founded on Brussels I) either generally, or for cases where EU-domiciled defendants are alleged to have committed wrongful behaviour against weaker parties in a third state. In the light of the experience of such cases in the English courts before and since the *Owusu* decision, it is clear that any such move would be quite wrong and contrary to principle and justice.

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5. When the court has suspended its proceedings under paragraph 1,

   a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or

   b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.