

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT



INSTITUTO MEXICANO DEL SEGURO SOCIAL,

—v.—

Plaintiff-Appellant,

STRYKER CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN AT GRAND RAPIDS

**BRIEF OF *AMICUS CURIAE*, SECRETARÍA DE RELACIONES
EXTERIORES DE LOS ESTADOS UNIDOS MEXICANOS
IN SUPPORT OF PLAINTIFF-APPELLANT**

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STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae*, the Secretaría de Relaciones Exteriores de los Estados Unidos Mexicanos (the SRE),¹ is the equivalent of the United States Department of State. The SRE is responsible for representing Mexico's interests abroad, including, when warranted, intervening in foreign litigations when such litigations affect vital interests of the Mexican government. The anti-corruption action filed by the Instituto Mexicano de Seguro Social (IMSS), an agency of the Mexican government, the subject of this appeal, is such a matter.

Mexico has a direct interest in this appeal because the district court made an express determination about the policy interests of Mexico and got it wrong. The district court's holding presumed what Mexico's interests were in IMSS' lawsuit and the anti-corruption claims IMSS sought to bring in the district court. By this *amicus*

¹ As part of the process for determining if an *amicus curiae* filing was appropriate, counsel for the Appellant, the Mexican Social Security Institute or IMSS (Instituto Mexicano del Seguro Social), an agency of the Mexican government, provided a draft outline of a possible amicus brief to the SRE. This brief, however, is the work, and responsibility, of counsel for the SRE and was drafted by that counsel. For convenience, IMSS arranged and paid for the printing of this brief.

filing, Mexico desires to express *for itself* what Mexico's interests are and how the district court misjudged those interests.

Ironically, the district court dismissed IMSS' action against Stryker, and thereby damaged Mexico's interests, on the express basis that Mexico's "strong interest" in IMSS' anti-corruption claims "strongly weighs in favor" of dismissing those very claims. Mexico's strong interest in IMSS' claims thus became a tool to damage those claims and Mexico's related interest. Mexico is concerned that the district court substituted its own judgment of what Mexico's policy position should be rather than accept the stated position of Mexico's governmental agency, IMSS. Instead of substituting its own judgment of Mexico's interests, the district court should have acknowledged and respected the express statement of the Mexican government that it desired to pursue its claims in United States courts.

In addition, Mexico is interested in this matter because the district court's opinion undermines the principles and protections set out in the United Nations Convention Against Corruption (the "Merída Convention"), places the United States in contravention of

its obligations under that Convention, and materially damages the interests of Mexico. In brief, when the district court exercised its discretion under the *forum non conveniens* doctrine to dismiss IMSS' action, it placed the United States in violation of its international obligations under the Merída Convention. As a result, the district court's ruling adversely affects Mexico's anti-corruption policies, Mexico's rights under the Merída Convention, and Mexico's agency, IMSS.

Notably, the district court did not even mention the Merída Convention in its opinion.

ARGUMENT

IMSS brought suit in United States court by right pursuant to the Merída Convention, although there is no mention of that Convention in the district court's opinion.

1. *The United Nations Convention Against Corruption applies in United States courts.*

After more than two years of intense negotiations, the United Nations Convention Against Corruption was adopted through the United Nation's General Assembly Resolution 58/4 on 31 October 2003 and opened for signature in Mérida Mexico on 9 December 2003. Essentially the entire international community of States has joined the Merída Convention.² Mexico and the United States ratified the Merída Convention, respectively, on 20 July 2004 and 30 October 2006.³ The Merída Convention came into force on 14 December 2005.

² See the list of 186 State Parties and the European Union in UN Doc. CAC/COSP/2019/CRP.1 of 27 November 2019. Only Andorra, Barbados, Eritrea, Monaco, North Korea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Somalia, Suriname and Syria have not joined the Merída Convention.

³ Available at www.state.gov/06-1129.

Corruption is a major focus of the United Nations, of Mexico, and of the United States. In the Preamble to the Merída Convention, the State Parties express their concern “about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.” “Some studies have suggested that the cost of corruption exceeds by far the damage caused by any other single crime.”⁴

In supporting ratification, the United States Senate stressed the purposes of the Merída Convention as set forth in Article 1: “a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery, and c) To promote integrity, accountability and proper management of public affairs and public property.”⁵

⁴ United Nations Press Release, 10/05/2004, SOC/CP/301.

⁵ Senate Report 109-18, UNITED NATIONS CONVENTION AGAINST CORRUPTION, TREATY DOC. 109-6 (Aug. 30, 2006) (“Senate Report”) at 1.

Thus, the drafting and negotiation of the Merída Convention, in which both the United States and Mexico played central roles, is a major achievement for the international community. The Merída Convention is the first and remains the only binding multinational treaty targeting corruption. In support of ratification of the Merída Convention, the United States Senate reported that Merída Convention “is the first multilateral treaty to target corruption on a global basis and is also the most comprehensive international legally-binding anti-corruption instrument in terms of the scope of activities covered.” Senate Report at 1.

The provisions of the Merída Convention are part of United States law. After obtaining the advice and consent of the United States Senate (in compliance with Article II, Section 2 of the United States Constitution), the United States ratified the Merída Convention on 30 October 2006, thus making the Merída Convention the “supreme law of the land,” with the consequence that “the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding,” as expressly

provided by Article VI of the United States Constitution (the Supremacy Clause).⁶

2. *The United States is bound to respect in good faith the Mérida Convention’s provisions on asset recovery and compensation, including the requirements of Article 53.*

A. Asset recovery and compensation are central goals of the Mérida Convention.

A principal tenet of the Mérida Convention is that State Parties are guaranteed access to the civil courts of other State Parties to seek redress for acts of corruption. According to Article 51 of the Mérida Convention, “The return of assets pursuant to this chapter is a fundamental principle of this Convention, and *States parties shall afford one another the widest measure of cooperation and assistance in this regard.*” Mérida Convention, Art. 51 (emphasis added).

⁶ See also Henkin, *et al*, INTERNATIONAL LAW: CASES AND MATERIALS at 114, 138 (West 1980); *Missouri v. Holland*, 252 U.S. 416, 432 (1920); “Constitution Annotated: Analysis and Interpretation of the U. S. Constitution: Supremacy Clause: Current Doctrine,” Library of Congress, available at https://constitution.congress.gov/browse/essay/artVI-C2-1-1-3/ALDE_00001028/; Interpretation of Convention of 1919 concerning Employment of Women during Night, Advisory Opinion, Permanent Court of International Justice Ser. A/B, No. 40 (Nov.15 1932) at p.38; C. M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, (Georgetown University Law Center 2008), available at <https://scholarship.law.georgetown.edu/facpub/979/>; Hathaway, McElroy & Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 The Yale Journal of International Law 51, 51-106 (2018).

According to U.N. Secretary General Kofi A. Annan, the Merída Convention’s “provisions—the first of their kind—introduce a new fundamental principle, as well as a framework for stronger cooperation between States, to prevent and detect *corruption and to return the proceeds*. Corrupt officials will in future find fewer ways to hide their illicit gains.”⁷

This fundamental principle is achieved chiefly through Article 53 of the Convention, by which State Parties commit to opening their domestic courts for foreign State Parties to bring civil actions for the recovery of assets or compensation for corruption. Indeed, the objective of “asset recovery” provided by Article 51, together with the implementation of “Measures for Direct Recovery of Property” provided in Article 53, play a central part in the Merída Convention’s object and purpose.

The United States has committed to enforce the requirements of the Merída Convention. The Senate Report recommending advice and consent to ratify the Merída Convention records the remarks of John Ashcroft, then United States Attorney General, at the signing

⁷Foreword to the Merída Convention (emphasis added).

of the Convention in Mérida on 9 December 2003, that “this document is not enough. It must not become a symbolic gesture. Our governments must translate the words of this Convention into effective actions. These deeds will reinforce intergovernmental cooperation and, through domestic efforts to stem corruption, reaffirm our collective goals.” Senate Report at 59. The Report also records the statement at the United Nations General Assembly by the United States Permanent Representative to the United Nations, Ambassador John D. Negroponte, on 31 October 2003, in which he stressed the fact that the Mérida Convention “for the first time in any multilateral agreement, provides a useful framework for governments to cooperate in recovery of illicitly obtained assets,” and calls for “the implementation of the innovative and helpful approaches that we have developed together.” Senate Report at 57.

During the Sixth Session of the Mérida Convention’s Conference of the Parties in 2015, Resolution 6/4 was adopted, entitled, “Enhancing the use of civil and administrative proceedings against corruption, including through international cooperation, in the framework of the United Nations Convention Against

Corruption.”⁸ The Resolution recalls specifically Article 53 of the Merída Convention and, in its paragraph 2, “Calls upon State Parties,” which include the United States of America, “in accordance with their domestic law, to effectively implement article 53, subparagraph (a)” of the Merída Convention (and in its paragraph 3 to effectively implement its subparagraphs (b) and (c)). *Id.*

The central role of “asset recovery” is eloquently recorded in the “Legislative Guide for the Implementation of the United Nations Convention Against Corruption,” which states that “State Parties may wish to review their current laws to ensure that there are no obstacles to another State launching such civil litigation.”⁹

In this context, Article 53 of the Merída Convention contains one of the most important binding provisions or mandates of the “asset recovery” regime. Article 53 requires State Parties to open their courts to other State Parties so they may seek compensation

⁸ Available at www.unodc.org/unodc/en/corruption/COSP/session6-resolutions.html.

⁹ Legislative Guide for the Implementation of the United Nations Convention Against Corruption at 208 ¶ 712 (2d edition 2012) (“Legislative Guide”), available at www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf.

and the recovery of assets lost through corruption. This obligation is not satisfied by merely allowing a civil action to be initiated and then immediately dismissed without hearing, but the taking of “such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences” and “to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance.” Merída Convention, Article 53.

B. The asset recovery provisions of the Merída Convention must be read liberally.

All State Parties are under a fundamental obligation to respect and observe these provisions in good faith under the principle *pacta sunt servanda*, which is arguably the oldest principle of international law, and, as such, a norm of *Jus cogens*, that is, a peremptory norm of international law, which is accepted and recognized by the international community of states as a whole. *See* Article 53 of the

Vienna Convention on the Law of Treaties; M. Shaw, INTERNATIONAL LAW at 633 (4th Ed. Cambridge University Press 1997).

The meaning of the text of Article 53 and of the obligations it imposes is confirmed by the records of the negotiations regarding the Convention, which international law labels “*travaux préparatoires*” (“preparatory work”) of the negotiation of an international treaty. This rule of international customary law is set forth in Article 32 of the 1969 Vienna Convention on the Law of Treaties and establishes a “supplementary means” to “confirm the meaning” of a treaty provision.

The Mérida Convention is managed by the United Nations Office on Drugs and Crime (the UNODC), which maintains the records related to the Convention, including an official document entitled, “*Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption.”¹⁰ The UNODC’s collection of the *travaux préparatoires* to the Mérida Convention confirms the meaning that the negotiating States

¹⁰ *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption at 459-65 (UNODC 2010), available at www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf.

intended to give Article 53 and the compliance obligations Article 53 establishes.

The collected record of the *travaux preparatoires* sets forth the leading role played by the United States in the construction of Article 53. The United States submitted revised versions of the provision and coordinated the working group entrusted with the “responsibility” of reviewing the evolving texts that ended in the final version which was adopted in the Merída Convention, and which the United States expressly accepted.

In addition, the Senate Report recommending advice and consent to ratify the Merída Convention records the answer provided by Samuel M. Witten, the State Department Deputy Legal Adviser, when questioned about “the authoritative nature of the *travaux preparatoires* that was submitted to the Senate for its information in connection with submission of the Convention.” In response, Mr. Witten stated that these records preserve certain points relating to articles of instruments that are subsidiary to the text,” citing expressly Article 32 of the Vienna Convention on the Law of Treaties,

as reflecting “several commonly accepted principles of treaty interpretation.” Senate Report at 59.

Another rule of international customary law (as faithfully reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties) is that the interpretation of a provision in an international treaty shall, “in the light of its object and purpose,” take into account “together with the context,” “(b) any subsequent practice in the application of the treaty.” In this regard, the State Parties to the Merída Convention, in application of its Article 63, “*Conference of the State Parties to the Convention*,” have recorded their “asset recovery” practices under the Merída Convention, including Article 53, and which has resulted, after three years of work, in the Digest of Asset Recovery Cases, adopted at the Sixth COP Session in 2015. The United States Department of Justice actively participated in preparing the Digest, which registers specific instances in which Article 53 has effectively invoked by State Parties.¹¹

¹¹Digest of Asset Recovery Cases (UNODC 2015) (“Digest”), available at www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf.

The Digest stresses that “Article 53 ... is one of the key provisions of the Convention. It deals with the domestic legal infrastructure that States Parties are *required to have in place in order to fulfill their Convention obligations* with respect to measures for direct recovery ... by another State party *asserting its rights as the legal personality lawfully entitled to property or to compensation damages.*” Digest at 57 (emphasis added).

The Digest registers “successful” cases of implementation of Article 53 of the Merída Convention in which a foreign State Party has been able to access the courts of another State Party, which has complied by taking effective measures to open its courts to that end. Digest, Chapter V. The cases involve civil actions by foreign State Parties in the opened courts of, among others, the United States, and also cases where the United States resorted to initiate civil action in the courts of other State Parties.¹²

¹² For information about the United States see Digest at 59, ¶ 151 (United States District Courts for the Southern District of Florida and the Southern District of New York), at 66-67 ¶¶ 176-77, at 87-89 ¶¶ 236, 237, 241 and 242 (United States District Court for the Southern District of Florida, the New York Court of Appeals, United States Courts of Appeal, and the United States Supreme Court).

C. The Merída Convention requires access to United States courts for the recovery of compensation.

The Legislative Guide for the Implementation of the Convention affirms that the Merída Convention includes a “*mandate to ensure access to compensation and restitution for victims of offences established in accordance with the Convention.*” Legislative Guide at 458 (emphasis added). Compensation is a vital part of the goals of the Merída Convention. “For these goals, as well as those that ensuring that justice is meted out and offenders are prevented from enjoying the fruits of their misconduct, measures designed to locate and seize proceeds of crime, alongside compensation for damages, are vital.” *Id.* at 315.

The letter of transmittal of the Merída Convention to the Senate sent by the President of the United States proclaims that, according to Article 53, “direct recovery would take place without recourse to mutual legal assistance procedures. First, States Parties must permit other States Parties to initiate civil actions in their courts to establish title or ownership of the property in question. Second, *States Parties must have a mechanism by which their courts*

*can order that another State Party be compensated or paid damages....*¹³

As one commentator noted, “This innovative provision departs from the notion that proceeds from corruption should be recovered primarily by way of confiscation and obliges states parties to recognize in their legal systems the right of harmed states to seek direct recovery through private civil actions for the return of property, compensation, or damages.” See C. Rose, M. Kubiciel, O. Landwehr, *THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY* at 536 (Oxford University Press 2019).

If there is an obstacle to accessing a foreign court, to which a State Party is entitled as a matter of right, not only is the obligation to respect that right contravened but, necessarily, also the obligation to respect the right to seek compensation is contravened. The decision of the district court in this case, therefore, thwarts the fundamental principle of the Merída Convention, which is the efficient and effective prevention and combat of corruption.

¹³ Available at www.congress.gov/treaty-document/109th-congress/6/document-text?overview=closed (emphasis added).

3. *The discretionary forum non conveniens doctrine is inapplicable in light of the Merída Convention's requirements.*

A. The Merída Convention applies to IMSS' action against Stryker.

IMSS' action against Stryker falls squarely within the provisions of Article 53, which is entitled "*Measures for direct recovery of property.*" Article 53 expressly provides:

Each State Party shall, in accordance with its domestic law:

- (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention,
- (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and
- (c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

IMSS, a governmental agency of Mexico, is a “State Party” under the Merída Convention. This is true for the same reasons that Stryker was held to have violated the Foreign Corrupt Practices Act when it bribed IMSS’ officials. In addition, IMSS brought a civil action seeking compensation for damages caused by the bribery of its officials—a corrupt act under the Merída Convention.

B. The United States is bound to respect Mexico’s right to choose as forum a United States court.

In accordance with Article 53, of the forum choices available to Mexico (IMSS), Mexico chose a court in the United States—in the very district where its opponent resides. That choice of forum was made *as a matter of right* according to the Merída Convention, which right was created by the express intent of the negotiators of the Merída Convention.

The inevitable consequence of the district court’s opinion dismissing IMSS’ lawsuit by applying the discretionary doctrine of *forum non conveniens* is that Mexico (IMSS) is being denied access to United States court and denied the ability to exercise an express right Mexico derives from Article 53.

The district court, however, did not even mention the Merída Convention’s requirements. That failure was error. As explained above, the Merída Convention requires that the United States allow State Parties like Mexico and IMSS access to United States courts to seek compensation for corrupt acts as set forth in the Merída Convention. The immediate, non-merits dismissal of IMSS’ lawsuit on discretionary grounds violates those provisions. In other words, the Merída Convention requires that IMSS be given a real opportunity to prove its right to compensation. For example, Article 53(b) states expressly that the United States is required “to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences.”

If the dismissal on the basis of *forum non conveniens* were to stand, it would inevitably interfere with the ability of IMSS or any other State Party to bring an action in the foreign court it chooses according to the Merída Convention, which would place the United States in violation of the Convention.

C. The district court erred in substituting its judgment of Mexico's interest for Mexico's stated interest.

As a result of its refusal to apply the Merída Convention's provisions, the district court's ultimate conclusion is contradictory—the district court dismisses a lawsuit brought by the Mexican government for the stated reason that the dismissal of Mexico's lawsuit best serves the interests of the Mexican government. Opinion, Dkt.32 at 13.

The district court erred when it substituted its own judgment of the policy interests of Mexico and of the United States as set out in the Merída Convention and in IMSS's lawsuit. Rather than acknowledging that Mexico (through IMSS) had expressed its preference under the Merída Convention to bring suit here, the district court turned Mexico's strong interest in fighting corruption against Mexico, incongruously holding that Mexico's strong interests in IMSS' anticorruption laws "strongly weighs" against Mexico's suit remaining in a United States' court. *Id.*

The district court's holding as to Mexico's interest is manifestly incorrect. Pursuant to the Merída Convention, Mexico (through its agent, IMSS) made the policy choice to sue here, not in Mexico. While

Mexico has an overwhelming interest in combating Stryker's corruption, the district court erred in deciding for Mexico (indeed directly against Mexico's expressed choice) how it pursued that overwhelming interest.

It is for the State Party, in this case, Mexico, to decide, and not for anyone else, if it is or is not in Mexico's best interest to exercise its Convention rights, or to instead choose to litigate elsewhere, including in its own courts. The courts of a State Party cannot substitute their own judgments for Mexico's without violating Mexico's rights and the Merída Convention.

Any opposite conclusion would run contrary to the official statements (quoted above) made by the United States regarding the scope of the Convention and the rights it recognizes and the obligations it imposes. The United States and 185 other nations have promised to respect their individual choices in such matters and to open their courts for exactly this type of action.

In the same manner, the district court misjudged the United States' interests as reflected in the Convention. The United States adopted the Convention as part of its "strong national security

interest in opposing corruption and bribery worldwide.” Senate Report at 7. To serve those ends, the United States promised all States Parties that its courts would be open to them to claim compensation for corruption originating from the United States.

D. The discretionary forum non conveniens doctrine cannot override Mexico’s rights under the Merída Convention.

There is no doubt that IMSS’ action falls within the Merída Convention, and therefore, IMSS and Mexico had the substantive right under Article 53 guaranteeing Mexico access to United States courts to bring anti-corruption claims in the district court below. That Convention right includes the right to proceed to hear the initiated action, to administer justice, and to seek a judgment of compensation. To have the action dismissed on non-merits grounds, and particularly on discretionary grounds that serve the convenience of the district court, makes those rights nugatory and contravenes the Merída Convention’s obligations.

Article 53’s requirements that State Parties open their courts includes the qualifier that actions in their courts shall be made “in accordance with its domestic law.” This does not mean that the

domestic law of the United States, much less a discretionary doctrine, can be used to curtail the exercise of the rights set forth in the Merída Convention, which rights are binding and not discretionary.

As set out in the 1969 Vienna Convention on the Law of Treaties, “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.” Article 46, ¶1. Certainly, the discretionary *forum non conveniens* doctrine does not create a “manifest violation” of United States law and cannot justify the district court’s refusal to respect Mexico’s invocation of its right to choose a United States forum under Article 53. The same point is clear from paragraph 2 of the Article 46 of the Vienna Convention, which provides that “A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

If the dismissal here were to be sustained, Mexico would be denied its rights under Article 53 of the Merída Convention, not only

to choose to file in the United States district court under subparagraph (a), but also and necessarily its right under subparagraph (b) to seek compensation there, as well as its right under subparagraph (c) to have its claim recognized, as the legitimate owner of property acquired through the commission of an offense established in accordance with the Merída Convention.

Consequently, several Merída Convention rights would be interfered with, and several corresponding obligations contravened, if the provisions in its binding articles were to be supplanted by a domestic discretionary doctrine. These contraventions would constitute a “material breach” of the Merída Convention, as provided by the Vienna Convention in its Article 60, which consists of (a) a repudiation of the treaty not sanctioned by that Convention, or (b) the violation of a provision essential to the accomplishment of the object and purpose of the treaty.

Article 53 of the Merída Convention has nothing to do with convenience, but with an established right of access. That access to foreign courts is secured by Article 53 as a matter of right, not

discretion. Therefore, the right of access guaranteed by the Merída Convention cannot be denied based on convenience or discretion.

4. *The district court's dismissal violates Mexico's legitimate expectations regarding the Merída Convention and grants a safe haven to corrupt parties.*

Mexico acknowledges the sovereign right of the United States to decide how to implement domestically its international obligations and to determine the public policies that should apply within its territory. Nevertheless, when a State enters into an international agreement, legitimate expectations arise that it will live up to its international commitments.

When ratifying the Merída Convention, the United States appended a “reservation” to the effect that the operative provisions of the Merída Convention were going to be assumed “in a manner consistent with its fundamental principles of federalism.” Senate Report at 9. This reservation does not relieve the United States of its obligations on the international legal plane. Instead, it operates as a representation to the international community that the United States’ international legal obligations derived from the Merída Convention will be discharged through the medium of the domestic

law of the United States. The reservation amounts to an undertaking to the other States Parties to the Merída Convention that the United States will secure the legal remedies set forth in the Merída Convention through domestic law following its principles of federalism.

Consequently, this reservation leaves it to the United States to choose the means of implementation, but does not excuse the United States from complying with the obligations assumed under the Merída Convention.

Denying Mexico's sovereign agencies access to United States courts under the discretionary *forum non conveniens* doctrine undermines Mexico's legitimate expectations to use all available remedies under the Merída Convention to combat corruption; *de facto* grants safe haven to the agents of corrupt practices; and goes against the efforts of the States Parties to the Merída Convention to have multiple *fora* to combat this transnational crime.

Such non-compliance would bring into play the delicate question of whether or not there will be reciprocity between the two State Parties involved in the application of the Merída Convention,

which could benefit only the perpetrators of corruption. The United States would irremediably assume international legal responsibility for these contraventions, which, again, could trigger considerations of reciprocity in the application of the Merída Convention between the State Parties involved. The question of reciprocity would not be limited to application of Article 53.

5. *The district court's opinion sets a dangerous precedent that undermines the Merída Convention by allowing transfers to the courts of the victimized State Party in the interests of convenience.*

Perhaps one of the most pernicious aspects of the district court's precedent is that, by substituting its own policy determinations and deciding that Mexico (or any other State Party) would be better served by its own courts, despite the State Party's contrary choice, the district court directly defeats the Merída Convention's purposes. According to the district court's precedent, a victimized State Party would always have a greater interest in its own corruption claims than a United States court, so the district court would send all such cases back to the victimized nation.

The district court's ruling would apply to all actions brought under Article 53 *unless* the victimized State Party were able and *willing* to challenge the competency of its own judicial system. State Parties should not be put to that choice. When a victimized State Party decides (for whatever reason) that its interests are best served by recourse to foreign courts pursuant to the Merída Convention, that decision should be given the highest respect. Indeed, the fact that a sovereign would decide it is better served by seeking justice abroad rather than in its own courts is, at least in most cases, a compelling justification for the Merída Convention's requirements. It is equally telling that a corrupt entity like Stryker would rather defend itself in the courts of a nation that it victimized through corruption than in the courts of its home district. *See Iragorri v. United Techs. Corp.*, 274 F.3d 65, 74 (2d Cir. 2001).

6. *Forum non conveniens* dismissals are supposed to support justice, not mere convenience.

Finally, we are compelled to note that the United States Supreme Court has stated that the *forum non conveniens* doctrine is not limited to seeking convenience but also justice: "the ultimate inquiry is where trial will best serve the convenience of the parties

and the ends of justice.” Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 527 (1947) (emphasis added); *see also Kamel v. Hill-Rom Co., Inc.,* 108 F.3d 799, 802 (7th Cir. 1997) (dismissal appropriate “if it best serves the convenience of the parties and the ends of justice”).

The Merída Convention’s binding provisions do not permit State Parties to avoid the Merída Convention’s obligations solely on the basis of court convenience, by sending them at the request of the corrupt party to the nations victimized by international corruption and bribery. Any attempt to apply the *forum non conveniens* doctrine in such a fashion would not only lead to a contravention of the Merída Convention, as explained above, it would also lead to difficult dilemmas, such as leaving the bad precedent of allowing the corrupt party to move to courts of the victimized nation under the expectation of repeating the same illicit practices in those courts.

Similarly, the United States clearly understood that the Merída Convention would add to the burdens of its own courts, when it committed to allow State Parties to seek compensation in its courts.

The convenience of avoiding that obligation does not override the Merída Convention.

In the interest of justice, the district court's dismissal should be reversed.

CONCLUSION

For these reasons, the Secretaría de Relaciones Exteriores de los Estados Unidos Mexicanos is concerned that the dismissal of this case contravenes the Mérida Convention, and respectfully urges this Court to reverse the order and judgment dismissing IMSS's action on the basis of *forum non conveniens*.

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Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7). The text and the footnotes of this brief appears in 14-point Century Schoolbook font. All portions of the brief—aside from the Cover Page, Rule 26.1 Disclosure Statement, Table of Contents, Table of Authorities, Signature Block, Certificate of Rule 32(a) Compliance, Certificate of Service, and Certificate of Rule 30(d) Compliance—contain 6,449 words. This certification is based on the word count function of Microsoft Word, which was used to prepare this brief.

Dated: June 1, 2021

Respectfully submitted,

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Certificate of Service

On June 1, 2021, I caused a true and correct copy of this document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Dated: June 1, 2021

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