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DJ# 145-15-3175

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SEP 25 2008 151

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: *In re Assicurazioni Generali, No. 05-5602 et al. (2d Cir.)*

TIME LIMITS

The court of appeals invited the views of the State Department and requested that the Government notify the court by August 31, 2008, whether the Government intends to file a brief, further providing that any brief would be due by October 30, 2008. We asked the Second Circuit to extend the time for informing the court whether any response will be filed. Assuming that the court grants this request, we will need a decision on amicus participation no later than September 30, 2008.

RECOMMENDATIONS

The Department of State<sup>1</sup> recommends amicus participation on question 1. The U.S. Attorney's Office<sup>2</sup> recommend amicus participation.

I recommend amicus participation on question 1.

QUESTIONS PRESENTED

1. Whether it is the foreign policy of the United States that Nazi-era claims for unpaid insurance policies brought against an Italian company that voluntarily participated in the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be resolved exclusively by ICHEIC rather than in litigation in U.S. courts.

2. Whether federal foreign policy preempts litigation of plaintiffs' state law claims seeking to recover on unpaid insurance policies or, alternatively, whether that policy supports dismissal of the claims on the ground of international comity and/or *forum non conveniens*.

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<sup>1</sup> See attached letter from John Bellinger; Sharla Draemel, 776-8343.

<sup>2</sup> See attached email from David Jones.

## STATEMENT

### A. Overview.

This consolidated multi-district litigation involves claims brought by Holocaust survivors or their heirs seeking to recover on insurance policies issued in Europe before or during the Nazi era. The defendant, Assicurazioni Generali, is a large Italian insurance company that sold insurance policies to Jewish families and businesses throughout Europe in the years leading up to World War II. *See, e.g.*, J.A. 306-307 (Weiss Complaint). The district court held that plaintiffs' claims were preempted by federal foreign policy, which favors exclusive resolution of Holocaust era claims by the International Commission on Holocaust Era Insurance Claims (ICHEIC), rather than in litigation in U.S. courts. Plaintiffs appealed. Following oral argument, the Second Circuit solicited "the advice of the Executive Branch on the question whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States."

### B. Background.

#### 1. The Foundation Agreement and ICHEIC.

The United States Government has long been involved in efforts to resolve claims arising out of Nazi-era harms. *See generally American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401-408 (2003). Reparations for wartime harms was a principal object of post-war Allied diplomacy, and the West German Government enacted restitution laws, but those laws left out many claimants and certain types of claims.

After Germany was unified, numerous class-action lawsuits for restitution were brought in U.S. courts against companies doing business in Germany during the World War II era. The U.S. Government sought mediated settlement as an alternative to litigation, and the President ultimately signed an executive agreement with Germany establishing a foundation funded with 10 billion DM, contributed jointly by the German Government and German companies, to be used to compensate individuals who suffered at the hands of German companies during the Nazi era. Agreement Concerning the Foundation 'Remembrance, Responsibility and the Future,' 39 Int'l Legal Materials 1298, 1303 (2000) ("Foundation Agreement"). Similar agreements were signed with Austria and France, *see Garamendi*, 539 U.S. at 408 n.3, but not with Italy, the country of nationality of defendant Generali.

The United States committed in the Foundation Agreement to file a statement of interest in cases in which Holocaust-era claims against German companies were pending in U.S. courts, declaring that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Garamendi*, 539 U.S. at 406. The Foundation Agreement also specified that "[t]he United States

does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal.” *Id.*

The Foundation Agreement contemplates a central role in claims resolution for ICHEIC, a voluntary organization that had previously been formed by European insurance companies, the State of Israel, Jewish and Holocaust survivor organizations, and the national association of American state insurance commissioners. *See Garamendi*, 539 U.S. at 406-407. ICHEIC would negotiate with European insurers to provide information about unpaid insurance policies issued to Holocaust victims, and would establish and implement procedures to settle claims brought under those policies. *See id.* at 406-407. The German Foundation subsequently agreed to set aside 200 million DM to pay claims approved by ICHEIC and a portion of ICHEIC’s operating expenses, with another 100 million DM in reserve to be used if the initial funding was exhausted. *See id.* at 407. The German Foundation also agreed to contribute 350 million DM to a humanitarian fund administered by ICHEIC, and to work with German insurance companies in order to publish a comprehensive list of possible insurance policyholders who might have been Holocaust victims. *See id.*

## 2. The Garamendi Litigation.

In *American Insurance Ass’n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court considered a constitutional challenge to a provision of California law that required each insurance company doing business in the State to disclose for publication detailed information concerning policies issued by the company or its affiliates in Europe decades ago. The United States urged, and the Supreme Court agreed, that the statute impermissibly intruded into the conduct of U.S. foreign policy.

The *Garamendi* Court explained that, in negotiations over Holocaust-era claims, the foreign policy of the United States has “stressed mediated settlement as an alternative to endless litigation promising little relief to aging Holocaust survivors.” 539 U.S. at 405 (international quotation marks and citation omitted). The Court noted the commitment of the United States to file statements of interest in pending district court cases, and to use its “best efforts, in a manner it considers appropriate,” to convince state and local governments to respect the foundation as the exclusive mechanism for resolving Holocaust-era claims. *Id.* The Court also noted the pivotal role of ICHEIC in the payment of insurance claims.

The Court held that the disclosure provisions of California law were preempted by federal law because they “interfere[] with the foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France.” 539 U.S. at 413. Although the Court recognized that the Foundation Agreements were not themselves preemptive, it held that the state statute was preempted because it conflicted with the federal foreign policy embodied and reflected in those agreements. *Id.* at 415-417, 420.

The Court pointed to the history of negotiations over the Foundation Agreements as evidence of a “consistent Presidential foreign policy \* \* \* to encourage European governments and companies

to volunteer settlement funds in preference to litigation or coercive sanctions.” *Id.* at 421. “As for insurance claims in particular,” the Court continued, “the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information.” *Id.* The Court described the agreements as “exemplars” of the United States’ foreign policy, but also quoted and relied on various statements by officials of the State Department, including statements by Deputy Secretary of State Stuart Eizenstat and others setting out the position of the United States that ICHEIC “should be considered the exclusive remedy for resolving insurance claims from the World War II era” and that “a company’s participation in the ICHEIC should give it a ‘safe haven’ from sanctions, subpoenas, and hearings relative to the Holocaust period.” *Id.* at 422 (quotation marks and citations omitted).

The Court held that the California state-law approach of providing regulatory sanctions to compel disclosure and payment conflicted with the federal foreign policy towards Holocaust-era insurance claims. *See* 539 U.S. at 423-425. The Court noted that Deputy Secretary Eizenstat had written to the state insurance commissioner following enactment of the California law to complain that California’s actions “damag[ed] the one effective means at hand to process quickly and completely unpaid insurance claims from the Holocaust period” — *i.e.*, ICHEIC — and threatened to derail the German Foundation Agreement. *See* 539 U.S. at 424, 411. The effect of the state law was to place the Government at a disadvantage in seeking to persuade foreign governments and foreign companies to participate voluntarily in ICHEIC, and ultimately to “thwart[] the Government’s policy of repose for companies that pay through the ICHEIC.” *Id.* at 424. The Court also noted that the California law diminished the effectiveness of ICHEIC by undermining European privacy protections. *See id.* at 425. Holding that the California provision was “an obstacle to the success of the National Government’s chosen ‘calibration of force’ in dealing with the Europeans using a voluntary approach,” the Court concluded that the state law was preempted. *Id.* at 425 (citation omitted).<sup>3</sup>

The dissenting Justices in *Garamendi* focused primarily on the inadequacy of ICHEIC and the lack of any formal federal law that could be afforded preemptive effect. Thus, the dissenters emphasized that ICHEIC had made only “slow and insecure” progress in resolving Holocaust-era insurance claims. 539 U.S. at 432. The dissenters also noted that the directive to ICHEIC members to publish lists of unpaid Holocaust-era policies “has not yielded significant compliance”; petitioner *Garamendi* “may have sold more life insurance and annuity policies in Eastern Europe during the Holocaust than any other company,” but had apparently refused to disclose the bulk of information from its internal list of insurance policies sold between 1918 and 1945. *Id.* at 433. The dissenting Justices emphasized that the only provision at issue in *Garamendi* was the information disclosure requirement, which “imposes no duty to pay any claim, nor does it authorize litigation on any claim.”

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<sup>3</sup> Although the Court held that this conflict was sufficient in itself for preemption to apply, the Court also emphasized the “weakness of the State’s interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner” employed by the challenged state law. 539 U.S. at 425.

539 U.S. at 435. Finally, the dissenters criticized the extension of “dormant foreign affairs preemption” applied in cases such as *Zschemig v. Miller*, 3489 U.S. 429 (1968), in which state action involved criticism and judgment of foreign governments, to the “dissimilar” context of a state statute aimed solely at private insurers doing business in California and not taking any position on a foreign government or regime. 539 U.S. at 439-440. Noting that it was uncertain “whether even litigation on Holocaust-era insurance claims must be abated in deference to” the Foundation Agreements, the dissenters stated that it should be clear that “those agreements leave disclosure laws like the [California provision at issue] untouched.” *Id.* at 440-441 (emphasis in original). The dissenters also criticized the majority’s reliance on statements by Deputy Secretary Eizenstat and others to determine the substance of federal foreign policy. *See id.* at 441 (“The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.”).

### C. This Litigation.

The plaintiffs in these MDL cases sued Generali and other European insurance companies under various state law theories, including breach of contract, breach of fiduciary duty, breach of the duty of good faith and fair dealing, conspiracy, and unjust enrichment. *See, e.g., id.* at 242-250, 288-289. Claims were also brought under state statutes extending the limitations period for Holocaust victims to sue to recover on unpaid insurance policies and making other changes to enable Holocaust victims or their families to recover damages from the carriers of those policies. *See, e.g., id.* at 339-340 (bringing claim under the Florida Holocaust Victims Insurance Act, codified at Flor. Stat. § 626.9543 (1999)).

#### 1. District Court Refusal To Dismiss Under *Forum Non Conveniens*.

Generali moved to dismiss the cases on the ground of *forum non conveniens*, arguing that plaintiffs’ Holocaust-era insurance claims should be resolved by ICHEIC. (Generali was one of the founding insurance companies of ICHEIC and contributed a substantial amount of money towards its operations. *See In re Assicurazioni Generali*, 228 F. Supp.2d at 254.) The district court (Mukasey, J.) denied the motions, holding in relevant part that ICHEIC was not an adequate alternative forum. *In re: Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp.2d 348 (S.D.N.Y. 2002).

Although the district court recognized that ICHEIC offered several advantages in comparison to litigation in U.S. courts, the court nevertheless concluded that the forum was inadequate. *See* 228 F. Supp.2d at 354-356. The court first suggested that no private, non-governmental organization “can ever constitute an adequate alternative forum.” *Id.* at 356. As the court explained, “[t]he doctrine of *forum non conveniens* is appropriately used as a tool to force plaintiffs to litigate in a more convenient public forum, but it cannot be used to throw a plaintiff out of court and into a private dispute-resolution mechanism.” *Id.* “For that reason alone,” the court stated, the motion to dismiss on the ground of *forum non conveniens* would be denied. *Id.*; *but see id.* (stating that court

would “not entirely foreclose” the possibility that “a private, nongovernmental forum could under certain circumstances be an adequate alternative forum”).

In addition, the district court held that ICHEIC was not adequate because it “lacks sufficient independence and permanence.” *Id.* at 356. The court reasoned that the founding insurance companies “could use their financial leverage to influence the ICHEIC process.” *Id.* at 357. The district court pointed to various statements by ICHEIC Chairman Lawrence Eagleburger reflecting member companies’ disagreement with various actions taken and statements that they would end their voluntary participation if they disagreed with ICHEIC’s decisions. *Id.* at 357. The district court questioned whether ICHEIC would continue to be viable if member companies left the organization, as one corporation had already done. *Id.* at 357. And the district court noted that only a few claims had been paid to date and that its operations had been criticized as uncertain and potentially at the point of collapse. *Id.* at 358.

The district court recognized that the United States had repeatedly expressed the view that ICHEIC “should be considered the exclusive remedy for resolving insurance claims from the World War II era,” but dismissed those statements as “irrelevant.” *Id.* “Absent a statute or executive agreement suspending plaintiffs’ claims or an executive agreement that gives rise to specific foreign relations concerns,” the district court held, “the government’s position is not controlling and speaks at most to the convenience of ICHEIC as a forum.” *Id.* at 358 (citation and footnote omitted).<sup>4</sup>

## 2. District Court Dismissal In Light Of *Garamendi*.

Following the Supreme Court’s decision in *Garamendi*, Generali moved for dismissal on the ground of federal preemption. The district court granted the motion, holding that “laws supporting litigation of plaintiffs’ benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC,” and that plaintiffs’ claims are “not actionable because \* \* \* they do not allege any cognizable injury other than that caused by Generali’s non-payment of benefits, redress for which is committed to ICHEIC.” 340 F. Supp.2d 494, 497 (S.D.N.Y. 2004).

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<sup>4</sup> The district court also rejected Generali’s argument that the claims should be dismissed in deference to litigation in the courts of the European countries in which the insurance policies were issued, either under *forum non conveniens* or pursuant to forum selection clauses in those policies. The court reasoned that forcing the plaintiffs to litigate in foreign courts could be a “death knell” to their claims, and also that the U.S. forum had a strong interest in the claims by virtue of the local residency of many plaintiffs and New York’s law barring dismissal of Nazi-era insurance claims on the ground of *forum non conveniens*. 228 F. Supp.2d at 365-367. The court also held that it would be unreasonable to enforce forum selection clauses because the parties “could not knowingly have consented to jurisdiction in the courts of Poland, Italy, the Czech Republic, Austria, Slovakia, and Hungary as constituted in the year 2002.” *Id.* at 373.

The district court held that federal foreign policy preempts not only state statutes “designed to foster litigation of Holocaust-era insurance claims,” but also “claims arising under generally applicable state statutes and common law \* \* \*.” *Id.* As the court explained, permitting either type of claim to go forward “necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC.” *Id.*

The district court also held that the federal policy to resolve Holocaust-era insurance claims exclusively through ICHEIC encompasses claims against Generali. 340 F. Supp.2d at 503. The court noted that Generali was a petitioner in *Garamendi* as well as the most prominent of the defendants, and yet the *Garamendi* Court had not excluded the company from its holding on preemption. *Id.* at 503. The district court also relied on statements by Executive Branch officials—some of which were referenced in *Garamendi*—that promoted ICHEIC as the exclusive remedy for Holocaust-era insurance claims. *Id.* at 504-505. The district court recognized that there was no Foundation Agreement between the United States and Italy, the country of Generali’s nationality, but held that federal foreign policy was not required to be embodied in an executive agreement in order to have preemptive force. *Id.* at 505.

Finally, the district court held that the fact the United States had not filed a statement of interest in this case did not preclude dismissal on grounds of foreign policy preemption. 340 F. Supp.2d at 506. The court declined “to infer from the mere fact of executive inaction that the policy favoring ICHEIC resolution does not encompass claims against Generali.” *Id.* at 506. The district court also noted that the Government’s failure to file appeared to “stem from an unwillingness to act on behalf of a private company absent a government-to-government agreement encompassing claims against the company in question,” rather than from the underlying federal foreign policy towards the claims at issue. *Id.* at 506-507.

### 3. Second Circuit Proceedings.

The remaining plaintiffs<sup>5</sup> argue on appeal that there is no federal preemption because the statements of U.S. officials are not themselves preemptive and there is no executive agreement between Italy and the United States. The plaintiffs also argue that, because the United States has not filed a statement of interest, there must be no federal foreign policy supporting dismissal. They argue that there is, conversely, a greater state interest than in *Garamendi*, because some of their claims arise under common law, an area of traditional state interest. They argue that some of their claims, because they involve recent conduct by Generali, do not implicate federal foreign policy. Finally, the plaintiffs assert that ICHEIC is an inadequate forum, and that as a result the policy of

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<sup>5</sup> Appeals were initially brought on behalf of all plaintiffs in the consolidated actions, including the named plaintiffs in the class actions. Prior to oral argument, Generali entered into a settlement agreement that resolved the class actions. *See Rubin v. Assicurazioni Generali S.p.A.*, 2008 WL 2329321 (2d Cir. June 6, 2008) (affirming district court’s approval of settlement agreement). The three sets of plaintiffs who remain in this litigation include opt-outs from the settlement class and individual plaintiffs whose claims were not settled.

the United States to provide for compensation through an alternate forum is inapplicable and due process prohibits dismissal of their claims on the ground of federal preemption.

At oral argument, the court of appeals asked repeatedly about the foreign policy of the State Department towards claims brought against Generali, and queried why the State Department had not expressed its views in this litigation. *See, e.g.*, Transcript 34 (Calabresi, J.) (“[W]hy isn’t it appropriate for a court simply to say, to the extent that there is a question as to whether there is a foreign policy conflict, \* \* \* the president must tell us again that there is a conflict in the new case.”); *id.* at 49 (Pooler, J.) (suggesting that, even absent an obligation to file, the State Department could make its position “clear so that we don’t have to deal with ambiguities”); *id.* at 61-62 (Leval, J.) (suggesting that statement by Executive Branch would be relevant and that counsel for Generali could request State Department “to furnish a letter to the Court saying that this is the policy of the United States”). Although Generali argued that the United States’ foreign policy was the same policy at issue in *Garamendi*, the plaintiffs relied on a letter sent to them in 2001 by Ambassador Bindenagel, stating that the United States has no obligation to file a statement of interest in a case brought against Generali, to argue that no federal foreign policy is implicated by this litigation.

On August 1, 2008, the Second Circuit sent a letter to the Secretary of State soliciting “the advice of the Executive Branch on the question whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States.” Letter at 1. The court recognized that the United States’ amicus brief in *Garamendi* had stated that ICHEIC “should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era.” *Id.* at 2. “The Court is unaware, however, whether this continues to be Government policy, whether Government policy on this question is influenced by the fact that ICHEIC is no longer accepting claims, and whether that policy today encompasses insurers from countries (like Italy) not covered by executive agreements, as against companies from countries (like Germany and Austria) that are.” *Id.* The Court requested that the State Department notify it by August 31, 2008, whether the government would file a brief as amicus curiae; we have asked the Court to extend the date for notification to October 1, 2008.

### DISCUSSION

We recommend participating as amicus curiae in response to the invitation of the court of appeals. Although we are still awaiting guidance from the State Department as to the precise scope of the government’s foreign policy, the State Department has informed us that it continues to be the policy of the United States that ICHEIC should be the exclusive remedy for all Holocaust-era insurance claims. Furthermore, it is government’s position that a company’s voluntary participation in ICHEIC should give it a safe haven from Holocaust-era claims, even if that company’s government did not enter into a Foundation Agreement with the United States. It is thus clearly appropriate to respond to the Second Circuit’s questions and to set out current U.S. foreign policy.

We recommend against taking a position in an amicus filing on the question whether the government’s foreign policy requires dismissal of plaintiffs’ claims. The Second Circuit has not explicitly asked the government to address this question, and the State Department has indicated that

it does not wish to express a view on the question. Furthermore, there are significant weaknesses in any argument for dismissal. While the logic of *Garamendi* arguably militates in favor of dismissal of plaintiffs' claims on federal preemption grounds — the argument made by the defendants in this case — the position of the United States urged in that case does not extend inexorably to the preemption of all common law state claims against foreign corporations arising from the Holocaust era. Indeed, urging some form of blanket preemption would arguably be in tension with the government's stated view in the Foundation Agreements that its foreign policy interests do not constitute an independent basis for dismissal of such claims. Similarly, although it would be possible to argue for dismissal under *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57 (2d Cir. 2005), a Foundation Agreement case in which Holocaust-era claims were dismissed under the political question doctrine and case-specific deference, such an argument would mark a substantial expansion of justiciability doctrines and might be difficult to defend on further review.

If, however, you disagree with the recommendation *not* to address the impact of the government's foreign policy interests to the claims in this case, we recommend that you give serious consideration to urging the court to sidestep federal preemption and the political question doctrine and to consider instead whether international comity is a basis for dismissal. This discretionary doctrine would permit consideration of foreign policy interests in conjunction with other factors, and would appear to provide a more established doctrinal basis on which to dismiss the action.

A. The United States Government has repeatedly expressed the view, both in court filings and in public statements by government officials, that ICHEIC should be the exclusive remedy for Holocaust-era insurance claims. In the government's view, that is true even for claims against a company that is not a national of a country that has entered into a Foundation Agreement, so long as that company has voluntarily participated in the ICHEIC process. The *Garamendi* Court cited and relied on a number of those statements in analyzing the scope of the federal foreign policy there at issue, and the State Department has informed us that its policy remains the same. That history is discussed in the Supreme Court's decision and in the government's brief as *amicus curiae*.

Although the plaintiffs argue in their briefs that ICHEIC was flawed in practice, and that the statements about U.S. foreign policy in the *Garamendi* litigation should not be taken at face value, the State Department has continued to endorse the ICHEIC process in more recent years. In 2008, following the formal closure of the ICHEIC claims process, former Deputy Secretary of the Treasury Stuart Eizenstat testified before Congress (in coordination with, although not on behalf of, the State Department) that ICHEIC was able "to achieve its mandate of providing some measure of justice for Holocaust survivors and their heirs as quickly as possible," and "ultimately was successful." Testimony of Stuart Eizenstat Before the House Financial Services Committee, Feb. 7, 2008. Eizenstat also stated that litigation should not be permitted to proceed against companies that "participated fully in the ICHEIC process without the benefit of an Executive Agreement" because, although "there was no technical legal peace extended by the U.S. Government," those companies "nonetheless participated in good faith in a process that the United States Government had decided was the 'exclusive remedy' for resolving all Holocaust-era insurance claims." Eizenstat stated that "[t]here is no justification for now subjecting them to some other remedy. This is a conclusion

shared by the United States Supreme Court, in its *Garamendi* decision \* \* \* [and by the] *In re Assicurazioni Generali* decision dealing precisely with this issue.”

Furthermore, there are compelling reasons to set forth the U.S. foreign policy in this case. The State Department has informed us that the United States is in discussions with several European governments in an effort to convene a second Holocaust assets conference as a follow-up to the 1998 Washington Conference. The 1998 Conference provided a strong impetus to the governments of Germany, Austria, and France to enter into executive agreements, and the United States is hoping for similar compensation programs to be established by governments from Central and Eastern Europe. The State Department is concerned that the specter of ongoing litigation against companies that participated in ICHEIC may discourage these governments from establishing and participating in a new Holocaust compensation program. In addition, litigation in a U.S. court may affect current efforts by our government to persuade Germany to expand the scope of existing compensation programs. Accordingly, there appears to be a significant government interest in articulating the current federal foreign policy in response to the explicit solicitation of that policy by the court of appeals.

The fact that ICHEIC is no longer accepting claims does not modify the U.S. foreign policy at least with respect to claims that were or could have been submitted to ICHEIC. (As noted above, the time period for submitting claims to ICHEIC has expired.) Although participating companies have voluntarily agreed to continue to accept and process claims under the same procedures and guidelines employed by ICHEIC, we are not aware of any State Department policy formally supporting that effort as an exclusive remedy. We are currently discussing with the State Department whether its support of ICHEIC extends to support of the new round of claims processing by participating companies, and will reflect any resolution of those discussions in the amicus filing. At a minimum, however, we can articulate in an amicus filing the foreign policy that ICHEIC should be the exclusive remedy for claims that were or could have been submitted as part of that claims resolution process.<sup>6</sup>

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<sup>6</sup> A pending federal bill, H.R. 1746, would, if enacted, modify federal policy at least prospectively. That bill would require insurers to disclose information relating to Holocaust-era policies and would establish a federal cause of action for claims arising out of a covered policy. The bill contains congressional “findings” that ICHEIC has not complied with certain reporting requirements relating to implementation of the German Foundation Agreement; that U.S. courts have jurisdiction over actions by Holocaust victims and their families to recover insurance proceeds, including actions against Generali; that ICHEIC did not take adequate steps to compensate policyholders under Holocaust-era policies; and that Holocaust victims and their heirs should be permitted to bring insurance claims in U.S. courts. H.R. 1746, § 2(14), (17-20), (26). Among other things, that bill would create a federal cause of action to recover benefits from an insurance company under a Holocaust-era insurance policy, would provide for retroactive application “to the fullest extent permitted” by the Constitution — “including claims previously dismissed on the grounds of executive preemption” — and would provide a new limitations period of 10 years to bring suit. *Id.*  
(continued...)

B. We recommend against taking a position on the impact of foreign policy on the claims in the case. The State Department has requested that we not weigh in on the legal impact of the relevant U.S. policy, and the letter from the court of appeals does not specifically request our views on this question. Furthermore, the most obvious arguments in support of dismissal (including the argument accepted by the district court) are problematic — although it is certainly possible that the court of appeals will nevertheless treat the government’s statement of foreign policy as sufficient to warrant dismissal. An elaboration of the government’s legal position is probably significant only if you wish to head off a ruling by the court of appeals that the foreign policy interest of the United States renders non-justiciable the claims in this case.

As noted, the State Department has informed us that they do not wish to express a view in any amicus filing on the effect of U.S. foreign policy on the claims in this litigation. The State Department has concerns about the potential strength of any arguments that could be made for dismissal, and is also concerned that taking a position on this issue could complicate efforts to defeat the pending bill, H.R. 1746, or similar future bills. We are currently discussing with the State Department whether it would be better simply to omit mention of the legal effect of the U.S. foreign policy, or instead to note affirmatively that the government does not take a position on the issue, and we anticipate that this issue will need to be resolved in the course of drafting any amicus submission. In any event, however, the State Department has expressed its clear, and strong, preference against making any legal arguments in favor of dismissal.

Furthermore, submission of a filing that sets out U.S. foreign policy but does not address the legal consequences of that policy would be fully consistent with the terms of the court’s invitation letter. That letter invites the government to address “whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States,” and to elaborate on certain aspects of the nature and scope of U.S. foreign policy. Although nothing in the letter would prevent the government from taking a position on the ultimate legal questions in the case, the letter does not on its face solicit such a position.

Finally, we have concerns that the most obvious arguments in support of dismissal are potentially weak on the merits, and would mark a substantial extension of existing precedent.

In its letter to the State Department, the Second Circuit described at length the holding in *Garamendi*, and framed the issue on appeal as whether the district court erred in holding that the plaintiffs’ claims were preempted by federal foreign policy under *Garamendi*. The parties have also briefed the case as one of federal foreign policy preemption under *Garamendi*. Although the

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<sup>6</sup>(...continued)

§ 10(a)(1), (d), (e). Should this bill (which the State Department opposes) be enacted, it could have a substantial impact on our articulated foreign policy relating to ICHEIC as the exclusive remedy for Holocaust-era insurance claims. At a minimum, we would likely need to acknowledge that the prior foreign policy, which was in effect during the period of ICHEIC’s active operation, would be modified prospectively.

defendants-appellees recognize that, unlike in *Garamendi*, there is no executive agreement that bears on the claims against Italian company Generali, they argue that this distinction is not dispositive, relying on the fact that in *Garamendi* the agreements were not themselves held to be preemptive but were instead treated as evidence of the preemptive foreign policy. Furthermore, the foreign policy at issue in *Garamendi* also involved the U.S. Government's policy towards Generali (which was a petitioner in the case), and the Court drew no distinction between the federal foreign policy relating to German companies, on the one hand, and federal foreign policy relating to Italian companies, on the other.

But any argument that the federal preemption holding in *Garamendi* also bars the claims at issue here is problematic. Even those statements of federal foreign policy in the German Foundation Agreement are deliberately ambiguous. On the hand, they include a commitment by the President to inform U.S. courts that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Garamendi*, 539 U.S. at 406. The United States would thus suggest to the courts that "U.S. policy interests favor dismissal on any valid legal ground." *Id.* At the same time, however, the Agreement explicitly provides that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal." *Id.* The Agreement thus might be read to reflect the view that United States foreign policy does not, as such, preempt state law claims arising from the Holocaust era. The government's brief in *Garamendi* does not suggest otherwise. The brief urged that California had impermissibly interjected itself into the conduct of foreign policy by adopting a regulatory scheme that was extraterritorial in purpose and effect. The government's analysis addressed the conflicts between this regime and the ICHEIC process without suggesting a broad preemption of all Holocaust-era claims.<sup>7</sup>

Arguing for federal preemption in this case would require an extension of the holding in *Garamendi* to a setting in which there is no executive agreement to support the assertedly preemptive foreign policy, but merely public statements of State Department officials. Furthermore, we would be required to argue that federal foreign policy preempts not only state laws specifically targeted at the problem of post-war reparations for insurance claims — a context in which the Supreme Court viewed the state's interests as minimal, *see* 539 U.S. at 425-426 — but also common-law claims seeking to enforce traditional tort duties. Although we have argued in other federal preemption cases that the fact a claim arises under state common law rather than positive enactment does not preclude

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<sup>7</sup> At oral argument in *Garamendi*, the Supreme Court inquired as to the impact of the government's position on "the litigation that was ongoing in the Eastern District of New York that I think involved a slave labor question? Did the United States take a position in that litigation, which involved people who moved here, or their survivors moved here after, that that was improper litigation?" *American Ins. Ass'n v. Garamendi*, No. 02-722, Transcript of Oral Argument, 2003 WL 21015147, \*28 (U.S. Apr. 23, 2003). Government counsel responded: "No. Those — that did not involve State regulation, that involved private lawsuits, and there was a settlement which the United States encouraged. Again, this was part of the overall approach of the United States Government." *Id.*

application of conflict preemption, *see, e.g., Riegel v. Medtronic, Inc.*, No. 06-179, Brief for the United States as Amicus Curiae 16-19, it would nevertheless mark a further step beyond *Garamendi* itself.

Although the court of appeals and the parties have framed the relevant question on appeal as one of foreign policy preemption, another possible approach to the case would be to assert that the claims are barred under the political question doctrine or as a matter of case-specific deference to federal foreign policy. In *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005), the court of appeals held that federal foreign policy as expressed in the Austrian Foundation Agreement and a statement of interest filed by the United States under that Agreement barred the adjudication of claims against Austria and Austrian entities arising out of the Nazi-era confiscation of the property of Austrian Jews. Invoking both the political question doctrine and “case-specific deference” to foreign policy, *see Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004), the court held that the claims were “nonjusticiable.” 431 F.3d at 73. The Third Circuit has similarly held, in *In re: Nazi Era Cases Against German Defendants Litig.*, 2006 WL 2162308 (3d Cir. Aug. 2, 2006), that claims for compensation against German companies arising out of inhumane Nazi medical experimentation in concentration camps were barred by the political question doctrine. *See also Alperin v. Vatican Bank*, 410 F.3d 532, 559-562 (9th Cir. 2005) (holding that political question doctrine barred claims that Vatican Bank assisted the Nazi regime in committing wartime atrocities and was unjustly enriched by profits derived from slave labor).

An argument for dismissal on these grounds would also pose potential problems, however. Even in cases in which the United States has filed a Statement of Interest pursuant to a Foundation Agreement, there is considerable tension between the position that foreign policy requires dismissal of an action and the express recognition in the Foundation Agreement that the agreement does not itself provide an independent legal basis for dismissal. In *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), a Foundation Agreement case, the Eleventh Circuit pointed to this disjunct in holding that the political question doctrine did not apply. *Id.* at 1235-1237. Even if the federal foreign policy might warrant case-specific abstention by a federal court in a case involving Holocaust-era insurance claims arising under state law, furthermore, it would be difficult to argue that a similar claim brought under a cause of action created by federal law would also be nonjusticiable — a problem with courts’ treatment of the issue as one of justiciability, which is highlighted by the pending federal bill. *See n.7, supra.* And the argument would appear particularly difficult to make in the circumstances present here, where the allegedly dispositive foreign policy is expressed only in an amicus brief and public statements by sub-cabinet-level federal officials, sources that have not previously been considered to give rise to binding federal law.

Accordingly, in light of the request from the State Department not to address the impact of U.S. foreign policy on the litigation and the potential problems with the most obvious doctrinal grounds on which to support dismissal, we recommend that, consistent with the plain language of the court’s letter, any amicus filing by the United States merely articulate the federal foreign policy towards ICHEIC, including with regard to claims against a company that voluntarily participated in the ICHEIC process but was not a national of a country that entered into a Foundation Agreement.

However, should you determine nevertheless to address the impact of foreign policy on the disposition of this litigation, the doctrine of international comity (or its related cousin, *forum non conveniens*) might better harmonize general U.S. policy with the explicit recognition that this policy, at least as of the time of the Foundation Agreement, did not require dismissal of all claims. As noted above, in its initial decision, the district court refused to dismiss the claims against Generali on the ground of *forum non conveniens*, holding in relevant part that ICHEIC was not an adequate alternative forum and suggesting that no private forum could ever be adequate. We believe that these aspects of the district court's holding were in error. (Indeed, the district court itself has suggested that parts of its earlier decision might no longer be valid following *Garamendi*. See 340 F. Supp.2d at 505-506.)

If we were to address this issue in a filing, we would explain that the United States' policy towards ICHEIC should be given significant weight in any consideration of *forum non conveniens* or the related doctrine of international comity. Both doctrines require a court to consider the adequacy of the alternate forum as a relevant factor. See *Ungaro-Benages v. Dresdner Bank AG*, 379 F.2d 1227, 1238 (11th Cir. 2004). Here, the policy of the United States is that Holocaust-era insurance claims should be resolved exclusively by ICHEIC — a policy that strongly suggests, therefore, that ICHEIC was an adequate forum. We think that the Eleventh Circuit was correct in *Ungaro-Benages* to consider the Executive Branch's policy supporting the German Foundation as the exclusive remedy for Holocaust-era claims also to support application of international comity. See 379 F.3d at 1240. Conversely, the district court was wrong to suggest that the United States' policy towards ICHEIC was "irrelevant" to its analysis of the adequacy of the forum under *forum non conveniens*. 228 F. Supp.2d at 358.

Addressing this issue would also provide an opportunity to disagree explicitly with the district court's suggestion that a private forum cannot be adequate for purposes of *forum non conveniens* (or, presumably, international comity). There are several reasons why a private entity might be used to process claims in favor of a government body, such as a desire to preserve the independence or impartiality of the claims process. The State Department has previously supported the use of private entities of this type, such as the claims tribunal established by agreements between the United Arab Emirates and other countries to provide compensation to former camel jockeys. The State Department has an interest in preserving foreign states' ability to resolve claims through the use of a private mechanism, without rendering inapplicable in a U.S. court the doctrines of *forum non conveniens* or international comity.

Accordingly, should you determine that the government's filing should take a position on the legal effect of the federal foreign policy, an argument in favor of international comity could provide an alternate basis on which the court of appeals could affirm the judgment of the district court. We urged the court of appeals to follow a similar approach in a recent case in which a district court held that the State Department's position that dismissal of the action would be in the foreign policy interests of the United States, set forth in a Statement of Interest filed in the case, rendered the case nonjusticiable under the political question doctrine. While suggesting that foreign policy interests may properly support dismissal in some circumstances under the political question doctrine or the doctrine of case-specific deference, we suggested that the court

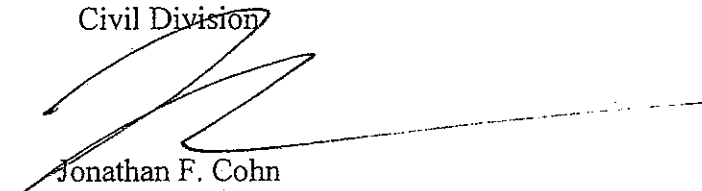
of appeals did not need to decide the question because the case was properly dismissed under the doctrine of international comity. *See Mujica v. Occidental Petroleum Corp.*, No. 05-56175 *et al.*, Brief of the United States as Amicus Curiae 10-12 (9th Cir. filed Mar. 17, 2006). A copy of that brief is attached.

CONCLUSION

For the foregoing reasons, I recommend that we file a brief as *amicus curiae* in support of defendants-appellees on question 1.

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