



United States Department of State

The Legal Adviser

Washington, D.C. 20520

August 18, 2009

Mr. Robert E. Kopp
Director, Appellate Staff
U.S. Department of Justice
Civil Division
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Robert:

I am writing in reference to *In re Assicurazioni Generali*, No. 05-5602, et al. (2nd Cir.). The Department of State received the attached letter sent on behalf of a three judge panel of the Court of Appeals for the Second Circuit inquiring whether the position of the Executive Branch remains the same as that expressed in the Government's October 2008 letter brief. The Department of State, recognizing the important legal and policy implications of the dispute, and wishing to honor the Court's request for advice, believes we should respond by acknowledging that our position remains in substance the same as that communicated in the October 20, 2008 letter.

We would recommend, however, that in responding to the Second Circuit's renewed request, you update the October 30, 2008 DOJ letter brief in two respects, perhaps in a supplemental statement of the kind envisioned by the court's July 29, 2009 letter. First, the reference on page 9 to a second Holocaust assets conference scheduled for Prague in June 2009 could be updated to indicate the outcomes of that conference relevant for this litigation. Specifically, a new letter could note that the United States and other participants at the Prague Conference agreed to establish the European Shoah Legacy Institute in the Czech Republic to facilitate an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation programs in Central and Eastern Europe. This and other on-going efforts of the United States focus on engaging countries and other relevant parties in voluntary compensation programs. Our ability to continue to negotiate and facilitate successful compensation agreements and alternative programs to settle Holocaust-era claims would be undermined if litigation eroded the status of ICHEIC as the exclusive remedy for Holocaust-era insurance claims.

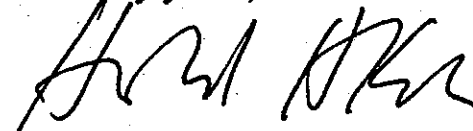
Second, a supplemental filing could more persuasively explain why the absence of an executive agreement with Italy does not affect the relative strength of U.S. foreign policy interests in this case. For example, the October 30 brief states without background on page 6 that the “United States did not conclude any agreement with Italy.” Later on that same page, in discussing *Garamendi*’s holding on the preemptive effect of U.S. foreign policy on inconsistent state statutes, the brief quotes the Supreme Court’s statement that “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” (emphasis added). While the letter brief goes on to argue that it is the U.S. policy that has preemptive force in *Garamendi*, not the specific executive agreements, a fuller, more persuasive explanation of our policy position, as well as a discussion of why our foreign policy should be considered by the court, despite the lack of an accompanying executive agreement in this case, seems warranted. The statement on page 8 of the letter brief—“as in *Garamendi*, the pertinent U.S. foreign policy interest is not diminished, for purposes of this case, by the absence of an executive agreement with Italy”—may read to the Second Circuit more like *ipse dixit* than as an argument as to why a U.S.-Italy executive agreement is not necessary for the foreign policy interest standing alone to have sufficient persuasive force in this case. We believe this point needs to be fleshed out further to fully answer the Second Circuit’s question.

The legal significance *vel non* of the absence of an executive agreement with Italy is obviously a question of great concern to the Second Circuit panel, a concern that led it not once but twice to seek the U.S. government’s views on this issue. Indeed, on page 2 of its August 1, 2008 letter to then-Secretary Rice, the court expressly states: “The Court is unaware whether ... [the U.S. Government policy] today encompasses insurers from countries (like Italy) not covered by executive agreements, as against companies from countries (like Germany and Austria) that are.” We do not believe the Second Circuit panel will be satisfied without fuller elaboration of why the Obama Administration continues to support the prior Administration’s policy. An updated version of the October 30, 2008 letter brief should specifically answer the court’s question by asserting, with persuasive supporting reasons, that “the U.S. Government policy today favoring exclusive claims resolution before the ICHEIC encompasses insurers from countries (like Italy) not covered by executive agreements, as well as companies from countries (like Germany and Austria) that are.”

In our view, at a minimum, a supplemental statement should provide more details on the extensive efforts undertaken by the Executive to resolve Holocaust-era claims through non-adversarial mechanisms. These efforts should be presented as part of a larger policy to ensure the greatest compensation for Holocaust victims and their heirs, as well as to support broad "legal peace" for countries and companies subject to on-going claims. We should underscore that the United States has long been committed, and remains committed, to a policy favoring non-contentious, cooperative mechanisms for resolving Holocaust claims more generally. We recognized that this was the most effective way of ensuring broad compensation to victims who could generally not meet evidentiary standards required by courts. The supplemental statement should offer a more complete explanation as to why our policy alone in this case deserves the same deference as our policy combined with the executive agreements with Germany and Austria. We should make clear to the Second Circuit that the agreements are not the basis for the policy, nor are we urging any particular legal grounds for dismissal of the claims in this case. Specifically, we could note that the relevant portion of the agreements with Germany and Austria simply required that the United States file Statements of Interest in U.S. courts recommending that suits against German or Austrian companies be dismissed on any valid legal ground. Our commitment to filing this statement informing U.S. courts of our policy interests was an essential element of securing the cooperation of those key partners as we pursued a measure of justice for Holocaust victims through cooperative mechanisms.

I am happy to discuss with you further if you would find it helpful. Should you have any questions or need assistance in developing further supporting reasons for inclusion in any supplemental statement, please feel free to contact attorney Sharla Draemel in my office at (202) 776-8343.

Sincerely yours,



Harold Hongju Koh
Legal Adviser