UNITED STATES
COURT OF FEDERAL CLAIMS

ISMAEL JOHN, et al., and PEOPLE OF BIKINI,	)	
Plaintiffs,	)	
v.	)	Docket Nos.: 06-289L
	)	06-288C
UNITED STATES,	)	
Defendant.	)	

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005-4018
(202) 628-4888
hrc@concentric.net

1288983.1

UNITED STATES
COURT OF FEDERAL CLAIMS

Pages: 1 through 181

Place: Washington, D.C.

Date: April 23, 2007

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005-4018
(202) 628-4888
hrc@concentric.net

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ISMAEL JOHN, et al., and PEOPLE OF BIKINI, Plaintiffs,	)	
v.	)	Docket Nos.: 06-289L 06-288C
UNITED STATES, Defendant.	)	

Courtroom 5, Room 505
National Courts Building
717 Madison Place NW
Washington, D.C.

Monday,
April 23, 2007

The parties met, pursuant to notice of the Court, at 10:08 a.m.

BEFORE: HONORABLE CHRISTINE ODELL COOK MILLER
Judge

APPEARANCES:

For the Plaintiff Bikini:

JONATHAN M. WEISGALL, Esquire
MidAmerican Energy Holdings, Co.
1200 New Hampshire Avenue, N.W., Suite 300
Washington, D.C. 20036
(202) 828-1378

APPEARANCES: (Cont'd)

For the Plaintiff Ismael John:

JON M. VAN DYKE, Esquire
DAVOR PEVEC, Esquire
University of Hawaii at Manoa
William Richardson School of Law
2515 Dole Street
Honolulu, Hawaii 96822
(808) 956-8509

For the Defendant:

KATHRYN A. BLEECKER, Esquire
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
1100 L Street, N.W.
Washington, D.C. 20530
(202) 307-6290

Also for the Defendant:

BRUCE TRAUBEN, Esquire
U.S. Department of Justice
Environment and Natural Resources Division
601 D Street, N.W.
Washington, D.C. 20004
(202) 305-0238

P R O C E E D I N G S

(10:08 a.m.)

THE CLERK: All rise. The United States Court of Federal Claims is now in session, the Honorable Christine Odell Cook Miller presiding. God bless this honorable Court. Calling the case of People of Bikini v. United States and Ismael John v. United States, Case Nos. 06-288 and 06-289 for oral argument on the motions to dismiss.

THE COURT: Good morning, everybody. For those of you who can be, please be seated. We'll begin as soon as I get my precious piles I've been lugging around in the correct order.

Okay. Mr. Weisgall.

MR. WEISGALL: Good morning, Your Honor.

THE COURT: Good morning. How are you?

MR. WEISGALL: Jonathan Weisgall. Very well, thank you.

THE COURT: Pleasure to meet you.

Professor Van Dyke.

MR. VAN DYKE: Good morning, Your Honor.

THE COURT: How are you?

MR. VAN DYKE: Good. Thank you.

THE COURT: And Mr. Pevec.

MR. PEVEC: Good morning, Your Honor.

THE COURT: Good morning. How are you?

We have here Ms. Bleecker. Good to see you. It's been awhile. And Mr. Trauben.

MR. TRAUBEN: Good morning, Your Honor.

THE COURT: I think it's the first time. Am I wrong?

MR. TRAUBEN: It is.

THE COURT: Good. Glad to meet you. I want to congratulate everyone on such excellent briefing before we begin. I understand that the government has already caused an eggbeater in my mind by dividing up issues instead of claims, but I will cope with that. Are there any preliminary matters we need to address?

MR. WEISGALL: Only one brief issue, Your Honor. Could I just take a moment to introduce some of the visitors who have come from the Marshall Islands?

THE COURT: Certainly. I hear Mr. Juda is here. I'm very honored.

MR. WEISGALL: Well, you're going to be hearing a lot about Juda 1 and Juda 2, but there is only one Juda. But actually maybe I'll just quickly introduce the Marshallese. Mayor Eldon Note from Bikini Atoll.

THE COURT: Thank you.

MR. WEISGALL: Their liaison, Jack Niedenthal. That is Juda 1 and Juda 2.

THE COURT: There he is.

MR. WEISGALL: Senator Tomaki Juda. Two council members, Quincy Caleb and Jackie Irujiman. In the back row, Senator Abika from Rongelap. We have Mayor Jackson Ading from Enewetak in the Ismael John case. We have Senator Jack Ading in the Enewetak case. And then three other Marshallese, Senator Iroij, Senator Michael Kabua, Senator Tony Dibrum, who used to be the foreign secretary of the Marshall Islands, and Senator Jebon Riklon as well. And the first secretary of the Marshall Islands embassy,

Charles Paul, and Dixie Lomae, the legal counsel, and the assistant to the ambassador, William Reiser. Thank you, Your Honor.

THE COURT: Well, needless to say, I am very impressed with the fact of this interest by the parties Plaintiff and their representatives. It certainly means a lot to the Court, and this interest has been carried forward by the excellent advocacy that we've had to date.

I wanted to share a bit of personal history. When I first came to the Court as a young judge, Kenneth Harkins was laboring mightily on the Juda and Peter opinions over a period of years, and I remember how much of himself he put into them. We certainly discussed his work, not the specifics but how interesting and compelling he found the cases. And I had occasion many times to reread Juda 1 and Juda 2, Peter 1 and Peter 2, and it all came into play again. What an excellent foundation he created for me to work on.

So, with that in mind, Ms. Bleecker, I guess

you too were young at the time at the Department of Justice.

MS. BLEECKER: That's correct, Your Honor. May it please the Court. I hope we haven't scrambled your mind or your thinking too much in the way that we've divided it, but we thought that because the cases had been consolidated for the purposes of oral argument only and because they do have major issues that overlap that we would try to address the issues for each Plaintiff or for both Plaintiffs.

THE COURT: You do your best. I'll do my best. Just tell me ahead of time who's going to talk about res judicata and collateral estoppel.

MS. BLEECKER: Primarily I will be doing that, although to the extent that there are statute of limitations issues that were resolved in the prior cases, because Mr. Trauben will be addressing statute of limitations and failure to state a claim, he may also have some discussion as to that.

What I will be primarily discussing, I'll begin by presenting a brief overview of the Compact in

the Section 177 agreement and then explain to the Court why it lacks jurisdiction over these claims initially. And this is consistent with our reply brief more than the moving brief in the Bikini case because this presents nonjudiciable political questions and also because as the Court of Claims held and the Federal Circuit agreed in the prior cases, jurisdiction has been withdrawn by the Court. And again, if the Court would rather address it any other way, I'm happy to do that.

THE COURT: No problem. But I'll ask you if the Federal Circuit were looking today as an original proposition, you would have preferred that they would have issued the 1979 D.C. Circuit Antolok decision instead of the one they issued, is that correct?

MS. BLEECKER: It has a more fulsome discussion of the issues that are being presented now, yes.

THE COURT: Fulsome is the right word I think. I would say it takes a different tact on the political question for sure. Are there any

distinctions between the Antolok case and the cases that were presented to the Federal Circuit in Juda and Peter that came up before them that were issued in Enewetak and Bikini that would have caused the D.C. Circuit to have emphasized the political question more than the Federal Circuit chose to address?

MS. BLEECKER: I don't believe so because I don't think quite frankly particularly in Juda 2, which is the main case as to both Plaintiffs here that discuss the issues before the Claims Court at the time, Judge Harkins really didn't address political questions.

THE COURT: It was before him, though. The argument had been made to him.

MS. BLEECKER: The argument had been made to him. And it sounds like by reading the Antolok case that it had been made similarly to how the plaintiffs in that case made it to the D.C. Circuit. So yes, the Federal Circuit could have as the D.C. Circuit did delved into the issues that had been addressed by all the parties, and in fact they were briefed to the

Federal Circuit.

THE COURT: Well, because remember I'm not dealing with this matter as an original proposition. I'm dealing with it with respect to the issues that the Federal Circuit determined survived and affirmed the survival of those issues and then deferred for further consideration the future, which you say wasn't done, but that's how I read the opinion.

MS. BLEECKER: We respectfully disagree. We don't think that either the Claims Court or the Federal Circuit stated that the claims survived. What they said was that Congress had properly withdrawn jurisdiction over these claims, and they also said in what we would describe as dicta that it was premature, and the decisions couldn't be addressed at this time, but there was nothing that we see in those opinions that said claims survive.

THE COURT: They didn't use that term, nor did they use the term ripeness, but what we're talking about is perhaps a condition. We could agree that that was a condition that was implicit in their

ruling, that the claims had been withdrawn. Pardon me. Jurisdiction for the claims had been withdrawn. However, implicit in that or as a condition to that was the notion that it be premature to judge any adequacy of the Nuclear Claims Tribunal awards until that matter had run its course.

I think that is consistent with Lagenegger, which dealt with the notion that a true extinguishment of the claims does not occur when there's an international forum available.

And in Enewetak, the Court, I know you call it dicta, but I regard it as a condition to their reaching their ultimate decision that it is mere speculation that an alternative remedy is inadequate and that it has to become concrete enough to sue on as implicit, and then they talked about not making a determination in advance of exhaustion of the remedy that had been set up, meaning the Nuclear Claims Tribunal.

These weren't added-on thoughts by Judge Harkins in either Peter 2 or Juda 2. They were part

and parcel to the reasoning of both Courts of why the withdrawal of jurisdiction would be honored.

MS. BLEECKER: Well, we respectfully disagree.

THE COURT: You better give me a good reason. Go ahead.

MS. BLEECKER: What the Courts did hold was that jurisdiction was properly withdrawn, and they relied upon Lynch and the line of cases that are discussed within Lynch and that have since cited to Lynch that state that Congress can properly withdraw the consent to sue on a claim. It can't extinguish the right, but it can change the remedy. And that's precisely what Judge Harkins found in Juda 2 to have happened here.

And the reason why I've restructured the argument a little bit in terms of arguing the political question first is because it's apparent by the cases that all the parties have cited that it is a difficult question to determine whether Congress can ever withdraw jurisdiction over particularly a

constitutional claim.

We believe they can, and we believe that it was done properly here. But even if there was some sort of conditional dismissal by the Court of Federal Claims and the Federal Circuit of these claims, the Plaintiffs still have an obligation to establish jurisdiction over the current claims. And we believe that the way their claims are fashioned now they do raise nonjudiciable political questions consistent both with Judge Sentelle's reasoning and Judge Wald's concurring opinion in Antolok.

And also we believe that the claims are barred by the statute of limitations for various reasons depending on the claim asserted.

THE COURT: Are you saying, assuming that the Court doesn't accept your argument that there's been a complete withdrawal of jurisdiction, that the claims in the amended complaint are barred under the political question doctrine to the extent that they do not merely carry forward the same claims that Judge Harkins allowed and the Federal Circuit agreed should

proceed forward or be held in reserve or whatever language we mutually can agree on?

MS. BLEECKER: No. Well, the claims are the claims, so yes.

THE COURT: No. What are the claims? Are the claims the claims that Judge Harkins said survived, which are different claims in both cases?

MS. BLEECKER: Right.

THE COURT: Or are they the claims as restated in the amended complaints to the extent of any difference between them?

MS. BLEECKER: I think either way they still have to establish jurisdiction of this Court at this point in time.

THE COURT: That's correct. But it would be a two-prong question to the extent that the claims in the amended complaint were different, because any new claims, you're right, would have to establish jurisdiction before they're able to proceed. With respect to any claims that were, if you will, held in reserve until the exhaustion of the alternative

remedy, those would not have to reassert themselves jurisdictionally because Judge Harkins and the Federal Circuit have already passed on those issues.

See, this is what we're confronted with, and it doesn't satisfy both sides. The government would rather that the Federal Circuit looked at this in terms of Judge Sentelle's majority opinion in Antolok, which would have said the whole issue is a political question. The Courts should not address it. Unfortunately, in the sense of the umbrella ruling, the government would wish that is not what the Federal Circuit did in Enewetak.

So I cannot proceed on that basis here. I might with respect to any additional or new claims that air in the many complaints before me now that were not raised before. That would be very appropriate for you to argue those de novo. No difficulty with that at all. But with respect to those other claims, there is a problem.

And the difficulty from Plaintiffs' point of view is there's a lack of symmetry. In Peter, the

only claim that survived was a breach of contract through the Federal Circuit's decision in Enewetak. In Juda, it's a little unclear whether the first takings claim survived. I have to spend a little more time on that. It was unclear whether Judge Harkins allowed it. With respect to the second takings claim from 1979 on, that did survive, and the breach of contract claim survived.

What this means as a practical matter is that the Plaintiffs are in a markedly different position, and that is that the most recovery that the Peter Plaintiffs could get or John Plaintiffs is based on breach of contract, which means no attorneys' fees, no interest. And Plaintiffs in Juda, which is our Bikini case, would be eligible if they succeeded on a takings theory to interest and attorneys' fees, which are big numbers in terms of what they're asking.

The breach of contract claims in both would be subject to further motions practice in terms of their sufficiency to state a trust relationship, And that's because we've had intervening authorities from

both the Federal Circuit and the Supreme Court on whether and to what extent one can premise a contract action based on a breach of an implied in fact fiduciary duty.

As far as the takings goes, from Juda's point of view, as I say, we have to find out whether we're talking about an earlier temporary taking or not, but the takings claim was allowed to proceed to whatever the next stage is. That assumes that the Court makes the determination that I don't think either party has really briefed to my satisfaction, which is not a standard I assure you. You're here to clarify any misunderstandings I have, and I well may.

But there really is an issue in this case of what is meant by a Court's determining whether a remedy is adequate. And I would appreciate your addressing the fact whether and to what extent the government takes the position that the settlement agreement as enacted in the Compact Act was intended to be a final settlement of all claims so that when reviewing the adequacy of the remedy, meaning the

establishment of the tribunal and the ultimate decisions of the tribunal, what the Court is looking at is did the tribunal do what it was mandated to do.

Did it disburse the monies that it was funded? Was there an intention that this be the limitation of the funding, or was the intention rather that the adequacy of the remedy be established by funding the ultimate remedy that was awarded by the tribunal?

See, there are two ways to look at adequacy. One is, I'm just going to pick a figure, if $100 million were allotted for a tribunal and the tribunal awarded $30 million, the argument could be made that the remedy was inadequate. If $100 million were allotted for a tribunal and the tribunal awarded $600 million, the decision well could be this was an adequate remedy because the remedy was encompassed within the amount that the tribunal found, and it has been paid so that it was at least adequate.

Of course, there would be no way to enforce the tribunal award other than by remission to Congress

would be another point of view that probably the government would have, but I don't have briefing yet on what the Court does in determining whether the remedy is adequate.

And although I'm very willing to hear you on complete withdrawal of jurisdiction, I want to let you know where I am, which is I believe that my first job is to determine whether the alternative remedies, the two decisions of the Nuclear Claims Tribunal, met the standard of adequacy of the original Compact alternative remedy that was established.

MS. BLEECKER: I have several responses to that. Hopefully I can remember them all. The claims adjudication fund was only one small part of the Section 177 agreement.

THE COURT: That's correct.

MS. BLEECKER: And specifically it allocated or stated that $45.75 million would be available to the Claims Tribunal as necessary for whole or partial payment of monetary awards to be distributed in annual amounts, and it has some amounts there. This is

Section 6 of Article 2 of the Section 177 agreement that was attached to both of the claims.

THE COURT: So you read the Compact and the Section 177 agreement as establishing a fund, part of which can be used for purposes of payment in whole or in part of any awards that are made?

MS. BLEECKER: Yes. Correct.

THE COURT: And that's the total recourse?

MS. BLEECKER: With respect to the Claims Tribunal. But the Section 177 agreement set up a comprehensive scheme to pay for and to fund a variety of programs, environmental programs, health, agriculture. It allotted in a separate section, Sections 2 and 3 of the same article, it provided $75 million to the Bikini Distribution Authority and $48.75 million to the Enewetak Distribution Authority to pay for, I don't want to misstate here, additionally to pay for loss or damage to property and persons to those people.

So if the Court is going to consider -- and again, we don't think it should -- but if the Court is

going to consider the adequacy of the compensation, then the Court has to look at the entirety of the scheme and the intent of the scheme. And in our view, the entirety and the intent of the scheme also involves full settlement of all the claims.

THE COURT: Well, it's not so much the adequacy of the compensation. Wouldn't I be looking at the adequacy of the remedy?

MS. BLEECKER: Yes, I agree. As you were describing one of the things you may have to review in determining the adequacy of the compensation, you began to touch on things that we perceived to be political questions. You said you would have to look at what the Claims Tribunal did, other awards that they gave. Arguably, you would have to look at how the original $150 million was invested.

THE COURT: That isn't what I contemplated.

MS. BLEECKER: Well, I don't think you should. I mean, the Section 177 agreement provided to the Republic of the Marshall Islands the responsibility to constitute the Claims Tribunal and

for that body of the Republic of the Marshall Islands, which is now a sovereign state and it can't be challenged in that regard, to distribute the fund consistently with the agreement.

So this Court is being asked to, if we get that far down the line, you're being asked to review the actions of a body of another sovereign state, and we think that's beyond the reach of this Court under the judiciability or under the political question doctrine.

THE COURT: Well, certainly as a matter of first order, I have to determine what was contemplated that the Court would look at. There is a big difference between determining whether the tribunal discharged its mandate, did it entertain the claims, the nature of the proceedings that it entertained and the fact it entered awards and to find out if in fact, and the parties seem to agree, that monies have been duly distributed for the authorized purposes under the agreement. That is one way of determining adequacy of the remedy.

Another way of determining adequacy of the remedy is a more textual determination, and that is if the funding was $500 million for a variety of purposes -- I'm putting aside the $90 million extra to the Bikini people -- if the $500 million was for a multiplicity of purposes and $45 some million was dedicated by Section 6 for claim adjudication, whether or not that $45.75 million was intended to be whole or partial payment with subsequent distributions which we know that this agreement envisioned or whether or not that $45 million was intended to be the sole amount, and as long as it was applied to whole or partial payments, that fulfills the Compact, and therefore, the remedy is adequate.

There may be ways the Plaintiffs suggest it to be looked at, but you're saying that irrespective of the fact that the Federal Circuit in Enewetak could have well issued an Antolok decision but didn't and was impressed with the notion that the adequacy of the remedy would be preserved as a legal question, that when you get into it, an examination of the adequacy

of that remedy poses a political question which the Federal Circuit should have foreseen and that I can't make that examination. You'd want me to go out on that limb.

MS. BLEECKER: Precisely. I don't consider it a limb. I consider it a responsibility. From our point of view, the Compact Agreement, including the Section 177 agreement, had two primary purposes. One was for the United States to recognize the Republic of the Marshall Islands as a self-governing state, and the other and as an integral part of that, it was to settle the claims and to provide a comprehensive system for compensation for the loss and damage that resulted from the United States' nuclear testing program.

So you can't attack the settlement without in our view attacking the demonstrably -- I'm sorry, but the words of Baker are a little heavy. "The textually demonstrative constitutional commitment of the issue to Congress and the Executive of the power to recognize a foreign government, which includes the

power to settle claims." So that tees up a political question. And notably, I mean, I'm not at all saying that the Court is bound by the reasoning in Antolok, and there were splits among the judges.

THE COURT: I'm not in any way affected or influenced by that. It's not even persuasive authority because I'm governed by the Federal Circuit in Enewetak. Those are my marching orders.

MS. BLEECKER: Yes.

THE COURT: But it was very important to determine what the Federal Circuit could have decided and chose not to decide because it didn't. It didn't give us an Antolok decision. It could have. It didn't.

MS. BLEECKER: What it decided on the issue of withdrawal of jurisdiction was that it rejected pretty much the same argument that the Plaintiffs are making here. They tied it to the Blanchette case, the railroad reorganization cases, but it's similarly addressed in our cases or in these cases by Ruckelshaus v. Monsanto and some other cases.

But the Court said specifically that the Supreme Court did not hold that a fallback Tucker Act claim was necessary to sustain the constitutionality of every alternative procedure. So at least to the extent of that argument that it's per se unconstitutional to withdraw --

THE COURT: Well, that deals with whether jurisdiction under Tucker is specifically withdrawn as opposed to whether or not it is affirmatively represented as a fallback position. And we know from all the case law that the Tucker Act remedy does not need to be affirmatively stated. The key concern is whether it is specifically withdrawn.

And in Dames & Moore, there was a representation of the government that it hadn't been withdrawn, and in Blanchette, you were dealing with a situation where the alternative remedy hadn't been explored, and the Court was impressed with the fact that that forum would have to run its course.

The thing about Blanchette or the regional rail reorganization cases as they are known is that

that involved a domestic piece of legislation and that it may be somewhat different.

MS. BLEECKER: Yes. As do many of the other cases that the Plaintiffs have cited.

THE COURT: That's correct.

MS. BLEECKER: And we think that the fact that this case arises in the context of an international agreement that as a key part of which was the recognition of a sovereign state that that does differentiate this.

And we don't find anything in Dames & Moore which didn't specifically address the political question either but forbids the Court from finding that jurisdiction was properly withdrawn or that supports the Plaintiffs' argument that -- let me rephrase that.

Nor is there anything in Dames & Moore that addresses the political question one way or the other, and so that doesn't foreclose this Court from examining the possibility of political question issues arising here.

THE COURT: What you're saying is that in discharging the implicit mandate of the Federal Circuit, I mean, they didn't remand the case or reverse the case with directions. What they did was affirm all of Judge Harkins' substantive rulings.

They also affirmed the withdrawal of jurisdiction, but they indicated that Congress intended the alterative procedure be utilized, and we are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate, and then they cite Blanchette. "In any event, we do not read Blanchette to mandate such a determination in advance of the exhaustion of the alternative provided."

I understand your argument, but I think your time is better spent in addressing where we go from here, because I do read the Federal Circuit's decision as not a holding that withdrawal of jurisdiction has been affected but rather that the withdrawal of jurisdiction is affected condition on a possible

reexamination of the adequacy of the remedy based on what the Federal Circuit itself said.

It's interesting that you would call that dicta. I think it's intertwined, but you have a situation here. I think it is compelling argument on the government's part that the Compact itself provided for what you do in Article 9 with changed circumstances, and the remission of the claim is to Congress, and that is where the parties are. They went to Congress when they received their awards, and Congress to date has done nothing, although having been apprised that the awards entered -- I shouldn't say entered. I mean by the tribunal.

In 2000 to 2001 respectively, however, there were Senate and House hearings in the 2005 timeframe, and nothing has been done since. So my question to you is, what is your position on the pendency of these matters in Congress?

MS. BLEECKER: The only recourse the Plaintiffs have for getting additional compensation beyond what's in the agreements and what was intended

in the agreements is to go to Congress.

One thing that I haven't had a chance to emphasize is that the initial $150 million was not a flat sum, take it or leave it. It was intended to be invested and the proceeds to be used perpetually. Something apparently happened, and I don't know what it is, and I'm not sure that this Court is the appropriate body to examine that, but the fund did not prove apparently to be perpetual.

THE COURT: Excuse me. I misspoke earlier when I referred to it as a $500 million fund. I correct myself. That's a more or less rounded off total of the awards, $150 million. And given the timeframe in which that fund was established, understanding there were other purposes, it's not unreasonable to assume that if the monies had been properly invested or invested as contemplated that under the agreement in roughly 1983, mid 1980s .timeframe to today, that fund could have easily accreted $500 million.

MS. BLEECKER: I would think so.

THE COURT: Yes. But in your view, that's a matter for an accounting by a Congressional committee of some kind?

MS. BLEECKER: Yes. Absolutely, for the reasons that I discussed earlier, that it's the Marshall Islands that is operating the fund and the Claims Tribunal so that anything that's done there, the Court shouldn't be looking over the shoulder of the RMI. But Congress as a full party to the Compact agreement is the appropriate body to consider the present circumstances and whether they fall within the changed circumstances.

THE COURT: The State Department made a report that it didn't believe in 2005 also that under the changed circumstances clause that recommended against any additional payments, and I know that the representative of the State Department is here. It would be very helpful to the Court if Congress would give a signal that it is making a final determination.

MS. BLEECKER: Mr. Weisevelt was in the best position --

THE COURT: To address it. I don't know the status of the matter.

MS. BLEECKER: I don't either. He has had recent contact with Congress and just has generally alluded to it, and I'm not saying he has to answer any questions, but to the extent I don't have the knowledge, but from what he's told us generally --

THE COURT: It is a waste of time to have the Court attempt to guess when or if Congress is going to act in this matter. It is also a waste of effort for the Court to in any way impinge on the separation of powers. But all the cases that we have have the advantage of advising the Court when final action has been taken or a final extinguishment of the claims, and uniquely these two cases don't give us that at this point.

I mean, do you wait 10 years? Do you wait five years? Do you wait eight years? When do you determine Congress has finally acted?

MS. BLEECKER: I don't think for the purposes of this Court that's relevant. The

agreements charge or set it up so that Congress and so that the parties, so that RMI, come back to Congress to seek additional funds.

THE COURT: There is no intention in the entire structure in your view that in any way these arbitration decisions would be judicially enforceable?

MS. BLEECKER: Correct.

THE COURT: Also, there's no way in your understanding of this that if the Court found that Congress was not going to implement these decisions beyond the amount of funds that have been committed, in other words, had made no decision to add more funds to meet the award amounts, that that would mean that the remedy is inadequate and the Court could begin de novo to try the claims that survived, which are not all of Plaintiffs' claims?

MS. BLEECKER: Respectfully, I understand you have a different view, but we continue to say that the claims didn't survive and that this Court must look anew both at the new claims and whether they can reassert the old claims.

THE COURT: In other words, in your mind, the Federal Circuit's Enewetak decision could have well stopped with the withdrawal of claims have been affected, and therefore, the Court has no jurisdiction. The parties are emitted to Congress, end of subject, with no discussion about the adequacy of any residual remedy in the Courts.

MS. BLEECKER: Yes.

THE COURT: Or I should say the availability of any remedy and the Courts to judge the adequacy of the alternative remedy, and you'd say yes to that. I was the one who garbled my statement.

MS. BLEECKER: I do need to point out -- and this is kind of cutting my own throat perhaps.

THE COURT: The government never does that.

MS. BLEECKER: But Article 9, the changed circumstances petition, does say that it is understood that this does not commit Congress to authorize appropriate funds. So there is no guarantee even when Congress reaches a final determination that they will give more funds, but that was the intent all along.

THE COURT: Well, that's why you're saying that the fact that you have an arbitration award that, if you will, vastly exceeds the amounts originally appropriated for this purpose does not have any impact on any legal claim.

MS. BLEECKER: Correct.

THE COURT: You're saying Congress may choose to fund it, may not. May choose to appropriate monies for a different purpose. By that, I mean Congress may say we see the awards, but we don't regard ourselves as funding awards, but we will appropriate another, pick a figure, $90 million. Whatever. Okay.

MS. BLEECKER: Yes.

THE COURT: I will say that from a State Department drafting point of view, if there's ever an occasion in the future, you know what the glitch is here. This agreement could have been airtight, but it wasn't. And as well as the final settlement of the Bikini claims, it lumps together the notion of payment with the remedy that has been set up by the agreement.

So Plaintiffs can argue, well, this remedy fully hasn't been implemented, and therefore, there is no final agreement.

MS. BLEECKER: But there's no allegation that the United States hasn't made the payments that it agreed to in the Compact agreements. In other words, they put up the $150 million. They paid Bikini the additional $90.

THE COURT: It's not a performance argument. They're saying the adequacy of the remedy has not been tested, and one of the ways Plaintiffs want to test it is if the remedy is only to pay up to that portion of the $150 million that was designated for claim settlement purposes, that the remedy is inadequate in view of the fact that you have an arbitration tribunal set up, a Claims Tribunal I should say set up, and the Claims Tribunal has determined the award is vastly in excess of that amount. That's what Plaintiffs are going to argue.

MS. BLEECKER: Yes, it is. But again, I keep coming back to the agreements were intended to

fully settle all of the claims.

THE COURT: You set up a full structure with the circle around it and closed.

MS. BLEECKER: And the Claims Tribunal's jurisdiction was precisely the same as the language of the claims espousal in Article 10 of the Section 177 agreement so that there can be no question that the claims that were espoused are the very claims that were ruled upon by the Claims Tribunal. And that, as Judge Harkin did find --

THE COURT: It's Harkins, but that's okay.

MS. BLEECKER: Harkins. Sorry. Both RMI and Congress intended this to be a full settlement of all the claims. So the only way in our view that the Court can look behind it even with respect to the claims that you believe were preserved and Plaintiffs' briefs make it clear that challenge to the espousal, which includes a challenge to RMI's sovereignty and their authority or ability to espouse claims of their own nationals, and you would have to second-guess the President and Congress in fashioning this remedy, and

you would be intruding into areas that are specifically reserved to the Executive and in this case Congress.

THE COURT: What do you think the Federal Circuit had in mind by what you regard as its dicta?

MS. BLEECKER: That the case as resolved by Judge Harkins addressed the withdrawal of jurisdiction, and that was affirmed.

THE COURT: What was the dicta for?

MS. BLEECKER: Because the holding of Judge Harkins' decision in Juda 2 was the claims were properly withdrawn. It's not linked to the espousal provision. There's no requirement that in order for the withdrawal to be effective the espousal has to be effective. Those are all issues that were fully addressed by all the parties, and they had a full and fair opportunity.

And so at the very least, the Plaintiffs should be collaterally estopped on those subissues that developed or that resulted in or were an integral part of -- I'm trying to get the right phrase for

collateral estoppel --

THE COURT: Necessarily decided.

MS. BLEECKER: Thank you. Necessarily decided. The Court's resolution in the issues were critical and necessary to its ultimate determination, and those issues were fully aired and fully addressed, and so Plaintiffs are back now with to a certain extent some of their old claims and certainly with new claims attacking the espousal. And there's no way that this Court can or should be reviewing the United States Government's decisions to recognize RMI and have the claims settled or RMI's authority to espouse the claims and to carry out the Compact agreement.

THE COURT: Do you want to reserve your time?

MS. BLEECKER: Thank you.

THE COURT: Thank you very much, Ms. Bleecker. Mr. Trauben.

MR. TRAUBEN: Good morning, Your Honor. Bruce Trauben for Defendant, United States. And just coincidentally, I'd like to note that today happens to

be the 20th anniversary of the oral argument in Juda 2 that led to the dismissal based on the Compact Act, so maybe we'll get the same result.

THE COURT: Well, if that's what anniversaries mean to you.

MR. TRAUBEN: I'm here to address the statute of limitations and the --

THE COURT: Why do you think the case has gone on that we're looking at it again after 20 years?

MR. TRAUBEN: I'm sorry, Your Honor?

THE COURT: Why do you think we're looking at this case again after 20 years?

MR. TRAUBEN: Because from my perspective, the Plaintiffs are looking for a deep pocket. Rather than going to the RMI where they should be going, they're coming to the United States because there seems to be an endless pot of money.

THE COURT: Tell me why you think they should be going to the RMI.

MR. TRAUBEN: They should be going to the RMI because, at some point, this is an international

agreement between two countries, and at some point, the RMI took over some responsibility, and that was when the Compact agreements went into effect in 1986. So if they're not getting the money that they were supposed to get, then they should be going to the RMI and asking the RMI why is that happening.

THE COURT: Do you think under Article 9 of the Compact, the agreement implementing the Compact, that they could go to Congress and say we have a changed circumstances here, this fund was not administered in a way that it generated the money that could have satisfied a lot of the awards that were made by the Claims Tribunal, and therefore, you should conduct a Congressional investigation, or do you think that's beyond the jurisdiction of Congress?

MR. TRAUBEN: Well, also under Article 9, the changed circumstances that are contemplated are for claims that were unknowable at the time such as perhaps cases of cancer or something like that which did not accrue until sometime later. So where the damages were unknowable, then they could come back and

identify those as changed circumstances warranting additional funds. But mismanagement of the funds given to the RMI is not one of the criteria for which they can come back to Congress and seek more funds.

THE COURT: Who would have jurisdiction over an inquiry against the RMI if Plaintiffs wanted to compel the RMI to make such an investigation or accounting?

MR. TRAUBEN: Right. Under the Compact agreements, if there are questions regarding the distribution, then the Nuclear Claims Tribunal has jurisdiction to make inquiries into the distribution of funds.

THE COURT: You don't think a changed circumstance has occurred that renders the provisions of the agreement manifestly inadequate?

MR. TRAUBEN: I'm sorry, Your Honor?

THE COURT: Well, reading Article 9, I'm asking if you agree that anything has occurred that renders the provisions of this agreement manifestly inadequate.

MR. TRAUBEN: Has anything occurred that has made this manifestly inadequate?

THE COURT: Right.

MR. TRAUBEN: Not within the scope of Article 9 that I'm aware of, Your Honor.

THE COURT: You're saying it's limited to loss or damage to property and persons or is discovered after the effective date of this agreement, and they were not and could not reasonably have been identified, and it's limited to that situation as opposed to two other issues: (1) the adequacy of the RMI's discharge of its responsibilities or (2) whether or not an award that exceeds the amount originally committed for award purposes should be implemented. Those aren't changed circumstances in your view?

MR. TRAUBEN: Right. That's correct. Mismanagement of the funds by RMI, if that's what maybe there should be an inquiry of that, that's not a changed circumstance that Congress needs to respond to.

THE COURT: What Court has jurisdiction over

claims against the RMI if there were such one levied to ask for an accounting?

MR. TRAUBEN: I believe that the NCT, the Nuclear Claims Tribunal, has jurisdiction.

THE COURT: It's not a matter under the general jurisdiction of any tribunal that was set up to hear matters of this nature in Marshall Islands?

MR. TRAUBEN: Not that I'm aware of.

THE COURT: So you're saying anything that has to do with this agreement is under the jurisdiction of the Nuclear Claims Tribunal.

MR. TRAUBEN: It's specified in the Compact agreements. I believe it's in Article 4. Yes. It says that, "The tribunal shall have jurisdiction to render final determination upon all claims past, present and future which arise out of the nuclear testing program and disputes arising from distributions under Articles 2 and 3 of this agreement." And that's what I'm basing my response on.

THE COURT: Well, I don't know what it said,

but if you can give me a brief summary of the report of the State Department to the U.S. Congress recommending that there are no changed circumstances, if you can give me a summary of that. What exactly was that State Department report addressing as changed circumstances, if you know?

MR. TRAUBEN: Actually, I really don't know what was contained in that report. I looked at it. It's been awhile. I can't recall right now. I wasn't prepared today to summarize the State Department's report.

THE COURT: No.

MR. TRAUBEN: But it's just my understanding that the State Department's evaluation concluded that the changed circumstances request did not present or fall within the changed circumstances contemplated under the agreements.

THE COURT: And what were the changed circumstances that were presented? I was just wondering if you knew. If you don't, fine.

MR. TRAUBEN: I just have a general

understanding that the Plaintiffs or the Marshall Islands are just seeking additional funds based on their contention that the original award was inadequate.

THE COURT: Thank you. Now that I've gotten you off track, you're welcome to go back on and address the statute of limitations and failure to state a claim.

MR. TRAUBEN: That's correct, Your Honor. First let me summarize some of the pertinent facts, and then I'll get to the merits. But briefly, Your Honor, the people of Bikini were removed from the Atoll in March 1946 in advance of nuclear testing at the Bikini Atoll, which was conducted from 1946 to 1958.

THE COURT: Nineteen forty-six to 1958?

MR. TRAUBEN: Nineteen forty-six to 1958. That's correct. They were permitted to return in 1969 and resided on the Atoll for about nine years until 1978 when some radiological surveys indicated that the conditions at Bikini actually were not suitable for

human habitation, and so the people of Bikini were once again removed from their Atoll in 1978, and they have not been permitted to return.

The people of Enewetak were removed from their Atoll in December 1947. Nuclear testing was conducted in Enewetak from 1948 to 1958. In 1958, the President halted all atmospheric testing of nuclear devices, and then after an environmental cleanup of Enewetak, which was conducted during the 1970s, they were permitted to return in 1980, and they've remained there since.

THE COURT: And Judge Harkins found a big difference in the circumstances between the two sets of Plaintiffs in that the people of Bikini were reevacuated in 1978.

MR. TRAUBEN: That's correct. And as Your Honor is aware, the prior lawsuits that ensued, I don't need to go into those. I would point out that, however subsequently to dismissal in 1986 that the people of Bikini then brought their claims in 1993 to the Nuclear Claims Tribunal. In March 2001, the

Nuclear Claims Tribunal awarded $563 million about to the Plaintiffs, and what they're seeking here as damages is that $563 million less about $2 million that they have received in two payments from the NCT.

The people of Enewetak brought an action before the Nuclear Claims Tribunal in 1990 seeking compensation for their loss of use and consequential damages. The NCT awarded damages in April 2000. They were awarded $386 million, and that forms the basis of their claim here less amounts received.

And you're aware of the changed circumstances petition. We've discussed that, and the Plaintiffs put a lot of stock in the January 24, 2005, report to Congress. They look at that as a triggering event. We can discuss that.

THE COURT: You're talking about for a new cause of action?

MR. TRAUBEN: Right.

THE COURT: In other words, you're addressing the issue of whether or not the statute of limitations bars claims in the amended complaint that

differ from the original claims because the issue of the timeliness of the original claims has already been decided?

MR. TRAUBEN: Yes. Especially in the Peter case.

THE COURT: Right. The takings claim is gone.

MR. TRAUBEN: Exactly.

THE COURT: Now are you saying that in the amended complaints, the successor to Peter, the John case here, is bringing new claims that arise based on subsequent events?

MR. TRAUBEN: That's what the Plaintiffs will say.

THE COURT: Right. And to what extent do they embrace the earlier claims?

MR. TRAUBEN: Well, actually the people of Enewetak reasserted the original claims in Count I in John. They reassert the same Count I, the taking of the Atoll, the temporary taking from 1947 to 1980. So that claim was already found. That is our collateral

estoppel argument. It was already found to have been late when brought in 1982.

THE COURT: Well, what I'd like to hear from you -- and you can certainly reserve your time responding to Plaintiffs because you're preaching to the choir about the original claims.

MR. TRAUBEN: Okay.

THE COURT: They're gone. They're gone in the sense of resolved and embraced within a final judgment. In terms of events that have occurred after giving rise to claims that are new or different, what has occurred, and what's your response? In other words, to what extent are the amended complaints in this case new and different than those that had originally been pleaded?

MR. TRAUBEN: Right. Well, they allege a taking of their takings claim in John in Count II. Excuse me. Count III they allege a taking of their takings claim. In Count IV, they allege a taking of their breach of implied contract claim and that these takings are a result of the inadequate funding of the

NCT. In Counts V and VI, the Plaintiffs -- actually in both cases in Counts V and VI -- they allege a taking of the Atoll by entering into or enactment of the Compact agreement in 1986, and also they allege a breach of implied contract by the enactment of the Compact agreements in 1986.

But in Count I in Bikini, they allege a taking of their legal causes of action as well, and they also allege a taking of the Atoll through the compact agreement and a breach of implied contract. I already said the breach of implied contract by the Compact agreements.

So what they are looking at is events that occurred actually in 1986. It's the government's position that the event that they're complaining about is the entering into of the Compact agreements. That occurred in 1986, so anything that happens subsequently by a federal government action. They're complaining that or they argue that their claims were triggered when the NCT issued its decision either in March 2001 in the case of Bikini or in 2000 in the

case of John.

THE COURT: In other words, the full extent of the damage was not known until the alternative forum that had been set up rendered its decision advising them of the full extent of the injury/damage. That's their theory in your view?

MR. TRAUBEN: That's what they argue. Right. But actually they had long known what their injuries were. Their injuries were what they were when they came back to the Atoll in 1980 in the case of Enewetak. And when the people of Bikini were evacuated in 1978, that's when the second taking I suppose occurred, and they knew what their injuries were then.

And also even in Juda, it's interesting that the Court in Juda notes that at that time, they were seeking between $450 and $600 million. So they knew the value of the property that was lost at that time, and they had estimates certainly of what their claims were, and they knew what they were going to get at that time through the Nuclear Claims Tribunal. At

least they knew the maximum amount that could be awarded.

But that aside, you have to look at the U.S. Government role in all this, what action was conducted by the United States that could possibly have triggered a claim against the United States. And the only thing that they can point to is entering into the Compact agreements in 1986. There's no subsequent action after that that they point to in any of their papers or the complaint, and maybe they will today, but I haven't seen it yet.

THE COURT: Let's say Congress absolutely stonewalled Plaintiffs under this changed circumstances clause, totally ignored a petition, wouldn't act on it. And let's say for purposes of argument, the petition was clearly based on what was contemplated by changed circumstances, such as finding a new type of injury, something of that order. What forum, if any, would you say would be available for redress if that happened?

MR. TRAUBEN: Their forum, it's political.

Their forum is in front of Congress. They have to petition the Administration and Congress to seek redress.

THE COURT: Or go to the Nuclear Claims Tribunal again?

MR. TRAUBEN: Or perhaps the Claims Tribunal if the question is the distribution's handling of the funds. But here their plea is to the conscience of the sovereign, and that would be through the Administration and the Congress.

They also assert new breach of implied contract claims, and here again, to have a breach of implied contract, there has to have been a meeting of the minds to some actions that occurred that could have created a contract that the United States then breached. And certainly anything that occurred with respect to the breach of implied contract terminated in 1986 with the Compact agreements because here you have an explicit contract which would preclude any implied contract.

So, to the extent that they have any

surviving breach of implied contract claims in 1986, they were certainly extinguished at that time or breached at that time. That's the latest period that the breach could have occurred was in 1986, and so those breach of implied contract claims would have expired in 1992 and were untimely filed in 2006.

And similarly, Your Honor, getting to the final part that I wanted to address this morning, and that's their failure to state a claim. If the final governmental action occurred in 1986, they have not cited any governmental action within their papers that also now would be sufficient to state a claim. In other words, they failed to allege any affirmative governmental action upon which they can state a claim under Rule 12(b)(6).

That's just another grounds for dismissal of the takings claim, and as I was saying, Rule 12(b)(6) provides alternative grounds to dismiss their breach of implied contract claims.

THE COURT: I guess I'm not following you. How does the lack of any governmental action since

1986 bear on the implied contract claim?

MR. TRAUBEN: The elements have to be met for the creation of an implied contract.

THE COURT: And you're saying that's dealing with the U.S. Government?

MR. TRAUBEN: That's right. So I've touched on all the points I wanted to make. Does Your Honor have any additional questions I can address?

THE COURT: Not at this moment, but I think your time will best be used in response.

MR. TRAUBEN: Okay.

THE COURT: This is one where Plaintiffs have an uphill battle.

MR. TRAUBEN: Okay. Thank you, Your Honor, and I'll reserve the rest of my time.

THE COURT: Thank you very much, Mr. Trauben. Would you like a short break before we begin your argument?

MR. WEISGALL: That would be good.

THE COURT: How much time would you like?

MR. WEISGALL: Ten minutes.

THE COURT: Okay. We'll break until 11:25.

(Whereupon, a short recess was taken.)

THE CLERK: Please be seated.

THE COURT: Mr. Weisgall.

MR. WEISGALL: Thank you, Your Honor. Still good morning, Your Honor. You've raised a myriad of questions, and I'm sure you'll start with some on your own, but I want to try to make a couple of basic points at the beginning.

I want to discuss first of all I think I know where you're headed on the question of this conditional dismissal, but it is interesting that indeed it was 20 years ago today that I stood in front of Judge Harkins arguing -- and I have the transcript -- that there wasn't going to be enough money in the tribunal to pay the award because the $150 million had to earn 12 percent annually to pay all these folks and the prime rate was then at 7.

What did Judge Harkins do? Ruled that it was premature. The question wasn't ripe, and that is what the Federal Circuit did as well. We're

unpersuaded. Where I'm headed with this is I think that this road takes us back to this Court because it's a takings claim. It's a just compensation issue. I don't think the road takes us to Congress with the changed circumstances provision, and I will get there in a moment.

Obviously the Bikinians went back to the Claims Tribunal, brought the claim, and it is no longer premature. The issue is ripe today. The alternative procedure has run its course, to use Judge Harkins' original words.

I think it's also important that this is hardly a holding from Antolok, but I think Judge Sentelle did make a very important point noting the distinction between the tort cases, the unconstitutional tort cases in Antolok versus the takings cases, and he wrote at page 378 of that opinion, "If there is an uncompensated or inadequately compensated taking, then Plaintiffs' remedy is in the Claims Court under the Tucker Act", and then he added, "Since the Plaintiffs in Antolok who had brought tort

claims, they have not alleged a valid constitutional claim, we don't face the difficult question of whether inferior courts may be barred by an act of Congress from reviewing a statute."

Then on the next page, he used that same expression, "We don't face the difficult question". In fact, I'd even go so far to say that Sentelle, joined by Star, actually was joined philosophically by Chief Judge Wald, who said the Fifth Amendment prohibits only takings for which just compensation has not been paid. So I think you've really got three courts backing up your point that you were asking of the government and I think supporting our argument that there has to be a forum to hear these claims after the alternative remedy is exhausted.

The government has argued that Dames & Moore is not relevant to this case. I think it is absolutely four square in control of this case. First of all, both judges, both Judge Harkins and the Federal Circuit in People of Enewetak, cited it. You had a very similar issue where a company seeking to

enforce a judgment against a government agency of Iran found that assets were frozen. They came challenging that procedure, and again, the Supreme Court said it's premature to rule on whether there is a taking.

But the Court did say it is ripe to adjudicate the question whether there will be a remedy in the Court of Claims under the Tucker Act. This is towards the end. This is 688 to 689. They answered yes. I'm quoting, "To the extent Petitioner believes it has suffered an unconstitutional taking by the suspension of the claims," and I'll get back to that, "we see no jurisdictional obstacle to an appropriate action in the U.S. Court of Claims under the Tucker Act."

And Justice Powell, I think that's what he was getting at in his concurrence. He wrote, "The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a taking claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges." That's his very short concurring opinion.

Dames & Moore I think stands for the proposition that ultimately there has to be a safety net, a fallback in this Court to hear claims that arise under some agreement suspending them in favor of an alternative remedy. So what the Supreme Court said to the folks in Dames & Moore was go to the U.S./Iran Claims Tribunal. If you find that your claim is not fully compensated, come back here.

And by the way, the point about suspension, the agreement in Dames & Moore between the U.S. and the government of Algeria, says the U.S. is obligated to terminate the claims. The Supreme Court I think correctly characterized that the way you have earlier as a suspension. I think you used the words "a conditional dismissal." It was conditional because of the exhaustion requirement. Just like Dames & Moore had to first exhaust that tribunal, that Claims Tribunal, my clients had to exhaust the Nuclear Claims Tribunal remedy. We did that, and of course now I think it's hard to duck the real constitutional issue.

I think the elephant at this garden party,

if I could, Ms. Bleecker didn't say it and I can't show you in the brief, but the only logic of saying your jurisdiction is withdrawn and the Plaintiffs can't come back here is that Congress can pass a law withdrawing jurisdiction over takings claims. I mean, this law, if there is no forum where Plaintiffs can go, I think we have a law essentially abrogating the Fifth Amendment because there would be no remedy for the shortfall.

Now you've asked a lot about the changed circumstances provision. That I think is a smokescreen. That implies something sort of deliberate. I don't think it's irrelevant. That's the point. You have a question before you on a motion to dismiss, which is do you have jurisdiction to hear this claim.

Frankly, any day of the week Congress can appropriate whatever money it wants for whatever purpose. I don't know anybody who would turn it down. They could appropriate money to make up the shortfall in the Claims Tribunal. That I think on the political

question issue does not mean that this should stay in the legislative branch.

You asked the question I have. How long do we wait? The petition went there in 2000. I don't want to be a witness, but I can tell you. I mean, certainly you would have heard from the government if Congress had acted. It hasn't acted.

I don't think that's grounds for asserting the political question. But more importantly, I don't think the existence of Article 9, changed circumstances, is a reason for you to, I don't want to say duck, for you not to entertain the claim. It is here before you. And by the way, in Dames & Moore, if that was not calling out for a political question solution, I don't know what was.

There was a real crisis. Hostages had been freed, and Iran had said if the government doesn't rule, I think there was a July 1981 date, the Supreme Court took cert before final judgment. That was a foreign policy conflict. The Marshall Islands is going to be in the U.N. tomorrow if you rule today.

They are going to sign treaties. They're going to go about their business.

Judge Harkins, you're right, did have a hearing on that issue, and he said it's a takings claim, and we quoted it in our brief. He said, this is grist for the judicial mills because in fact we did suspend Juda 1 for over a year at the request of the government, and my clients agreed at the time let's see if this issue can be resolved through the diplomatic channels.

And after a year, we came back and said, okay. Let's go. Let's move to trial. This was after the denial of the motion to dismiss in Juda 1. And we took several depositions on the political question issue, and he ruled it's a takings claim. This is what Courts are supposed to do. So we went forward.

Dames & Moore wasn't a political question issue, and I think going to Congress is not. I think the road comes back here because the changed circumstances provision simply doesn't have legal significance to the case, and it has been pending

before Congress for quite some time, and it's not clear to me when or if Congress is going to act.

THE COURT: There's a difference between determining whether the remedy was adequate, which is the question that wasn't ripe, although the term "prematurity" was used, but they were talking about ripeness. There's a difference between that and saying that because the Claims Tribunal rendered a decision that vastly exceeded the amount appropriated for the claims purpose that a new cause of action arises for a taking. I see a difference between the two. Do you?

MR. WEISGALL: A difference between a situation where the tribunal has made an award in excess of the amounts it has and?

THE COURT: A decision between the Court's reviewing whether the remedy that was provided or the forum that was provided and the full playing out of that forum has taken place such that it's rendered a decision, whether this is adequate, a more structural approach and a more historical approach. In other

words, did the remedy proceed as the contracting parties envisioned, the contracting parties to the Compact? And the answer would be yes.

Or as opposed to if the decision of that tribunal was so greatly in excess of the original amount that was appropriated, does that mean that the claim has been taken to that extent?

Now either one of those focuses on the Claims Tribunal's activities insofar as they had been mandated by the Compact and enacted into law. It doesn't focus on whether the mere fact that an award was entered in a larger amount would state itself a new cause of action for a taking of that award or an award in that amount. I see a difference between the two.

MR. WEISGALL: Yes. My response, I mean, obviously the complaint alleges that the remedy was inadequate. I mean, we're here because there's a shortfall. So that's point one. I think that then gets to the question of well, wasn't that $150 million okay? And I think that goes to we cited seven

separate cases in our brief, by the way, to which the government said nothing, saying Congress can't set the price tag.

I mean, if Congress says $150 million to set up a fund of which $45.75 goes to the tribunal, that's fine, and that's a start, or Congress appropriates another $90 million for Bikini cleanup. That's a start. But these are takings claims under the Fifth Amendment, and those seven cases highlighted by the Monongahela ruling of the Supreme Court says that it is the role of the Court, not the political branches, to determine the amount of just compensation.

And in the Monongahela Court, I mean, it says the question about a takings, sure, that's a political issue, but if anything is clear, just compensation decisions are those of the Court, which again is why I want to take you logically from --

THE COURT: Before you do that, I think that leads to the question then, what would be adequate? For example, let's assume that the tribunal would have come up with a remedy of $5 million, which arguably

has already been paid. You'd argue this is inadequate because of the amount that the Congress originally appropriated was in excess, meaning Congress itself acknowledged that these claims were worth more.

So you come back in Court and the way you would prove that that remedy was not adequate was to prove up the bases of your claim. That's what you'd have to do if the Court had jurisdiction to consider that sort of thing, and I'm not saying it does, but that's the form it would take.

Similarly, if you were to come back here under your scenario, you wouldn't be proving that the tribunal found that you were owed your portion or you were owed in excess of $300 million. You would have to prove that your claim was worth that amount, going back to square one, and you would have to prove under the jurisprudence of this Court a takings and/or breach of implied contract claim that equaled or exceeded that amount.

Now let's say that you proved up an amount in a hypothetical of $10 million. In your mind,

there's nothing this Court can do to make the tribunal award enforceable. I hope you're not going to argue that. But you'd argue that the U.S. Government is liable for the difference between the amounts that Plaintiff received and that $10 million.

And if Congress wanted to fund the tribunal, wanted to award more, that would be its own prerogative, but that's not for me to say or for you to say in a Court. But in any event, there's no way that you would be proving the validity of the arbitrable award, the tribunal award. I keep calling it arbitrable because it's a tribunal. You would be proving up the claim as an original matter.

MR. WEISGALL: Well, I think, and I don't think I'm cutting my own throat to say this, but I think that if the tribunal had awarded $5 million, I would have come here to try to say, well, you know, that's outrageous. My clients want more, but I think that then goes to how the Fifth Amendment works.

I mean, let's begin. Under the Fifth Amendment takings laws, the government can obviously

take any property under its sovereign control for any public purpose if just compensation is paid. So, if the property owners are paid just compensation, that's it. You don't have a Fifth Amendment claim.

So I think in the case of a $5 million award, and I'm here in front of you kicking and screaming, wanting more, I think you look at me and you say the jurisdiction here was withdrawn conditionally on exhausting your remedy. You exhausted that remedy to see if the tribunal had enough funds. You got a $5 million award, and I'll take your example and say it was paid. You now have just compensation. Goodbye. Have a good life.

If the award from the tribunal is in excess, such as the amount here, that I believe is where Dames & Moore and the other cases kick in. It is that shortfall. It is the safety net jurisdiction that you have because it's a constitutional claim. It's not up to Congress in its wisdom to say, well, we'll pay this much for the claim.

The U.S. Government took my clients'

property. They then said, okay, we've got a mess here. We better figure out what to do. We'll set up an international-type tribunal like in Dames & Moore to figure out what they're owed, and we'll fund it with $150 million. That wasn't enough. Congress can't set the price tag.

In the U.S./Iran Claims Tribunal, it was quite clear that Iran had to replenish that fund, and if it didn't, that's what Justice Powell was getting at. If there's not enough from that alternative remedy, you can come to the Claims Court, because if not, then Congress if it doesn't abrogate the Fifth Amendment can certainly set the terms on which the Fifth Amendment is enforced, saying Court of Claims, in Rails-to-Trails cases, we're now going to appropriate $150 million and put it in a trust fund, and you guys figure out how to pay people.

I think if you satisfied Claimant No. 1 and just compensation was paid through the appropriate procedures in this Court, that claim would go away. But for the property owner who comes in when there's

no longer enough money, do you sit here and say, oh, my goodness, I can't award just compensation because Congress said I only had this much money? It's run out. I think those cases, beginning with Monongahela and really going through Dames & Moore, say it's not the job of Congress to set the price tag. It's up to the Courts.

THE COURT: I think the difference the government would point out is when we enter the area of looking at takings claims in the international context, when we get into issues of espousal, when we get into issues of recognizing new countries, that we're in a different area, and the cases can be distinguished on that basis until we get to Dames & Moore, and then the government says, well, Dames & Moore really didn't involve ultimately a passing on a form of settlement or Compact.

What it did was narrowly involve the propriety of nullification of attachments to an Executive order. And that's the narrow issue that the Supreme Court blessed because it didn't want to get

per Chief Judge Rehnquist's opinion into an area where they might have to contemplate the consequences of the decision in the future, which is where we are now.

I do think that Dames & Moore created a bridge because that was the quintessential foreign activity. As a historical footnote, that was the only case I personally was involved in in front of the Supreme Court. I did the brief, and my partner argued it.

MR. WEISGALL: Same here. I filed a brief.

THE COURT: Yes. We represented Iran and the Islamic Republic of Iran. Very interesting because it was done so quickly. I think the second fastest case since the Pentagon Papers, and I don't think anything has been as fast, even the Florida recount, as that. Quite exhilarating. And the exact result we wanted, but little did I know we'd be wrestling with the consequences years later.

MR. WEISGALL: But see, again, you asked the question earlier why didn't the Federal Circuit issue the Antolok ruling so that you could get rid of this

thing?

THE COURT: Well, that isn't what I'm saying, not the last part.

MR. WEISGALL: No. It was a theoretical question. It was a very good one. I think it's important that Judge Harkins and the Federal Circuit didn't say as I think Ms. Bleecker is representing that jurisdiction is withdrawn. They went out of their way to say come back here or at least come back here to see if you have jurisdiction.

Again, we're here on a motion to dismiss. So it's really, do you have jurisdiction to go ahead and examine espousal, to examine the $90 million? Those are all affirmative defenses. But ultimately they didn't say people of Bikini, people of Enewetak, the door is closed. The Compact Act as we read it withdraws Tucker Act jurisdiction completely. Goodbye. See you later.

They said the door is open to come back. And that implies à la Dames & Moore but à la what even in Antolok, that there is residual jurisdiction under

this Court to entertain the shortfall. Again, if not, what is to stop Congress from saying any kind of a regulatory takings -- let's take Rails-to-Trails cases. Congress provides a regulatory scheme for the taking and then, like Article 12, sets up a fund or sets up no fund and just says jurisdiction is withdrawn.

Congress can't do that. And I think that a reading here that there's no jurisdiction for you to examine these issues is a way of saying Congress is right. They've set the limit. There's no more money. That means Congress is essentially legislating in the area of the Fifth Amendment. That's the job of this Court.

THE COURT: Well, this is an interesting question because Congress wasn't doing this on a clean slate. What Congress was doing was enacting that part of its responsibility pursuant to an international agreement. And the power of the RMI to be subject to an agreement that leads to espousal claims, even though it was a nation coming into being, so to speak,

has already been resolved by Judge Harkins.

MR. WEISGALL: Well, yes. We'll call the espousal a release.

THE COURT: Okay.

MR. WEISGALL: The $90 million appropriation, by the way, is also a release, although I will touch on that. That's an affirmative defense. I think that there are interesting questions. In fact, the espousal question kind of goes to the second part of a takings claim. In other words, in part one, has there been just compensation? Five million dollar award. I come here.

The second way you can get through the Fifth Amendment is work your way around. My clients sit down with the U.S. Government and we work out a number, whatever it is, and we all sign on the dotted line and it goes away. The government is offering espousal, offering that as a release, as a way of saying this is now an issue that has been resolved.

That raises a ton of factual questions that I think you may have to examine at some point. I

think you certainly will have to examine them but not in a motion to dismiss where it's an affirmative defense brought by the government.

And the other point about espousal, I don't think it's quite right for the government to say, okay, this is an international agreement. Here is our defense. And by the way, our defense makes this a nonjudiciable political question issue.

I'm not aware, Your Honor, of a single Supreme Court decision. I'll go out on a limb here. I'm not aware of a single Supreme Court case where the Court said a takings claim is a nonjudiciable political question issue. Certainly, in Dames & Moore, I guess the Court could have ducked that whole thing. It certainly didn't want to, but I'm not aware of any case where that's happened. So that's where espousal again, it can certainly be an issue in this case, but I don't think it's an issue before us today. That's my point.

And actually let me segue if I could to the $90 million. You had asked about that a couple of

times. The $90 million appropriation by Congress under Public Law 100446, it's a release. That's the way the government characterizes it in its reply brief. It wasn't raised in the motion to dismiss. There again, there are factual issues there about legislative intent or whatever, but to the extent you do want to examine that $90 million appropriation, I want to say a couple of things about it.

The language of the law, and I think you touched on this in your questioning, it is pretty clear. You had said that I guess in the future, the State Department should be a little bit more airtight. I don't think it is airtight because the Bikinians dismissed their appeal of Juda 2 in return for two things, an appropriation of $90 million for the cleanup of Bikini and the second, together with other payments, rights, entitlements and benefits provided under the Section 177 agreement so that basically that settlement was $90 million plus what they're already entitled to get under the Compact, try the 177.

THE COURT: Which gets us back to the

adequacy of that remedy.

MR. WEISGALL: Right. Right. Which at least we allege in the complaint is not. By the way, you could see that $90 million, you could look at Article 6 of the Compact. Article 6 of the 177 agreement says, "The government of the United States reaffirms its commitment to provide funds for the resettlement of Bikini Atoll by the people of Bikini at a time which cannot now be determined."

So you could see that as a fulfillment in part of Article 6, but ultimately I would characterize the $90 million as a down payment on what the tribunal awarded. And in fact, in the 177 agreement in Article 4, the tribunal is directed to take into account any prior compensation.

So, in terms of fairness, I just want Your Honor to be aware of the fact that the award from the tribunal was net. In other words, the award would have been higher. It would have been over $600 million, but they took into account the $90 million, and they're required to do that under Article 4,

Section 2 of that Section 177 agreement.

And I guess the last point I want to stress on that is the dismissal. I want to make it very clear. What my clients dismissed was the appeal of Juda 2. So we dismissed that jurisdictional holding. You had asked earlier for res judicata.

THE COURT: Well, for collateral estoppel purposes.

MR. WEISGALL: Right. That was an appeal of the dismissal for lack of jurisdiction. So that was not a dismissal on the merits. So I still think again that at least addresses that issue, but that also segues to the statute of limitations question that had come up as well.

If the government is right that the last U.S. action was October of 1986 or whenever the Compact became effective and that's when the statute of limitations started to run, I think you would have laughed me out of your courtroom by holding up both Judge Harkins and the Federal Circuit, saying, Mr. Weisgall, have you exhausted the alternative remedy?

I mean, we filed our claim when the tribunal was finally established, and that was the early 1990s. I would have had to say no.

THE COURT: I think it's very clear that under the interpretation of the Federal Circuit's decision that Moore prepared to follow, that didn't create a new statute of limitations. It just said that when the tribunal has finished its business, you can come back if you believe the remedy is inadequate.

Then the question one tests is, are we talking about the procedural adequacy of the remedy? In other words, did you have a full venting of the issue? Did the tribunal play out the way it was supposed to? Or does it mean that the magnitude of the difference between the amount appropriated and the tribunal's award suggests that just compensation wasn't granted? Or does it mean that we have to try the issue anew as to what just compensation would be, meaning that we're not here to enforce the tribunal's award, that that's not a measure of inadequacy?

So I don't think it's clear what the review

of adequacy would be. I would caution that in terms of enforcing the award, that is not in my view your strong suit. The award would be a measure of what just compensation would be. The tribunal is not a measure of just compensation. The fact that it is so discrepant with the amount that originally was appropriated by Congress may be suggestive that the original amount was inadequate and that something greater had been taken, and then the Court would have to evaluate what that was again.

And in that process, we would have to determine first if breach of an implied in fact contract falls under the rubric that if you have a contract award, you don't have a takings claim. That's the first thing we'd have to determine.

Secondly, as part and parcel of that, we'd have to determine whether or not you do have a contract claim. A takings claim is obviously your stronger suit, but you brought the other one up.

Okay. Under a takings claim, we would be reexamining exactly the same proofs probably that were

offered but in a non I guess evidentiary proceeding, meaning the Federal Rules of Evidence didn't apply. They would apply here.

You might have all of this data developed, and it might be admissible. You might be in a position of having to look so retrospectively that it wasn't attractive. Who knows what that would take?

And then the John Plaintiffs would run up against I think considerable collateral estoppel effects of the prior two Courts' rulings on statute of limitations which were adopted on appeal, meaning that they're left with a breach of fiduciary duty claim, and that is not the stronger of the two readings given the intervening precedent.

So what I'm suggesting is, and I'm sure you've advised your clients, that if we were to proceed here, it would be a long, tortuous proceeding if we resolve the question of adequacy of remedy in Plaintiffs' favor. And by that, I mean that if the remedy were determined to be inadequate, we would then proceed to try takings claims or a breach of contracts

claims, whichever prevailed in your case and just breach of contract in the case of the John Plaintiffs.

It's an interesting question because none of the case law we could find addresses the situation of a Court's determining the adequacy of the remedy post facto, once the alternative tribunal had run its course. I would suggest that rubber-stamping its result is not an option.

MR. WEISGALL: It doesn't surprise me to hear you say that. I mean, yes, there was a Thornberg report from the former Attorney General saying the tribunal did use general principles of rules of evidence and functioned. I mean, I tried the case. It was neither here nor there, but I wouldn't be surprised if you said, okay, we're going to start over.

And you could well say, okay. You've run your course. There is an adequacy problem. I do have jurisdiction for Bikini. Let's get started on the takings. My clients do understand that that could be a long slog. Many of them are getting older. But

again, when they look at the fact that -- and please don't lose sight of it -- the U.S. Government, bless its soul, did have sovereignty over those islands and it took those islands, and my clients are still trying to get the just compensation for that takings, so it may be a while.

Or maybe a ruling on your part might well send a signal to the other branches quite frankly. Again, I don't want to be a witness, but yes, you saw what the State Department said in our complaint at least, and our complaint alleges that the State Department issued a report saying no changed circumstances.

That, by the way, is very much at odds with the briefs that the Justice Department filed both in the Federal Circuit on Juda 2 and on the writ of certiorari on People of Enewetak, saying, well, there's always that changed circumstances provision.

In fact, before the Supreme Court, the Solicitor General said it's conceivable that this continuous funding mechanism could prove inadequate to

satisfy future needs should radical long-term investment difficulties develop or if there are substantial unforeseen claims. Such contingencies, however, are highly remote and speculative. And I think that that representation had an effect on the Federal Circuit.

In fact, the Federal Circuit twice in People of Enewetak -- and I just noticed this last night -- the Federal Circuit talks about the United States at page 135 committed an initial sum -- that's at the very bottom of 135 -- an initial sum of $150 million, and there was one other point where it used that same phrase of an initial -- excuse me. And then the very next sentence, the initial amount, the implication being that, well, I guess we've been assured that there might be other monies coming, but that was not the case.

And as far as the ultimate ruling where you are, I think that it's important to understand the real holding of People of Enewetak was that the consent of the United States to be sued is withdrawn

in conjunction with. Again, I'm reading on page 136.

The Claims Court agreed that, "Consent to sue has been withdrawn in conjunction with the establishment of the alternative tribunal to provide", and look what the Court says, "to provide just compensation." And indeed, the Federal Circuit on page 135 also says the Section 177 agreement in that, "The United States Government accepted responsibility for just compensation owing." So, if that's your roadmap, I think there's a lot there.

And to the extent there was any ambiguity in Judge Harkins' ruling in Juda 2, I think People of Enewetak clarifies that. I might add, by the way, I think Footnote 4 is also important. You had asked about this earlier. But in Footnote 4, "Because we affirm the decision of the Claims Court to dismiss appellant's complaints for lack of subject matter jurisdiction, we need not address other issues." So I do think that People of Enewetak is limited to that.

THE COURT: They adopted the opinion of or reasoning of Judge Harkins with respect to other

issues, whatever that end result means.

MR. WEISGALL: Right.

THE COURT: And I do think that they did. In other words, the claims that go forward don't change by virtue of the fact that the tribunal made its final awards in 2000 and 2001. The nature of the claims doesn't change the fact that the adequacy of the alternative remedy can be assessed judicially as it reached the point when that's inappropriate activity for us to engage in.

But that doesn't change the nature of the claims, the timing of when they were brought and the full aspect of what they represent, and a new statute of limitations didn't mean that somehow the claims are revived. This wasn't a reviving issue.

This was an issue that signified we're now at the point where if Plaintiffs want, we can assess the adequacy of the Nuclear Claims Tribunal as an alternative forum, assuming that Defendant's arguments are incorrect that because all this is the genesis of an international compact, we have jurisdiction. I

haven't come down on that finally yet.

I do think Dames & Moore is a difficult case to distinguish. We all know, those who were involved at the time, that the exigencies of the situation drove it, but it's Supreme Court law, and that's what it is. And I think Judge Harkins was very impressed with the notion that there is a mission out there under the auspices of the United States to do what's right.

On the other hand, Judge Nichols, and he's one of the judges on the old Court of Claims, as you recall, but he's got a particular cache because he was such a brilliant writer. And in the Kabua case, he really wrote, look, the purpose of this judicial forum is not to act as a moral forum. And he was very apologetic about the limitations of the Court, but he expressed the arguments in that case that were made by the Justice Department were fully appropriate and pointed out the narrow role that a Court can take under the auspices of an international law situation.

We don't make political judgments of the

wisdom to enter into the compact which was ratified, and we can't look at the capacity of the individuals to enter it because that's uniquely a political question, besides which it was decided below. So the question I come down to is in determining the adequacy of the remedy which hasn't been briefed, what exactly do we look at?

The government will address this issue without prejudice to its position, but its interests are served by addressing it, exactly what kind of inquiry is appropriate, since this may be the first time such an inquiry has been made, and I think we need to know that.

One thing I am convinced by all the case law is that no way does this open doors to new claims. The original claims as of the date they were filed and the date they say were deemed to be timely governed, and that's a matter that has been litigated with the same arguments, and it's been the subject of two decisions, and there is some ambiguity in the Federal Circuit's decision.

Given the amount of paper that was committed to the prior resolution of the claims, it's a remarkably short opinion, and I do think the opinion insofar as it involves the people of Bikini is, as you point out, expressly conditioned on the implementation of the Nuclear Claims Tribunal and whatever payments Plaintiffs receive from it.

One of the things I wanted to do today was to urge caution on both sides. Plaintiffs -- and I'm sure you do a better job than I do, Mr. Weisgall, explaining this to their clients -- Plaintiffs run a genuine risk that upon reflection, the Federal Circuit will go the route of the D.C. Circuit and look more at the option of the political question as it was addressed in Antolok. That's something that the Federal Circuit can do. The Federal Circuit can also take the view that the claims were withdrawn and whatever it said was dicta.

It could take two draconian actions that would stop this litigation dead in its tracks. There is no way for me to predict what could happen. That

definitely could happen because the full implications of the ruling have now been spelled out. That's not, however, my purview. My purview is to take the Federal Circuit's decision and do what it says, and that's what I'm going to do because, as a trial court, that's my job.

Now what does that mean for both sides? It means that you may be in for protracted proceedings, and this always suggests that a resolution between yourselves is the way to get around this.

First you avoid any precedent that's difficult for either side to deal with, and second, you get that final resolution that everyone wanted to get in the first instance but didn't draft the appropriate agreements, and the answer is a settlement. It is not, as Judge Nichols tells us in Kabua, that we set up yet again another commission. That was the first alternative, and that didn't work.

But I think that the idea of continuing the litigation on does pose a downside for both Plaintiffs and the government. For the government, there is the

specter of years of litigation until such time as the government gets before the Federal Circuit and says, look what happened below, you can't really mean for this to have happened, and if the Federal Circuit adopted that view, the disappointment to Plaintiffs if they were to recover an amount in excess of what they've already obtained.

This is not a satisfactory approach from either Plaintiffs' perspective or the government's. This is a case that cries out for a settlement because no one expected it to unwind and have to be replayed here. You have already told your clients the bad news I was going to deliver, which is we don't enforce the award of a tribunal. We don't take it at face value. We don't say, gee, it almost looked like a trial. Plaintiffs start again here because the measure of the adequacy of the taking is to determine what was taken, and that's what we do.

Whatever problems of proof were encountered, it might be an amount vastly lower, and if it were equal to, it doesn't matter. Still we wouldn't be

enforcing the judgment. It would be what is just compensation.

But I don't want to minimize the potential legal difficulties that you get into because the Dames & Moore situation could well be viewed as distinguishable on the grounds that it did not deal with the sovereign act of recognizing a foreign state. Again, as you point out, all the dealings were and still are through the Embassy of Algeria.

The advocates might do a better job than they have with me in persuading the Federal Circuit which can look again at its ruling in determining the political consequences, downstream consequences of the ruling that you see, and the Court may well get to have an assessment that this isn't where it wants to go.

Both sides will have to assess the Supreme Court's views because this is a case that clearly is headed in that direction. In other words, relief is a long time coming, and so the better course, especially because I know we have representatives of agencies

here, is to use this opportunity to perhaps set up a meeting to see what can be explored that's within the grounds of reasonableness and that in the government's view, something in the neighborhood of $500 million total awards for these two cases is not.

One thing that's doubly clear in the Bikini case, except for the unfortunate wording of these agreements, the U.S. Government did everything possible to move the entire sphere of the adjudication of these claims outside of the Courts that it could ever do and to make those determinations final and binding. There were no more legal avenues available to it.

What it has is the hole, H-O-L-E, of the funding issues that it just couldn't get around. I mean, the language could have been drafted saying, look, it doesn't matter what's appropriated. Whatever is there is what you get and you agree to that, but that isn't what it said.

So I caution the parties that the Court can do what it can do with the limited tools that it's

given, the first of which at the trial level is to follow the directions of the Appellate Court, and then secondly is looking at the law as a whole to determine exactly where you stand. And that will be the first step if that's the course this litigation takes, and that is determining the adequacy of the tribunal.

And then we would get into the motions practice of the sufficiency of your claims or lack thereof, and then we would get into a trial, which point of view of the John Plaintiffs could be extremely limited or nonexistent, which brings up the issue of why have a lack of symmetry between the treatments of these two groups and that instead of arguing to open the door for the John Plaintiffs to me says it's in everyone's interest to sit down and work out a settlement.

Legally, the government is in a stronger case against the John Plaintiffs. Why treat them differently? It doesn't make sense, but that isn't my job. My job is to carry forward rulings that were made after full ventilation of all positions some 20

years ago, and I see no reason not to do it. Maybe you want to reserve the rest of your time, because I think you've thrown a lot of balls in the government's court.

MR. WEISGALL: Well, I do want to wrap up. I'll tell you very briefly the very first time I went to see the Bikinians in 1974 when I had hair and was 15 pounds lighter, we spent days doing civics, and I summarized everything as they're the three Cs for the branches of the government. You have the Courts, the Congress and the Compact. That was the Executive Branch. And that was 33 years ago we discussed these issues.

Does this cry out for a settlement? Absolutely, but I guess I'd leave you with the last thought of I do urge you to reject the government. I mean, the government's position -- and you were asking this -- where do you go? Well, we can't go back to the Nuclear Claims Tribunal. We need a forum. You're that forum.

Now maybe if you deny the motion to dismiss

and say, okay, I've got jurisdiction, I'm resuscitating those claims, it's now run its course, and even -- I mean, I'm not telling you what to draft in your opinion -- but if you begin with the assertion of jurisdiction, maybe that would trigger something. But right now I think it is essential to establish that there must be a forum for that shortfall or to determine that adequacy point and that that forum is this Court. And I'll reserve the rest of my time.

THE COURT: Thank you, Mr. Weisgall.

MR. WEISGALL: Thank you so much.

THE COURT: Mr. Van Dyke.

MR. VAN DYKE: Thank you very much, Your Honor. I want to start right with the issue that relates mostly to the Enewetak people, the statute of limitations issue regarding the takings claim, and I want to read carefully from the language in the People of Enewetak decision. Footnote 4, as Mr. Weisgall has mentioned, is quite clear that we need not address other issues, thus limiting its decision to the issues it addresses.

Now, in the last sentence, it then does say, "We adopt the Court's more extensive analysis", referring to Judge Harkins' in Juda, "relating to the issues discussed above." So they adopt Judge Harkins' decision only with regard to the issues that they have also addressed.

THE COURT: But let's just assume something. Let's assume that you're right and that this doesn't turn on an issue of collateral estoppel. What it does turn on is the claims are coming back to me in exactly -- they don't change. They come back to me exactly the way Judge Harkins left them and the Federal Circuit left them in 1987, 1988.

And I'm a successor Judge, and under Rule 54(b), I have the prerogative to relook at any order that was entered before or not. I'm not. We're starting off with that slate one way or the other. Nothing has changed. His ruling was very, very sound.

MR. VAN DYKE: Well, several things have changed with respect, Your Honor.

THE COURT: I'm dealing with the facts

underlying that ruling is what we're talking about, not any subsequent developments, because none have occurred that involve the statute of limitations issue that he addressed. There have been subsequent developments later but not acts of the U.S. Government.

MR. VAN DYKE: We have relevant decisions of the Federal Circuit that guide us as to what accrual of a claim is, and the Applegate case from 1994 I think is the most directly applicable one because that case teaches us that we have to look at the entire sequence of events before we determine whether a taking has occurred.

Now, in this situation, and we've alleged this very clearly in our complaint, the people of Enewetak were told constantly that they would be allowed back to the Atoll and that the Atoll would be made whole. So, for the purpose of this proceeding, Your Honor, you have to accept our allegations. And the government has made no attempt to challenge them, that they expected to get their Atoll back.

Now they didn't discover the full extent of the injury until they went back in 1980. And this morning at 11:06 a.m., Mr. Trauben acknowledged that the injury was not discovered by the people of Enewetak until they went back in 1980, and I'm sure the transcript will reflect that. So the law is well settled that you don't have a taking until you know or should have known what the damage was, and the people of Enewetak had no way of knowing what those damages were until 1980.

So the case law as we now have it certainly indicates that the statute of limitations would not have run until 1980.

THE COURT: Well, let me stop you there. Applegate, which again I have an unfortunate history in -- the other history has been fortunate I should say -- I do have an unfortunate history there. Applegate definitely changed Dickinson. It changed the certainty that Dickinson had given us, and Applegate has certainly caused some difficulties in that for the very first time, it introduced the notion

of relying on representations as a possible basis for tolling the statute of limitations.

There was a Supreme Court case that was cited in the unfortunate lower court opinion that I issued that said you couldn't rely on those representations. The Federal Circuit chose not to address that precedent. Given the history of post Applegate decisions, I am not so sure that the Federal Circuit fully intended its consequences to be that subsequent acts or representations of the U.S. Government would in any way impact a statute of limitations because obviously that's unworkable.

But understand that you're in a position where you're not only asking the Court to evaluate the adequacy of a tribunal that's been committed by Compact, subsequently enacted to an international forum, but also to dislodge certain rulings of the prior Court that certainly considered these issues more relevantly in time.

Did Applegate create a sea change? No, it didn't. Am I troubled with the lack of similar

treatment of the two categories of Plaintiff? I am, which is another reason the government should get serious about settling these claims, because I've seen this happen before.

An enormous effort is expended by the trial court, and I'm in no way suggesting I would be under a burden. I mean, enormous effort is expended at the trial court level in resolving a case, and it goes up to the Appellate Court, and the Appellate Court said, well, you were wrong on the first step you took.

And we would have to wait that many years, and that's what it would be, in terms of preparing these cases and getting a decision out on all the elements. So you would be asking the Court to take at step one a step back to say that these claims can be revived. This would be the first case where we examined the adequacy of the remedy.

And also you would be asking the Court to revisit Judge Harkins' very approved rulings. Now not only were his rulings approved by the Federal Circuit, but they were mentioned very favorably by the D.C.

Circuit. In other words, his overall treatment of all the issues was acknowledged, and I would be disagreeing on one. You like every other resolution he made, especially the essential dismissal of the political question implication.

You also like the notion that we don't have dicta but rather a holding and conditioned withdrawal on the ability to look at the adequacy of the remedy later. When you start parsing out ideas that you don't like, you may be tipping the whole boat, and your clients have to realize this is a very delicate matter.

The Federal Circuit may not like the approach taken, and you're back to square one being essentially dismissed as to everything. I think that you should approach the government representatives with an offer that is appropriately modest in the circumstances while the rest of this case plays out. And I think the government is not interested in retrying these issues in a judicial forum. It doesn't look good no matter how they're resolved.

The idea that this is leftover business this many years later is just not a credit to the U.S. Government, and even if it has to do with drafting of agreements, it's not a credit to the U.S. Government. The fact that we have Courts look at these things is a credit to the U.S. Government, but having to review the consequences of nuclear activities that vaporize islands is not. That's the business we don't want to be in right now, and when I say appropriately modest, I mean it.

The Plaintiffs definitely have an uphill battle here even if I'm inclined to go as far as both Plaintiffs' counsel are asking me to. I understand what you're asking me to do.

MR. VAN DYKE: Well, we certainly appreciate, Your Honor, that this is a delicate and difficult and complicated case, that the takings claim which Judge Harkins ruled was barred by the statute of limitations is of course the essential underpinning of the claim of the people --

THE COURT: That's the strong claim in both

suits, correct?

MR. VAN DYKE: Right. And we're talking about a large and wonderful Atoll that was vaporized in part and made uninhabitable, at least half of it uninhabitable for the foreseeable future. So this is a huge taking of very valuable property that impacts on a people, a unique people that were wards of the United States during a period in which we were fighting the Cold War, and we won the Cold War, and so what the U.S. did made sense at the time.

But you can't take those actions on the back of small people and then take advantage of them for the benefit of everybody else. Justice Powell speaks to that very clearly in his short concurring opinion in Dames & Moore and says, yes, the government can take action. The government can take property, but not on the back of one small group for the benefit of everybody else. And that's what we're seeing here, and that's why we had come back with some determination to try to rectify this situation.

So we would ask, Your Honor, to relook at

that statute of limitations situation. As you have said, Applegate is clear that we can look at subsequent activities. In that case, the Court had held forth the promise of a sand transfer plant for years. In this case, the United States had repeatedly told the Enewetak people that they would get their Atoll back in livable shape.

That did not happen in 1980. It has not happened now. It will not happen for thousands of years. So they were allowed to and were entitled to rely on the promise made by the United States Government, and the United States Government needs to be held responsible to that.

Now we have a second argument on the statute of limitations that I think is equally strong, which is that in the Compact itself, in 1986, the United States waived whatever defense it might have under the statute of limitations, and the Compact of Free Association Section 177(a) says, "The United States accepts responsibility for the compensation owing to the citizens of the Marshall Islands for loss or

damage to property of the citizens of the Marshall Islands resulting from the nuclear testing program."

So no language could be clearer than that. The United States accepts responsibility. And the Federal Circuit resummarizes that in the People of Enewetak case and says, "Under Section 177 of the Compact, the United States Government accepted responsibility for the just compensation owing for the loss of damage resulting from its nuclear testing program."

So it's very significant language, accepts the responsibility for just compensation. And those magical and important words are ones that the Courts of the United States have held responsibility for. And as Mr. Weisgall explained in the Monongahela case and in a whole series of others leading up to the 11th Circuit's decision in Gulf Power in 1999, U.S. Courts have said that determination of just compensation is one that we only can make.

That cannot be captured by Congress. Congress cannot say we're going to take the property

of John Van Dyke for a federal Post Office, and we're going to limit compensation to $10,000. That cannot be done. They can take my property for the federal Post Office, but they can't limit, they can't set the amount. I have a right to go to Court.

THE COURT: Understood. But we're dealing with a question of espousal. We're dealing with a question of foreign agreements. I agree with you completely that in terms of the Compact, the federal government opened itself up in the tribunal for a wider range of claims than those that had been presented judicially. No question about it. But that doesn't mean anything in terms of whether or not the claims are cognizable now in the form that they were raised.

That would involve my taking Judge Harkins' decision and saying that something is changed. We have a new Judge. We have 20 years. We have some new case law. This is where the case law is headed. I do not think it's manageable. Your case is the attractive case. There are unattractive cases lying

down the road, and that's why something approaching Dickinson was a very wise formulation of the doctrine that may or may not have given some relief in this case.

But by no means is it significant at all that the United States entered a Compact that made itself amenable to the consequences of responsibility for acts that would not be actionable in a Court of law. We're now in a Court of law, and we have to test them under the tools that we have, and there are a lot of good reasons for that, not the least of which is staleness and difficulties of proof because of that.

But I understand where you're coming from, the old adage of hard cases make bad laws, but this case has several twists that are new. And if the past is prologue, neither side would be happy with the ultimate result. Even if the government prevails, the government doesn't want a ventilation of these matters over the next several years in Courts of law and the consequent publicity. It certainly doesn't want to go through a full-scale trial.

From Plaintiffs' point of view, you have everything to lose, which is what makes it to trial costs money to go forward and time and effort, coordination with clients who are in far-flung locations and the expense of hiring experts, and it all may be for naught because the Appellate Court makes that determination. These are the consequences of everything that we ruled, and we can't live with these consequences.

I agree with you that Judge Sentelle left an opening. I don't know how he would resolve the opening. We'll find out in his opinion. Again, the Federal Circuit could look at the overall consequences and say they're the same, that there is a distinction between an agreement that is entered into in connection with recognition of a nation or a governing entity and the United States in its domestic affairs with its citizens.

I don't know the answer to that ultimately. All I can do is apply the last decision we have, which is Enewetak, and then the case law that exists

and the prior rulings of the Court to the extent that they don't have to be revisited.

One thing that would streamline the case if you wanted to do it and there were a quid pro quo is if the Court does get to the point where we relook at the takings claims for you to surrender your implied in fact contract claims, permanently withdraw them, because you don't want to be in a situation where the Court has to proceed on those first under the rubric as I was saying earlier when you have a contract that covers something, you don't get to make a takings claim.

And most of those contracts were always express. I don't know what it means if it's an implied-in-fact contract. It's a risk you don't want to run because your best suit of course is the takings for monetary reasons. And I see the basis of a settlement, but a settlement that is reached that has nothing to do with the ultimate figures that were awarded because they're way out of line. They are the best-case scenario, and when you get into litigation,

you're never aiming for the best-case scenario.

You've got to assess all the risks. And is this case at a 50 percent risk? No. It's at maybe a 25 percent chance of success. And who knows what a trial would establish in terms of reasonable compensation? I don't. I have no idea because the proofs would have to be proofs that either were stipulated in by the parties -- and I don't think the government's going to do that -- or meet the test of the Federal Rules of Evidence today in 2007.

The only relevance of the Claims Tribunal decision in my view, but we'll be hearing your views in briefing, is to set a barometer for whether or not the remedy is adequate. It doesn't set the measure of compensation. If you want to be in a Court of law, you're in a Court of law.

MR. VAN DYKE: The figures awarded by the Claims Tribunal seem large to some, but they're actually quite modest compared to other expenditures that our government has spent.

THE COURT: Well, you can argue that to

somebody else, but that isn't appropriate to me. I mean, I know that we're in the midst of a war that has more zeros after it than I can imagine in my lifetime, but that isn't how these decisions are made. You want to go for it? Fine. But I can't tell you that based on all my experience and all the reading of the precedents and seeing what happens when these cases get up on appeal that you don't run the risk of an ultimate disappointment. And I think that now is the time to be reasonable.

What do you really need? What can this generation use? How can you make lives better now with a reasonable sum of money that the government might be willing to entertain as the basis for settlement? If not, you're in for the long haul, or if the Court dismisses the case, you're in for the short haul of an appeal and take your chances there. But as you can tell from what I've been saying, I'm not leaning towards dismissal.

MR. VAN DYKE: Well, we greatly appreciate and respect your advice, Your Honor, and the reality

is that we've been totally stonewalled by the government, and that's why we're here.

THE COURT: Hopefully the government will see a possible wedge when it ultimately gets the decision, although everything is open. I haven't made up my mind because I will require, we'll discuss it later, but limited briefing on what is meant by a Court's assessing the adequacy of an award of this nature or an alternative tribunal of this nature. What exactly is meant? Are we evaluating the process? Did it play out? Is that enough?

Or are we evaluating the relative amounts? Or are we evaluating things like language of the Federal Circuit saying this was an initial commitment, which is very interesting, but that doesn't correspond to what I read in terms of the agreement itself or the statute. Those are difficult questions. I wish I was back in Judge Nichols' position in Kabua before the Nuclear Claims Tribunal was set up and we'd do a better job of setting the tribunal, but that's been done. We can't go that route.

So I urge all parties here to understand that a short-term final resolution is in everyone's interest, and a Court is not suited to rectify all the difficulties that have arisen after such many years' passage of time. That a Court can't do, and I think that's where Judge Nichols' remarks come into play. But what I can do is apply the rule of law to see that the litigants are treated fairly, and that I will do.

MR. VAN DYKE: Okay. If I could just make a couple more points before we break for lunch.

THE COURT: Please.

MR. VAN DYKE: Just finally on the statute of limitations matter, I would cite the case of United States v. Sioux Nation of Indians, a 1980 U.S. Supreme Court case which is cited in our brief but for other points. For the proposition that the United States can waive legal defenses, Justice Blackman for the Court said, "Congress may recognize its obligation to pay a moral debt not only by direct appropriation but also by waiving an otherwise valid defense in a legal claim against the United States." So that's very

clear that the United States can waive defenses.

THE COURT: If it wants to.

MR. VAN DYKE: And did waive such defenses in 1986 in the Compact of Free Association.

THE COURT: It did, but they do not have legal consequences beyond that remedy. That would be the end of legal compacts. You don't want to deal them a deal now. They have a great role in international relations. It doesn't mean that the government is saying we'll waive immunity to any claims, and if the remedy that is provided the tribunal is deemed to be inadequate, that means that we've waived any defenses in an action in a Court of law in the United States. I don't think that case stands for that proposition.

MR. VAN DYKE: The analogy between dealing with Native tribes and dealing with the wards who are in the trust territories is instructive we believe because this wasn't a normal treaty with a foreign government. The government has cited the Belmont and Pink cases in their briefing, which was of course a

process where the United States recognized the Soviet Union after many years and negotiated a comprehensive settlement of claims by citizens of both countries, and that was certainly an arms-length deal made in the context of complicated foreign relations which the Supreme Court upheld as written.

But here we're dealing with a nation that didn't exist as a nation until after the Compact allowed it to become a nation and the United Nations' Trusteeship Council finally concurred with that conclusion, and these were wards of the United States.

These were people that were very much under our sovereignty and under our control, and the United States was resisting their efforts to obtain independence in a number of ways. And so, at this point, on a motion to dismiss, it's not before the Court to deal with how we would ultimately characterize that, but we don't feel that that Compact stands as a valid settlement or release. And we've made those allegations.

THE COURT: Putting aside the argument that

I don't think you can win somehow, the individuals representing the government of the Marshall Islands weren't duly authorized representatives such that you would have them entering bilateral international agreements between the United States and some other country. I think you're on a very thin read there.

Where your argument is stronger is whether or not the United States' relationship to the Marshallese either imposed any additional duties or distinguished the situation such as you represent with the Soviet Union, and that's a stronger argument. But those are different arguments.

Attacking the capacity or competency of the signers would, I think the government's right, get you in a round robin where you could unwind any international agreement setting up a new government because the new government doesn't exist until it's set up and ratified. So you're in a circular argument of always challenging the legitimacy of those who entered into the agreement to speak for the resultant state.

But if this is distinguishable based on the relationship here, that's a different issue. And certainly, although I do not want to get into these at all, there's precedent in terms of how the United States dealt with American Indians in terms of their nationhood which led to a whole body of law in dealing with wards of the state or the other euphemisms that are used to describe the fact that the capacity wasn't perhaps as advanced as it might have been in other circumstances dealing with foreign nations. So your point is well taken, something that I'm aware of.

MR. VAN DYKE: And I think your recharacterization of it was very helpful as well to focus in on the key issues that would need to be developed. And our basic point at this time, Your Honor, is simply that at a motion to dismiss, it's not relevant to address that issue, and it's an affirmative defense of the government to develop that, and the argument that was made earlier that the 1986 express contract eliminated the implied contract I think is premature because we would have strong

arguments to develop before we would want the Court to get to that issue.

THE COURT: Thank you. And I'm not in any way saying that it would be appropriate now to rule whether or not the Court would revisit Judge Harkins' ruling assuming that collateral estoppel didn't apply. I would not be making a decision at this time on that. The issue would be whether I've got jurisdiction and whether jurisdiction has been withdrawn or not and then moving on from there. To the extent that the issues have been fully briefed on everything else, deal with it, but I'm not so sure they have with respect to the statute of limitations.

The one thing I wanted to disabuse Plaintiffs of is the notion that somehow receipt of the final decision triggered a new statute of limitations. That is not an argument that would ever lead to any finality, and that's the whole purpose of the statute of limitations.

What it did do was remove any issue of ripeness. And I think that the Supreme Court dealt

with that in the Persault case and called it ripeness. It doesn't matter that the Federal Circuit didn't, and it doesn't matter that Judge Harkins didn't. It is a form of rightness by any other name or failure to exhaust by any other name.

MR. VAN DYKE: Absolutely. And just two final points before we break for lunch. Your Honor, just to reiterate the point that Mr. Weisgall made with regard to the political question doctrine, and of course Judge Sentelle was only writing for himself, Judge Star did not join that part of the opinion, and Judge Wald certainly didn't join it. So it's only his views on the political question doctrine.

And Mr. Weisgall said that he didn't know of any U.S. Supreme Court cases that had said that a takings claim was a political question, and I think we can go farther than that because the government has not cited any case whatsoever in any Court that has said that a takings claim is a political question. The Dames & Moore case is obviously one that would have been possibly in that category.

THE COURT: I think what the government was saying is that if I were to microscopically go over everything that the Nuclear Claims Tribunal did that that would be exercising a sort of political supervision over the discharge of its functions. I think the government might be right. That's why I'm asking you for additional briefing on the issue of what does it mean to go over, to review the adequacy of the remedy in view of its having played out.

MR. VAN DYKE: And we would certainly be happy to provide additional briefing on that point.

THE COURT: Maybe you could solve the whole case with that.

MR. VAN DYKE: And we have of course the Lagenegger case that Your Honor mentioned, which is again a case with strong, enormous political overtones right in the middle of the Reagan period involving U.S. activities in Central America which were very central to the Reagan policy, and yet the Federal Circuit did not see that as a political question matter and allowed that claim to go forward despite

its many political ramifications.

And the Youngstown Sheet and Tube case could be mentioned too, right in the middle of the Korean war. Obviously a very controversial matter involving the seizure of the steel mills. But the Court took the case, adjudicated it, said that property rights are to be protected even in a time of war.

And the Lagenegger opinion says that as well. There's no national security exception to the Fifth Amendment. So we have strong language on that point that I think would lead to the conclusion that we do not have a political question in this situation.

And then finally the status of the changed circumstance petition has been talked about.

THE COURT: And you were going to enlighten us. This is just a point of information. That's all.

MR. VAN DYKE: Well, yes. Obviously it's before Congress, but its pendency before Congress should not in any way interfere with this Court's taking action.

And we have cited a couple of cases in our

brief that I wanted to just bring once again to the Court's attention, Arakaki v. Lingle, which is a case I've worked on as counsel. We got a very strong opinion from the Ninth Circuit, Judge Vibi, writing in unambiguous terms that the Courts of the United States do not wait for Congress to act.

The lower court had said we should defer to Congress with regard to issues related to the status of native Hawaiians, and Judge Vibi said, no, what Congress does is what Congress does. If we've got a case, we decide it based on the record.

THE COURT: Well, both sides today have convinced me to abandon that line of inquiry.

MR. VAN DYKE: Well, that's all I have, and I can reserve my remaining.

THE COURT: Thank you.

MR. VAN DYKE: Thank you very much.

THE COURT: Would an hour be fine? You're all remitted downstairs to the cafeteria. First come first served. That's about it for the neighborhood. There's a place next door. Mr. Lee may be able to

give you some suggestions, but why don't we come back at 5. We'll be in recess until 2 p.m.

(Whereupon, at 12:52 p.m., the hearing in the above-entitled matter was recessed, to reconvene at 2:00 p.m. this same day, Monday, April 23, 2007.)

//

//

//

//

//

//

//

//

//

//

A F T E R N O O N S E S S I O N

(2:00 p.m.)

THE CLERK: Please be seated.

THE COURT: Ms. Bleecker.

MS. BLEECKER: May it please the Court. The Claims Court and the Federal Circuit when these cases were before the Court before simply said that at most, and we're not abandoning the arguments raised in our brief in terms of the proper withdrawal of jurisdiction, but at most, they could be read to say come back and see if you can establish jurisdiction over the claims that are remaining, and that's at most that we think these decisions can reasonably be considered to establish.

The Court did not address the political question. The Court did not address the Compact as a settlement beyond the point of is a full and fair settlement beyond the point of decoupling the validity of the espousal with the jurisdiction withdrawing provision as a matter of statutory construction or agreement construction, which we think are amenable to

claims preclusion. Yes, Your Honor?

THE COURT: I'm sorry. Could you repeat the last thing you said?

MS. BLEECKER: The Court did explicitly hold that the validity of the espousal was not, that the withdrawal of jurisdiction was not conditioned upon the validity of the espousal. We think that that has impact on these cases as they're trying to be reraised now, and we think that it's exactly the challenge to the validity of the espousal that raises political questions that this Court can't adjudicate.

To use Mr. Weisgall's phrase, the elephant in the room from our perspective is that this was a settlement. This was a settlement of claims that also as an important aspect of an international agreement established and recognized the Republic of the Marshall Islands as a sovereign state, but this was meant to be a resolution of the claims. The citizens of the Marshall Islands voted in plebiscites and approved it by 58 percent.

Now some of the Plaintiffs here claim that

they didn't vote that way or that they disagreed with it. But it simply can't be the province of this or any Court to look behind a majority rule in an election or in a voting that was certified by the United Nations as being proper to second-guess the results or to undermine the bindingness, if that's a word, of the Compact agreements and the individuals' ratification of those agreements.

THE COURT: Do you see a distinction to be drawn between a settlement of claims against a foreign entity and a settlement of claims against the United States as part and parcel of a recognition of a foreign entity? I'm looking at Dames & Moore as opposed to this case.

MS. BLEECKER: Right. Well, Dames & Moore can be distinguished, but I'm not sure that that would answer your question. Could you repeat it? I apologize.

THE COURT: Whether there's a difference between a settlement of a claim against the United States in connection with recognition of a foreign

entity and a settlement of claims involving the foreign entity, involving claims against a foreign entity, which is the situation in Dames & Moore.

The United States took no responsibility over those claims. The underlying claims were against the Islamic Republic of Iran. The United States had responsibility according to Dames & Moore only if that commission, the Iran/U.S. Tribunal, proved to be insufficient. But the underlying claim was always a claim against Iran or one of its governmental entities, or yes, that's what it was.

MS. BLEECKER: I agree. The underlying claims that were extinguished through that agreement were against Iran.

THE COURT: So when I was asking you that question in the context of your emphasis on settlement of claims, the U.S. in this case you're saying is settling claims against it as opposed to making an effort to find a forum that will hear claims by our nationals against another government in a way that enables our government then to continue some sort of

diplomatic relations with the other country, which we did through the government of Algeria.

So I'm trying to ask that question in the context of you made an emphasis on a settlement of claims. You could argue that Dames & Moore didn't represent a settlement of claims against the U.S., which it didn't I guess. Does that make a difference?

MS. BLEECKER: It may make a difference, but it doesn't change the result, and it doesn't change our arguments here because of the interrelationship of the recognition of the Marshall Islands simultaneously espousing the claims of its nationals against the United States. So the full intent of the Compact agreement and the evolution of the Marshall Islands into a sovereign state was to have the responsibility to do things such as espousal claims. So that's another reason why we think that Dames & Moore isn't necessarily controlling.

There are a couple of other facts of Dames & Moore that are different here. For one thing, the agreement between the governments said that, "The

awards of the Claims Tribunal are final and binding and enforceable in the Courts of any nation according to their laws", and that's of course the exact opposite of what the Compact agreement resulted in.

And there's also some discussion, and it's not 100 percent clear to me, but when it's discussing whether the claims were suspended or terminated, the Court said they read the Executive Order to be addressing those claims not within the jurisdiction of the Claims Tribunal.

So it was saying that the Court continues to have jurisdiction over claims that are not necessarily settled through the Claims Tribunal that was being reviewed there. And that's consistent with Judge Harkins' ruling in Juda 2 and the language of Articles 10 and 12 that are the withdrawal of jurisdiction is coextensive to the settlement of the claims described in Article 10 but not any further.

THE COURT: What do you do with the approach of the Federal Circuit in Lagenegger, which predated its decision?

MS. BLEECKER: In Lagenegger, the one thing that was clear was that they did not perceive themselves to be asked to examine the motives and the actions of either sovereign, either the United States or the El Salvadoran government, that they were simply looking -- not so simply, but they were looking at whether there was a taking based on the substantial involvement of the United States Government as affecting the actions of El Salvador, and they weren't being asked to examine the motives of El Salvador or even of the United States. So I think that's a very strong distinction between that case and this case.

THE COURT: But they state at page 1570, "This is a claim of narrow focus requiring no second-guessing of the Executive Branch or detailed inquiry into the ulterior motives of the two governments. While cases involving foreign affairs may make the Courts uncomfortable, the Constitution mandates the role of the Judiciary without regard to comfort, and holding that a taking has occurred is in no way an attribution to the United States of reprehensible

conduct. Rather, the assumption is that Congress has provided the safety net of the Tucker Act to make sure that its actions will meet the standard of respect for property rights that the Constitution requires."

Lagenegger goes on to say that these cases of this nature have to be decided on the specifics of each case. Once again, they say look at the particular circumstances of each case on the last page, 1573, and that is a case that said go to the international forum. When that remedy has been extinguished, we can make an assessment if necessary here.

I agree with you that the key distinction with Lagenegger is not going into the ulterior or political motives. In your view, in what way would this case be different? How would you describe the examination of ulterior or political motives?

MS. BLEECKER: There are allegations in both complaints that talk about -- in fact, I believe it was Professor Van Dyke talked about the United States Government's strong-arm tactics in negotiating the

agreements, and there are similar allegations that raise questions about whether the United States used undue influence in --

THE COURT: You think we would be looking at those questions?

MS. BLEECKER: No, I don't think you should.

THE COURT: No. But you think that Plaintiffs are asking us to look at those questions?

MS. BLEECKER: Yes.

THE COURT: Okay.

MS. BLEECKER: Yes, I do. I think that's the only way that they can get around the validity of the espousal.

THE COURT: Let's say the espousal is valid, but the question is whether the espousal extinguishes the ultimate remedy of the Tucker Act just as a backstop, a safety net to use the Lagenegger Court.

MS. BLEECKER: Well, as we've tried to argue, we believe that the language of the Compact does exactly that, and it does it validly and that any recourse to make up this difference or to fill this

safety net does not lie with the Courts because Congress did withdraw jurisdiction, and the Court in the first go-around found that to be valid, and it did say yes, it's premature, but it didn't say come back and you automatically have your claims revived, and that's really what they're saying.

THE COURT: Well, you're right. I don't know what this meant, and that's what we'll be exploring in other briefing.

I asked you earlier since I don't think we have any case law to guide us whether you have an opinion as to the view of the safety net being the remedy that was spelled out as part of an international Compact ultimately implemented in the way it was intended and did it run its course? That would be one inquiry to see if the remedy was adequate.

Another would be to actually try the triable claims and determine what they were worth, and if they were worth less than what was awarded and what ultimately was awarded, what implication, if any, that

would have or if they were worth more, what implication, if any, that would have. That's a full-blown proceeding. Would that be your view of how we test the adequacy of the remedy? I'm not asking you to surrender your base position.

MS. BLEECKER: Yes, I believe it would be that the value of the claims would have to be litigated certainly. And the Court has made some reference to it, that the Claims Tribunal award is not something that the Court is going to enforce.

THE COURT: No.

MS. BLEECKER: It doesn't establish the adequacy of the award. It included claims or considerations and awards for matters that are not within this Court's jurisdiction and don't fall within a typical takings jurisprudence as this Court can hear it. Despite that, the Plaintiffs' complaints are both fashioned around the award being the trigger, the measure.

THE COURT: I think that's a misapprehension I've tried to dissuade them from. I think there are

risks to both sides, but that's one of them. It doesn't mean that if the alternative forum grants an award and that for some reason it's not enforced, whether it be a foreign government or this government, that the award gets supplanted and the Court becomes an enforcement arm of the government for that particular judgment or award. It means that the matter comes back to the Courts to determine if in fact there has been just compensation.

MS. BLEECKER: Well, then of course a much less intrusive measure would be the Court's first example where you look to see whether the process set out in the Compact was properly implemented and the procedures followed, and assuming the Court gets to having jurisdiction over that, that at least would be consistent with the Compact Act and the intent of the Act, and it would be looking to see whether it was properly followed.

THE COURT: And you're also saying that if the narrow holding of Enewetak is that the claims have been withdrawn, that means that the Court is not to

assume that the Federal Circuit wouldn't look anew at the political question much the same as Plaintiffs are saying that brings up every claim that was cognizable at that time and carried forth and addressed by Judge Harkins, but there's no final ruling so you can look anew at them. You're saying what's sauce for the goose is sauce for the gander?

MS. BLEECKER: Probably. And I think it's even stronger for the Bikini Plaintiffs because they dismissed their appeal of the original claim with prejudice and in conjunction with a statement that's saying the additional $90 million plus the payments received under the Section 177 agreement are full satisfaction of their claims. So they have reaffirmed the aspect of the settlement, and they've stated from our point of view that they received what was due under the Act.

THE COURT: I think there's a difference of interpretation between you and Plaintiffs, that's interesting, as to whether the agreement should be read for what the agreement says in the Compact or

whether the Federal Circuit's gloss on the term "initial funding" should be given any weight.

MS. BLEECKER: Well, I'm not sure where that came from.

THE COURT: It wasn't from the lower court.

MS. BLEECKER: Right. And two points to be made. No, the $150 million was not initial funding, but it also wasn't intended to be the complete award. It was intended to be a start and a fund to generate proceeds that then could be used.

THE COURT: It was a self-generating fund, but that was the entire contribution that was used for multiple purposes. The fact that it didn't self-generate is another matter. It's not a matter that's going to be litigated here, but it's certainly a matter that the tribunal should be asked to look at. It leads to some interesting questions.

Certainly we have to look at the $150 million as contributed and the process as it was intended to be implemented as being facts that aren't subject to examination here or I should say

reexamination here, and I say this because if you have a third party that's involved in the regeneration of funds and they haven't regenerated, that's not an action that's to be attributable to the United States.

So one has to make the assumption that the funding mechanism played out the way it was intended because you can't go back to the United States about that. Its responsibility was to make an initial contribution. It did. Whatever else happened, the fact it wasn't sufficient is another question.

But that doesn't answer the question of whether the $150 million was intended to be initial or not. The agreement would suggest that it was intended to be full funding, and the language of the Federal Circuit would tend to view it differently. But I don't know where that comes from.

MS. BLEECKER: I don't either.

THE COURT: I do know that sometimes they take the view of the lower courts should follow what they say literally, and again, you don't want to wait a number of years and find out I was wrong if I don't

follow that. Sometimes the mixed signals that are given in an appellate opinion is counsel that something should be settled. I mean, here you have a three or four-page opinion that gives rise to a lot of questions. You certainly don't have those questions about Judge Harkins' opinions.

So I understand where you're coming from. I do think that was loose language because I don't know where they got the notion this was initial funding.

MS. BLEECKER: I agree. I don't know, and it's not the position that we're taking.

THE COURT: To your knowledge, is there any Court that has examined the adequacy of a remedy under the Fifth Amendment after there has been a tribunal set up?

MS. BLEECKER: No. I looked too, and I was unable to find anything. They all seemed to stop where these cases stopped before with you have to go through the process and that will be determined.

I would like to point out that in the Antolok case, Judge Wald, who did not agree with Judge

Sentelle on the political question, did however say that any challenge to the adequacy of the settlement is nonjudiciable and that to the extent the Plaintiffs are attacking the espousal on the grounds that the government of the Marshall Islands was not truly sovereign also would be a political question. And I think that's what we have here are those kinds of claims, including the adequacy issue, and that those matters are simply not justiciable in this Court.

THE COURT: Thank you very much. Good to get you out of the litigating mood. A genuine pleasure for me.

MS. BLEECKER: Yes. If I could just ignore the review that's stacking up while I'm here, but thank you.

MR. TRAUBEN: Good afternoon, Your Honor.

THE COURT: Mr. Trauben.

MR. TRAUBEN: Bruce Trauben for Defendant.

THE COURT: Glad you came back, Mr. Trauben.

MR. TRAUBEN: Me too. Actually I never left. But I just want to make a few points. I'll try

and be brief. One thing that I would like to point out would be sort of an anomalous result if this Court previously found that the takings claim in Peter was untimely, but they were permitted to go to the NCT, assert that claim there, which they did in 1990 and they got their award.

In fact, a large part of the award that they got from the NCT was for the loss of the use of the Atoll during that time period, 1947 to 1980, and it would be very odd if they can now come back to this Court to get the money that they couldn't get previously because it was time-barred. And that's what they're trying to do. They're trying to avoid the statute of limitations by reasserting the claims through the intervention of the NCT.

THE COURT: Well, Professor Van Dyke would say there are accidents that occur. Some accidents are those of time. If Judge Harkins were sitting here today, he would not revisit his ruling in Juda 1. I should say Peter 1. Excuse me. Peter 1. What he would do is just go forward. And you're right to the

extent that the Plaintiffs were challenging the adequacy of the award, and if the Court had jurisdiction to proceed, we would be taking off from where he decided.

But when you have an intervening Judge, one of the things that can happen is that I can look at an earlier judgment. And it isn't your fault, it isn't Plaintiffs' fault that there was an intervening 20-year period where certain law matured and lo and behold Applegate fell from the heavens in the newtonian form and has been I think tweaking the government ever since, and that has to be dealt with.

But this is what happens. I was saying to my clerks over lunch do Plaintiffs understand that if this case goes forward in the shape that it's in -- by that, I mean the posture -- that it's very clear Mr. Weisgall will be here until time immemorial, but I may not be, and another trial Judge could come in and say, I just don't know about some of Judge Miller's rulings, and believe me, until final judgment, they can be taken back.

And the only way that Peter ruling could be taken back is if I determine that there's reason under 54(b) to do so. I wouldn't be inclined to do so. I'm just setting out all the variables that could occur.

I think that Applegate would allow for a different approach. And I think if I were sitting in Judge Harkins' shoes originally, I would not have drawn the distinction he did, but I'm very respectful of his ruling, and unless there's a good reason to revisit it, I won't because that's not appropriate.

MR. TRAUBEN: I'll just rely on our papers then for our other argument relating to Count I in the John action. But also the Plaintiffs argue that the Compact agreement tolls the statute of limitations by Section 177(a) in which the government acknowledges its responsibility to compensate the people of the Marshall Islands as the result of a nuclear testing program. So what they're arguing is that Congress impliedly tolls the statute of limitations although it explicitly withdraws jurisdiction from the Courts. And it just doesn't make any sense.

Why would Congress withdraw the statute of limitations by implication where it explicitly withdrew jurisdiction? In fact, Irwin v. Veterans Affairs recognizes that Congress cannot impliedly waive the sovereign immunity. So it just doesn't make sense that that statement in 177(a) of the Compact agreement would be a waiver of the statute of limitations.

THE COURT: I don't understand that particular argument, not yours but Plaintiffs. It would seem to me to follow through with the notion that one cannot bring the action to challenge the adequacy of an alternative remedy -- somebody's buzzer is buzzing -- until such time as the procedures run its course, it seems to me to be a deferral if you will.

It doesn't seem to me to be a tolling of the statute of limitations because you can't bring any new causes of action. I've been telling Plaintiffs that the original causes of action are the causes of action. They are what they are, and they are what

they are when they're brought. Peter, now John, may be one that should be revisited. I don't know that at this point, but the causes of action didn't change.

The tribunal award didn't set up a new cause of action for adequacy of the remedy. What it did was give grist to the mill to argue the remedy was not adequate. There's a difference. So there may be events that have affected the running of the statute of limitations vis-à-vis previous decisions but not that create a new event that starts a new statute with new causes of action because then we have a perpetual situation where there would never be finality. Any time you had a decision from a Court or from a tribunal, it could start again.

MR. TRAUBEN: Exactly. I think that's what the Supreme Court is warning about in Soriano, Your Honor, which I can quote.

THE COURT: Please. What page?

MR. TRAUBEN: This is 77 Supreme Court 269 at 275 where you may be familiar with the facts of this case.

THE COURT: Yes.

MR. TRAUBEN: Just very briefly, the plaintiff was arguing that it sought a claim from the Army's Claims Service. This arises from supply contracts in the Philippines during World War II, and it was resolved by treaty I believe, or, excuse me, this would have been resolved by the last requisition contract, which was in 1945, and they were trying to avoid the statute of limitations when they filed over six years later arguing that they didn't know they had a claim until the Army Claims Service had denied their request for compensation.

And the Supreme Court there said that it would frustrate the purpose of Congress. "It would be a limitless extension of the period of limitation that Congress expressly provided for the prosecution of claims against the government and the Court of Claims. This we cannot do." So, by graphing on the administrative procedure, the time taken for the administrative procedure would be an improper extension of the tolling of the statute of

limitations.

THE COURT: But where does that get us in this case? I asked Plaintiffs this. What are the new causes of action that arose? Plaintiffs intimated that there might be a taking by virtue of the fact that the tribunal award was higher than the amount initially -- than the amount committed to the Nuclear Claims Tribunal. Scratch initially because there's no evidence that it's initial.

And I understand that it was intended to be a comprehensive settlement. There are two efforts that show that both in terms of release language and final settlement language in the agreement as well as the supplemental terms of the settlement with the Bikini Island representatives.

But I don't understand where this gets us to have a new statute of limitations arising later because Plaintiffs can say issuance of the award triggered a cause of action that allowed you to test the adequacy of the remedy, but with respect to these two Plaintiffs, they sued in time.

There's a question about the Peter/John takings claim, but putting that aside for a moment, those are the same claims we're looking at today. So what's the new statute of limitations for?

Plaintiffs might argue that revived Peter/John claim, but I'm not going to accept that argument. That will be revived if it deserves to be revived under Applegate or anything else that happened. What do you think Plaintiffs get by arguing that there's been a subsequent act that started a new statute running as opposed to the Court's doing what Plaintiffs are asking the Court to do, which is to look at the adequacy of the remedy that the Court held in reserve?

MR. TRAUBEN: Well, I'm sure they'd be very happy if the Court decides that it's going to look at the adequacy of the remedy because that's --

THE COURT: That's all they're asking for.

MR. TRAUBEN: That's all they're asking for.

THE COURT: Right.

MR. TRAUBEN: That's right. One way or the

other.

THE COURT: There's something implicit. I don't know who is out there, but if there's anybody else out there and it was held that the issuance of a decision starts a new statute, you might have new claims, but since it doesn't, hopefully you won't. At least you know whom you're looking at. That should give you some degree of satisfaction, albeit I can see minimal.

We're not talking about tolling the statute. It didn't happen. What happened is that the Court expressly reserved a decision until such time as the remedy ran its course. That's not tolling anything, if it did that.

MR. TRAUBEN: If it did that, we would disagree. In fact, they didn't revive the earlier actions. They filed new actions, and then these new actions I think have to be evaluated on their own.

THE COURT: They didn't know how to go about reviving them. I mean, the case is long closed.

MR. TRAUBEN: Well, be that as it may, these

are new actions.

THE COURT: Well, I certainly would only look at them in terms of the intention was to revive the old ones and to ask for the inquiry that the Federal Circuit said they were entitled to.

MR. TRAUBEN: Something else that Mr. Weisgall mentioned, that he says it would have been futile if they had challenged the sufficiency of the award back in 1986 when the Compact agreements went into effect, but they didn't try. They made that argument.

They made a legal argument, but they didn't seek to amend their complaint to add takings claims arising from the Compact agreements. They didn't file another action challenging the validity of the Compact agreements. They didn't do those things. They didn't try to do them.

But now they're trying to argue it would have been futile, but first you have to try, and they didn't do that. And I think that Krepel and cases like Krepel and Love Ladies Harbor and Soriano suggest

that they should have done those things. They should have then at the time challenged the validity, maybe gotten a stay of a takings claims and pursued the validity challenge, but they didn't. So now they're trying to put things back, and I think it's too late to do that.

THE COURT: Well, if the Court reserved the issue of the sufficiency of the remedy or adequacy of the remedy, it would seem to me that at that time, Plaintiffs would be allowed to levy a challenge to the implications of what that question was and weren't required to say, oh, you told us this was our ultimate solution and the withdrawal was good, so now before you enter final judgment, we will ask for leave to amend just to preserve these claims. I mean, that's what the Court told them to do.

MR. TRAUBEN: Your Honor, I don't think that the Court conditionally dismissed.

THE COURT: No. They absolutely dismissed. You're correct. I would call it a pregnant dismissal with a long gestation period.

MR. TRAUBEN: But when you look at Article 12, Your Honor, in the Section 177 agreement, there's no condition on the withdrawal of jurisdiction for the United States. It's very plain simply that all claims described in Articles 10 and Articles 11, which are the claims related to the nuclear testing program, shall be terminated. "No Court in the United States shall have jurisdiction to entertain such claims, and any such claims pending in the Courts in the United States shall be dismissed."

Nowhere does it say shall be dismissed provided that they obtain enough money, what they deem to be enough money elsewhere, and then open it back up, which I understand the Court's sympathies, but that's not what the agreement says, which is incorporated into the Act. So you're putting more into it.

THE COURT: What does this agreement do to the cases that Plaintiffs decided that do stand for the proposition that there's always a residual remedy under Tucker Act? You're saying that the agreement

took away the possibility of that remedy, that the Plaintiffs had actually agreed previously to surrender that potential remedy?

MR. TRAUBEN: Absolutely. In fact, that is what the agreement was in 1986 entering into the Compact agreements. It was an agreement that their government was a party to, and this $150 million didn't come out of the air. They agreed to it. It was submitted in the 1983 plebiscite to the people of the Marshall Islands, and it was approved.

So they come into Court now acting as if it was a unilateral action of the United States, but that's not what it was. It was a bilateral agreement between the United States and the nascent government of the RMI. So they can't put all the onus on the United States.

THE COURT: So you're saying in the Compact, more was agreed to than should have been agreed to? If that were the case, in other words, if a settlement agreement didn't purport to cover all claims, you'd never have a settlement agreement that remitted people

to an alternative tribunal. It just wouldn't happen.

You might have a judicial action somehow that did that said a tribunal has been set up. You're supposed to go to the tribunal, but there's no particular settlement fund. Maybe Lagenegger was in that category where you have to go to a tribunal, but there is no concept that there's a settlement tied up with what the tribunal is doing.

MR. TRAUBEN: I'm not sure I'm following.

THE COURT: Well, it seems to me either there is a distinction between a disposition that involves going to a tribunal where for whatever reasons it's determined that the claimants have to go to the tribunal and a disposition where there is an agreement that all the claims have been settled by virtue of a settlement agreement that incidentally also remits them to a tribunal.

If there's no purported total settlement, then you have the argument that this is open-ended, nobody agreed to settle these claims finally and just see what awards could be made available in a tribunal.

The Plaintiffs were just remitted to a tribunal, and their causes of action were taken away.

And so the Court's role is to see if the remedy was adequate, and in those cases, if there had been no overall comprehensive settlement, then perhaps Plaintiffs would be in a different position arguing what they're advancing.

You say that not only was this a tribunal that was set up, but the government negotiating on behalf of the state to be recognized agreed that this tribunal would take cognizance of 100 percent of any claim that ever could be brought in a U.S. Court, that it's over, that there's nothing residual to look and see if it was a taking.

I guess what I'm putting emphasis on is the notion of a monetary settlement entered into by the United States and someone else vis-à-vis claims against the United States and an agreement by which claims are withdrawn to move to another forum without a comprehensive settlement.

MR. TRAUBEN: If there was a comprehensive

settlement.

THE COURT: There was here, and you're resting on it.

MR. TRAUBEN: Yes.

THE COURT: But therefore, you're saying to Plaintiffs it seems to me that there could be a situation where there wasn't a comprehensive settlement, and that's what you should be addressing. That's the situation where the Courts can be open to determine if in fact this was an effort to surrender all claims in any form at all forever.

For example, there's no dispute the Plaintiffs if they had a claim against the United States could have settled it and that 20 years later nobody could look at it and say that was an inadequate settlement. The settlement agreement would be absolutely binding, absent some kind of fraud in the making of the agreement of some sort.

So there's nothing wrong with the notion that you could have a comprehensive settlement that bars future attacks on it based on changed

circumstances or anything else. People enter into them every day in the private sector as well as the public sector.

What's different here is that we have an international settlement where the United States is purporting to settle all claims that could be brought against itself, and the question would be whether you could do that with respect to any claims that are arguably under the Fifth Amendment in a case such as this. Can you settle a claim that involves an international forum that will remove the Fifth Amendment Tucker Act fallback position?

MR. TRAUBEN: I believe so, Your Honor, and I'll be honest. I'm not as familiar with this action as perhaps I should be, but I think in Gold Bondholders, which we cite in our papers, that's pretty much what happened.

THE COURT: Right.

MR. TRAUBEN: I don't have that in front of me.

THE COURT: It's all right.

MR. TRAUBEN: I know we do cite it.

THE COURT: You do.

MR. TRAUBEN: I know for a fact that it was discussed in the Juda case as well.

THE COURT: Right.

MR. TRAUBEN: And it's my understanding that that did involve a Fifth Amendment action. But the citation is 676 F.2d 643. It's a 1982 case from the Court of Claims.

THE COURT: Okay.

MR. TRAUBEN: But, Your Honor, one thing that I think that I found persuasive, and that is I know that you might disagree, but Judge Wald's statement in Antolok that any dispute regarding adequacy of the settlement must be recognized as in substance a dispute between the Plaintiffs and their own government. And I think she hit the nail on the head with that.

And nobody here disputes that what happened to the people in the Marshall Islands ought not to have happened, and nobody here would stand up and say

that they shouldn't get all the money that they're entitled to. But what we're saying is that this is not the forum, that they should go to Congress to get more money from the United States if they may be entitled to it, but it's not a judicial decision. It's a political decision.

THE COURT: Gold Bondholders stood for the proposition that you can have a withdrawal of sovereign immunity. You can withdraw the right to sue, but that of course has implications for the Fifth Amendment, which Plaintiffs have brought up. The waiver of sovereign immunity can be withdrawn at any time by the sovereign, the sovereign who has power to do it.

MR. TRAUBEN: I'm just looking at the head notes of the summary in Gold Bondholders. It says, "Application of the joint resolution was not precluded on the theory that it constituted the taking of property right and thus was prohibited by the Fifth Amendment", but actually I would have to defer to Ms. Bleecker to argue Gold Bondholders further.

THE COURT: I knew this would happen. It did say that, "Consent to sue the United States on the gold clause contained in Plaintiffs' bond was withdrawn, and the Plaintiffs' claim is barred by the doctrine of sovereign immunity." And then it dealt with the Fifth Amendment peripherally, basically following Lynch.

But we'll see. That question has been the subject of some debate, meaning the tension, if any, between the sovereign's absolute right to withdraw the right to sue and whether there's any residual concern with a takings claim. And you raise some interesting points, and they are really ones to ponder, so don't think I'm taking them lightly. Any issue that involves suing the United States is a serious one.

MR. TRAUBEN: Thank you, Your Honor. Unless you have more questions?

THE COURT: No, I don't.

MR. TRAUBEN: I'll yield.

THE COURT: Otherwise, I'll get just tongue-tied again. I have the disadvantage of not having

them written out. You give rise to them with your very provocative argument.

Okay. Mr. Weisgall. My clerks couldn't get over the fact that your entire career seems to have been involved with these lawsuits.

MR. WEISGALL: I have a day job too, Your Honor.

THE COURT: Yes.

MR. WEISGALL: Yes. That's what the headstone is going to read. He did the Bikini case, although apparently I'm going to outlive it. I'm supposed to outlive you based on what you said earlier.

THE COURT: Outlast. There's a difference.

MR. WEISGALL: Actually, I realized a couple of very interesting things at lunch. One is that your name was one --

THE COURT: It changes.

MR. WEISGALL: Yes. You were once Christine Cook Nettsheim.

THE COURT: Nettesheim. They misspelled it

in the Supreme Court. My luck.

MR. WEISGALL: My goodness.

THE COURT: It's a former name.

MR. WEISGALL: Well, and I was a Lilly Associate under David Ginsburg.

THE COURT: We may have met.

MR. WEISGALL: The other thing I realized is that I think I am the only person in the world who has ever tried a case before the Nuclear Claims Tribunal and the U.S./Iran Claims Tribunal. I actually went to the Hague. I got yelled at by an Iranian Judge. I was called a Zionist, and I went to the U.S. Embassy. I said, you really put up with this kind of stuff?

THE COURT: They said daily.

MR. WEISGALL: Let me tell you something. That would not meet our standards. And with Mullahs watching me the whole time, it was not a lot of fun.

Okay. I really wasn't going to say too much, but I think a couple of new points have come up. You were pondering and I guess if you're going to ask for further briefs, let me just touch on this issue

very quickly, but you seem to be getting at the adequacy of the remedy versus the adequacy of the compensation.

I went back at lunch. I was reading Judge Harkins in Juda 2, 13 Cl. Ct. 689. It's funny. I've read it 100 times, and you see something else. "The settlement procedure as effectuated through the Section 177 agreement provides a reasonable and certain means for obtaining compensation. Whether the settlement provides adequate compensation" --

THE COURT: What page are you on?

MR. WEISGALL: Six eighty-nine.

THE COURT: Thank you.

MR. WEISGALL: The second column. I just copied it out of the old F.2d, out of the Claims Court library. "The settlement procedure provides a reasonable and certain means for obtaining compensation. Whether the settlement provides adequate compensation cannot be determined at this time." And I think he says that because, again, the issues here, they're grounded in the Constitution.

Again, it doesn't hurt sometimes I guess to go back and read the Constitution. "Nor shall private property be taken for public use without just compensation." And maybe this is a simplistic argument, but I would be looking and I'm looking for my clients at the adequacy of the compensation, not the adequacy of the remedy. I don't know if that's being responsive to what Your Honor was getting at or not, but Judge Harkins certainly grounded his decision in whether there was adequate compensation. I'm ready to move on, but --

THE COURT: Go ahead. No, I'll make a note of that.

MR. WEISGALL: Mr. Trauben said we should have filed a claim back in 1986. We should have challenged these issues, not say it's one thing for Mr. Weisgall to stand up and say you would have kicked me out of Court, you should have challenged. I'm just going to offer to Mr. Trauben here's a brief I filed in the U.S. Court of Appeals for the Federal Circuit. It's got my name on it as the counsel for the people

of Bikini, and it's dated April 15, 1988. I was challenging these issues. The brief says, "Statement" --

THE COURT: You got with a walking history.

MR. WEISGALL: Say again?

THE COURT: Walking history coming back to bite you.

MR. WEISGALL: I was there. "May Congress consistent with the Constitution deprive Plaintiffs of all judicial forums for the determination of their constitutional claims against the United States?" I mean, I've been beating my head against the wall for a long time. I was arguing it in 1988 two years after the Compact became effective. I mean, I was not alone. I was with the other Plaintiffs, but I just want to make that clear. We were challenging those issues.

Now did I bring an amended complaint? No. But I think where you're coming out today is probably logical, which is okay, where those claims were pregnantly dormant for some time and now they are

coming back because the alternative remedy has run its course. I don't think that required bringing a new complaint. If anything, the logic behind what you're saying is you're probably going to knock out my new causes of action anyway because you're saying we'll go back to the old ones. So I'm not sure what I could have done at the time.

THE COURT: Well, I think given things that the Supreme Court has said in other cases, and I pointed to Persault, the government frequently will say it's whipsawed. I thought it was a term that I coined.

Okay. Whoever has that phone, out of here and stay out.

I don't think there's a whipsaw in operation in this case because it would be unfair to tell Plaintiffs there's no need for you to try to progress further in the Courts and then to say, well, if there were some claims that you were aware of, then you should have at least noticed that they existed so the Courts would know that you noticed within an

appropriate period of time.

That would involve just exactly what the Supreme Court in Dickinson told us to avoid, which is when you're dealing with a taking to have to run it at every possible signal. I'm not talking here about a taking. I'm talking about the principle of running into Courts and every argument that existed as of that time that had been made was preserved. It was just frozen in dry ice until this process ran its course.

But I would say that the government has a point that given the comprehensive nature of the settlement the question of exactly what is meant by the Supreme Court's reservation of this question it could relate to process. It could relate to amount. The government would say, well, if it relates to amount, that could have been determined in 1986. The amount was $150 million as it grows.

If the real problem here is not that $150 million would have grown sufficient if properly managed and reasonably managed to be sufficient to fulfill these judgments, you should have known it

right then and should have challenged the amount.

The problem seems to be some intervening circumstances that are not the responsibility of the United States, to wit the management of the funds, and the Court is not going to get into issues of should that fund have grown or could it have better grown or where has the money gone. This is not the proper forum for that.

But if the United States settled for $150 million and if in fact it could have grown to some $600 million over this period of time, if invested -- you disagree about what the return rate would have had to be -- but it's certainly an amount that would have been $450 million easily.

I think we're in a very difficult position if we hold the government responsible or attempt to for any amount that would be not over and above $150 million. But you would be on better footing attempting to hold the government responsible for any amount that would have been in excess of that fund sufficiently growing. That's a real problem.

MR. WEISGALL: That's a problem. I'm going to make a stab at trying to persuade you of that in a second, though, because I think it is an issue. I want to try to clear the air a little bit on this mismanagement issue. I don't want to go outside the complaint, but first of all, let me walk you through the math. The 177 agreement, Article 2, we start with $150 million trust fund. Okay.

Article 2 of the 177 agreement makes clear that that trust fund has got to throw off $18 million a year in cash. Okay. Now the math I can do for you. That means the $150 million has to earn 12 percent a year. In other words, 12 percent of $150 million is $18 million. Why does it have to earn $18 million? Go through Article 2. Two million dollars a year to the Marshall Islands government, by the way, to buy technical services from the United States, but that's another issue.

One million dollars a year to the government of the Marshallese for medical surveillance and monitoring. One point two five a quarter, in other

words, $5 million a year to Bikini. So that's two plus one plus five, that's eight. Enewetak, $812,500 times four. Enewetak gets $3.25 million. Rongelap, another Atoll, $2.5 million a year. The numbers there are quarterly by multiplying by four. Utrik annually, $1.5 million. Nuclear Claims Tribunal administration, $500,000 annually. And the Claims Tribunal itself, well, $2.25 and then after three years $3.25.

Anyway, you can add up the numbers. That adds up to $18 million. Now Leman Brothers -- well, that's outside the record. It was invested. You know Wall Street folks. Trust me. When there's $150 million going around, you're going to get Wall Street folks coming in, and they're going to offer to invest the money and invest it as wisely as they can.

THE COURT: The client was the RMI?

MR. WEISGALL: Well, yes, and the client was absolutely the RMI. My clients had nothing to do with that money. I do know in the 501(c)(3)s in which I'm involved, there's a rule of thumb that says 5 percent of your endowment a year is about all you should play

with because you want that corpus to grow. It was pretty hard when you've got to throw off 12 percent a year to make that corpus grow.

Your Honor asked about where did this business come from about the initial sum. Remember you were asking that because People of Enewetak twice calls an initial sum. I have a clue, and my clue is the brief that the government filed in Juda 2. We refer to that brief, by the way, at page 21 of our own brief because in the brief itself, they said, this is the argument they were making to the Federal Circuit, "It's conceivable the fund could become depleted because of radical long-term investment difficulties." And they said in a footnote, well, there has been this correction in 1987, the stock market correction. But it's anticipated the fund will be fully restored in the near future.

But then the government's brief went on and said it could be depleted, but the agreement specifically provides for changed circumstances and cites the changed circumstances provision. Well, you

yourself I think correctly interpreted it. The changed circumstances isn't you run out of money. The changed circumstances is there were injuries that couldn't have been identified.

THE COURT: That was the government's position, but I agree with it.

MR. WEISGALL: And the State Department we know in January 2005 said, so there's no more money. Tough. I think if the State Department had stood when the United States stood before the Federal Circuit in 1988 and the question came about maybe possible depletion, changed circumstances -- by the way, it's page 34 of the government's Appellate brief.

THE COURT: Was that the appellate brief you say was in Juda 2?

MR. WEISGALL: It was People of Enewetak, yes. I misspoke. It's in the U.S. Court of Appeals for the Federal Circuit, People of Bikini, Enewetak, Rongelap, 88 1206, 1207 and 1208, and it's the State Department brief, Mr. Howard Hills for the Department of State and the Justice Department.

THE COURT: Is this a separate brief or was it -- he was of counsel?

MR. WEISGALL: He was of counsel, yes. Roger Marzulla. But it was assistant general counsel. It was the Justice Department. So they were essentially standing up and saying to the Court, well, there could be -- I don't want to use safety net again. If there's a problem, there's changed circumstances, but when it came time for the Executive Branch to pony up and say yes, Congress ought to do something about this, they said, you lose your money, you lose your money. Tough. But it was a real tough bar to make that 12 percent. So I just wanted to walk you through some of that.

The tribunal, there's reporting requirements. So I don't think the mismanagement is a huge point. I don't want to lose my time here. I'm going to jump to a couple of other points. I'm sorry for jumping around.

THE COURT: No, I think we've achieved something if we're at the point we can jump around.

MR. WEISGALL: Okay. I wanted to help enlighten you on some of that if I could without remembering, and my colleagues keep saying it's a motion to dismiss, it's a motion to dismiss, but I think it's important to understand a little bit of how those numbers worked out.

You asked about Dames & Moore. My gut tells me that the fact that Dames & Moore involved cases against Iran as opposed to the United States I think strengthens in a way my client's arguments because we are seeking just compensation under the Fifth Amendment for the damage done by the United States under its sovereign powers.

I mean, it had sovereignty over Bikini. That's how it took Bikini. So we're not challenging the fact that it had the sovereign control in 1946. It was probably wartime and occupied territory and stuff like that, but that was the damage caused by the Defendant.

The problems caused by the overthrow of the Shaw and the canceling of contracts, those were

slightly different issues. I think the holding is still completely relevant. But if anything, the fact that we're in this Court seeking a forum to pursue taking claims against the United States almost strengthens, we're almost a step above, Dames & Moore, because of the nature of our claims, which are takings claims against the United States. I don't know if that resonates or not.

THE COURT: Well, I think it does, but again, as was pointed I believe by your co-counsel or by counsel in the John case that in Dames & Moore, there was a built-in replenishment provision.

MR. WEISGALL: A built-in?

THE COURT: Replenishment provision.

MR. WEISGALL: Exactly. Yes.

THE COURT: Which when you're dealing with Iranians you know you need. Now whoever negotiated this -- and it was negotiated on behalf of the people, the Marshallese -- didn't provide for a built-in replenishment provision. It just wasn't provided.

And that is problematic because that at this

point I don't think can be held against the United States because these claims were espoused, and you know recognition of nations would never end in terms of being challenged if the ability to obtain recognition were always up to review by people who didn't agree with the decision.

So whether or not the original agreement was as comprehensive as it should have been, I think it was comprehensive in covering all claims. But comprehensive in terms of looking forward to adequate funding is not I don't think for the Court to determine. One of the things we learn in law is how easy it is to second-guess an agreement when you see it go bad, and if we were drafting it as a matter of first impression, we might make the same mistakes. This settlement itself may not have been as beneficial as possible.

Now we're not talking here about adequacy of the remedy then. We're talking about the adequacy of the original settlement agreement, and that's something that I think if the Court got into it would

be chastised.

MR. WEISGALL: Well, as you go through that, I guess all I can say is keep in mind the interplay of that with our seven cases beginning with Monongahela about the fact that they're different cases. Congress says here's the matter. You can't collect for this. But one thing after another. All the cases hold the general proposition that it's the Judicial Branch that sets the amount of just compensation, not Congress. So there's an interplay problem there, and that's going to be your job to figure out. I think that that's got to be an important --

THE COURT: That said, though, truthfully, Mr. Weisgall, parties can agree to agreements that aren't in their best interest, and the Court doesn't stand in some kind of in loco parentis over the parties, and I'm not saying this is one, but that's one of the reasons the Fifth Amendment isn't implicated in that kind of agreement. This is why it goes down to the common law of fraud, duress or some misrepresentation. We're not dealing with that here.

So I cautioned you before. I know that you understand this, that the last victory won is a pyrrhic one.

MR. WEISGALL: A minor point before leaving Dames & Moore. Ms. Bleecker talked about certain claims that wouldn't even be in the jurisdiction of the Claims Tribunal. I now remember, and I found that if you look at the decision 453 U.S. that goes from 684 to 685, "As we read the Executive Order, those claims not within the jurisdiction of the U.S./Iran Claims Tribunal will revive and become judicially enforceable in the U.S. Courts."

You may remember also from your involvement in the case some of those claims were actually not going to go to the tribunal. I think the Supreme Court's decision, though, was one of a case that was going to go to that tribunal.

THE COURT: That's correct.

MR. WEISGALL: Yes. Okay. A couple of minor points. Now I'm even forgetting whether it was Ms. Bleecker or Mr. Trauben. I think it was Mr.

Trauben, but he was talking about Public Law 100446 and said the Bikinians dismissed their claims. And again, I hope he misspoke, but I do want to clarify. The Bikinians dismissed their appeal on jurisdiction.

He also said that this was in full satisfaction of all their claims against the United States. Again, trust me, I was involved in 100446. It talks about, "Full satisfaction of all claims of the people of Bikini related in any" -- this is the very end of the statute -- "related in any way to the United States' nuclear testing program in accordance with the terms of the Section 177 agreement."

And as far as being a complete full satisfaction, I also refer you to one other sentence in that statute. "One year prior to completion of the rehabilitation and resettlement program, the Secretary of the Interior shall report to Congress on future funding needs on Bikini Atoll." So again, we have the sense that maybe that $150 million was not the alpha and the omega.

THE COURT: I'm sorry. What section is that

of the Act?

MR. WEISGALL: That is in Public Law 100446 about halfway through the statute. The $90 million was earmarked for the rehabilitation and resettlement of Bikini Atoll, and then, "One year prior to completion of the rehabilitation and resettlement program, the Secretary of the Interior shall report to Congress on future funding needs on Bikini Atoll." Again, my argument would be that this was an initial sum. This was a beginning. It was not the alpha and omega.

My last point, Your Honor, I think the elephant at the garden party, my elephant, has sounded its trumpet after lunch. Ms. Bleecker said there is a safety net, but it ain't here. And Mr. Trauben I think finally came out of the judicial closet and said -- sorry, I think finally said you do not have jurisdiction to hear this case because there is no place. There is no forum for this taking claim.

I urge you I think at a minimum that under the Tucker Act, there has got to be a safety net for

that shortfall. By the way, I may also have misspoken this morning when I talked about a small award, a $10 award, and I might not have been in front of you.

Based on what you said about looking at this whole issue ab initio, that really all the Claims Tribunal award stands for is okay, you punched your ticket, you exhausted your remedies -- I actually may have misspoken. We could be back here no matter what the award was of the tribunal, so in rethinking the logic.

But ultimately I think the basic principle here is that Congress cannot legislate around the Fifth Amendment. And we are in a takings claim and that ultimately there has to be some residual jurisdiction if not in this Court in some Court. But the Article 12 is pretty clear that no Court anywhere in the United States has jurisdiction, and I'm not aware of that. We had Judge Sentelle very carefully saying we're not facing that difficult question, and we all knew what the difficult question was, of cutting off jurisdiction for a taking claim.

When did Judges Wald, Star and Sentelle ever agree on anything? They agreed basically on that point. So maybe I'll leave it on that unless you have questions.

THE COURT: No, thank you. I enjoyed your argument very much.

MR. WEISGALL: Thank you.

THE COURT: Professor Van Dyke.

MR. VAN DYKE: Thank you, Your Honor. I want to start by emphasizing a point I made this morning, that when the Appeals Court of the Federal Circuit grabbed onto Judge Harkins' decision, they referred to Juda 2, the 13 Claims Court decision, and his ruling on the statute of limitations was earlier in the Peters case in the Sixth Claims Court. So they weren't in any way directly related to the statute of limitations determination.

And I think their statement on Footnote 4 reserving judgment on all those issues needs to be viewed as the definitive word on how they were dealing with the statute of limitations issue.

THE COURT: Thank you. That's the point I overlooked.

MR. VAN DYKE: Now we have heard a good deal about the importance of the careful language from the Federal Circuit in the People of Enewetak case, and I want to emphasize once again that they clearly engaged in an effort to explain that there should be a continuing monitoring of what Congress was doing.

So, in their careful language at the end of the opinion where they say, "We're unpersuaded that the judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate", they follow that with a sentence noticing that Congress has supplemented the fund in one respect which they say evidences Congress's concern.

So they're keeping their eye on Congress, and they are making it clear that they're going to hold Congress's feet to the fire because there is a duty of just compensation, and they want to make it clear that Congress knows that they understand that

that's a continuing duty and that they will make sure that the compensation is adequate in this case.

Now my next point is to focus on Claims 3 through 6 in the John complaint, the Enewetak complaint, which we haven't given too much attention to during this discussion. These claims are to some extent alternative claims. Count III and IV indicate that the whole process has led to an unlawful taking claim, the just compensation claim, and Count IV says there's unlawful taking of the implied contract claim.

Count V then refers to the Compact as being unlawful because of a breach of fiduciary duty. So, in their nature, a logical Court would either focus on Counts III or IV or Counts V and VI, depending on how the Court views the evidence. But both were added as alternative counts to make it clear that the Plaintiffs should be able to gain compensation for the continuing action of the U.S. Government.

Now Your Honor has expressed some sense if I understood your concern that we should sort of stop at the original counts and these add-on counts may not

have support if I understood you right.

THE COURT: I wouldn't think so. I hope I'm sounding like a logical Court saying this. But the Federal Circuit in what you refer to as its careful language determined that the adequacy of the remedy vis-à-vis the claims that Plaintiffs had brought forward would be subject to judicial review when that claim procedure had been exhausted. That didn't mean that there was an open-ended date for filing claims against the United States. The statute did run. I mean, if anything, it had run, and it had run your clients over with respect to their takings claim if Judge Harkins' analysis is to carry forward.

I think that any chances of upholding a case like this on review are dimmed considerably by the notion that the government would have to be amenable to a new statute of limitations that arose when the claims procedure was over.

MR. VAN DYKE: Let me offer an analogy if I could, and let's use the Dames & Moore facts because we've been talking about them all day. Let's suppose

six and a half years after the Algers accord and let's assume the Iran/U.S. Claims Tribunal has been operating for a few years, but it never got to the Dames & Moore matter, and then all of a sudden let's assume that the tribunal is abolished or let's make it even more interesting and say that the United States walks out and unilaterally says we're finished. This is no longer an operative tribunal.

So then what does Dames & Moore do? Well they're going to obviously be upset, and they're going to say we've been taken here. Our property has been taken. And so they're going to file another claim against the United States in this tribunal.

THE COURT: It's going to be the same claim, the same claim they filed earlier. They're saying it was to be satisfied by going through the claims procedure, and it wasn't capable of satisfaction because our claim wasn't entertained. Therefore, we revive our claim as it was in the United States Courts, but we don't have a new claim.

MR. VAN DYKE: But they would probably add

some additional counts saying that they were damaged by having to wait all this time.

THE COURT: I'm sure.

MR. VAN DYKE: That's an additional amount of damage.

THE COURT: Right.

MR. VAN DYKE: Resulting from the fact that they were sort of whipped around and forced to go to the Hague and so on.

THE COURT: It's sort of like the Vaccine Act cases in reverse. When Congress made a comprehensive settlement to let the concerns of the parents, the health providers, which means the doctors who injected the children and the pharmacists, pharmaceutical companies, they actually made the claimants go through an administrative procedure before they could go to Court, and that added built-in delay, built-in costs. Talk about an emotional kind of claim.

I mean,they say litigation is a continuation of a relationship. Well, that relationship is doubly

long if parties are dissatisfied with this procedure and then have to go back into Court. But it was lawful because it was a balancing of all interests.

So one of the costs of dealing with an international compact is that you may be deferred. Now is anybody going to give you compensation for waiting around? That wouldn't have happened with Dames & Moore. They might have pleaded it, but it wasn't going to happen. It's called the cost of doing business.

MR. VAN DYKE: Yes. And we accept delays if they are part of a procedure that's designed to be responsive to the situation. In my hypo, the United States just sort of pulls out and says we're out of here.

THE COURT: Well, if they had been to the same procedures that Mr. Weisgall would, they would have got fed up after awhile too.

MR. VAN DYKE: Okay.

THE COURT: I'm just pulling your leg. No, I understand what you're saying. The United States

would have done what Iran would have liked to have done: got up in your hypothetical and walked out.

MR. VAN DYKE: And so supposedly the Nuclear Claims Tribunal had simply been abolished six and a half years after it had.

THE COURT: The Indian Claims Commission was abolished because it didn't do its business, and all those claims were reposed back in the Court.

MR. VAN DYKE: Then they could have come to this Court.

THE COURT: And they did. They weren't amended in any particular way because there was a firm statute of limitations, but there was an example of a tribunal that didn't do its job.

MR. VAN DYKE: And basically that's what the Plaintiffs are doing in this case. They're coming to this Court because it was an illusory procedure that was set up as we look back upon it, that the Plaintiffs were forced to spend 10 years, a decade, litigating before the Nuclear Claims Tribunal. Very difficult, challenging evidentiary procedures.

They did it. They did their best. They got an award, and then it's illusory. It's a mockery. So that's why we're here looking finally for justice, Your Honor.

THE COURT: Well, I appreciate your argument. I wish one of the consequences after an argument weren't that I get it now. You've carried it for a long time. You'll get it back, but I've got to carry it now. I want to ask counsel in this to see if it's worthwhile. And you're free to take your seat. Are you through? I thought you were through. No?

MR. VAN DYKE: I just want one last point.

THE COURT: Go ahead.

MR. VAN DYKE: About the Gold Bondholder case which was mentioned by the government just recently.

THE COURT: Right.

MR. VAN DYKE: This is a unique case. The Court itself refers to it as unusual. It's unusual because it refers to the gold clause, and the gold clause has always been treated separately. Obviously

this deals with currency which is a unique national interest, and so we would distinguish this by emphasizing that it needs to be restricted to its unique facts. And the key language in the Gold Bondholder case is where they quote from Justice Stone's opinion in the Perry case.

The Perry case was the main gold clause case from 1935, and the Court of Claims quotes from Justice Stone's concurring opinion where he refers, this is on 646, to the undoubted power of the government to withdraw the privilege of suit upon its gold clause obligations. So this is a unique situation having to do with currency.

There are two other cases the government relies upon for this idea that you can completely eliminate jurisdiction. One is the Lynch case, Lynch v. United States, 1934. In that case, there is broad language, but the language is all dicta. The holding of the case is much more narrow, and in fact it rejects the idea that the Congress has eliminated the claim.

In other words, after all this broad language, Justice Brandeis comes back and says, well we can't assume that Congress would really want to eliminate a claim, a valid property claim, and the key sentence Justice Brandeis says towards the end --

THE COURT: On what page is it?

MR. VAN DYKE: This is page 586, 292 U.S. 586. "It does not appear that Congress wished to deny the remedy if the repeal of the contractual right was held void under the Fifth Amendment." He says, "You can't repeal the right." "You can't repeal the property right, and we can't assume that Congress would want to repeal the remedy if they knew that this was a right." So the holding is that neither the right nor the remedy is repealed, and the holding in fact supports our position rather than the government's position.

And the final case that is cited by the government is Maricopa County v. Valley National Bank of Phoenix, a 1943 U.S. Supreme Court decision, and again, this is easily distinguished. That case

involved a Congressional statute which the Supreme Court interpreted to say that states and counties could tax shares of the national bank. So you have a Congressional decision. The Court interprets it in a way that says states and counties can tax the federal bank.

The Congress then immediately passes another law saying no, you were wrong. States and counties cannot tax shares of federal banks, and the Court says fine. The counties came in and said, our property has been taken. But the Court said, no, your property wasn't taken because it was just a gift anyway. It was a gratuity from the federal government. They I think realized that they had been scolded for getting it wrong by Congress, but in any event, the way the opinion reads is because it was just a gift, a gratuity, Congress can take it back.

But it doesn't say that when you've got traditional property rights like land that is taken by the government, destroyed by the government, that the government can then just walk away and say, there's no

remedy.

So none of these cases have anything to do with land, have anything to do with the kind of traditional property that we're dealing with here. And if the outcome of this case is that the government, the Congress can eliminate claims to land and provide no remedy whatsoever for people under U.S. jurisdiction that lose their land because of U.S. government activity, then the Fifth Amendment has been eliminated from our Constitution. So a lot is at stake here, and we appreciate the Court's careful consideration of the matter.

THE COURT: Thank you.

MR. WEISGALL: Your Honor, Professor Van Dyke and I did not tag-team on one point. Just 30 seconds.

THE COURT: Certainly.

MR. WEISGALL: On Gold Bondholders, that was a case on profits under a contract, so it was not a property claim. And that really goes to the sovereign immunity issue, which is there's no question Congress

can assert sovereign immunity over takings claims, but I don't think sovereign immunity should be here. I don't think the government can use the shield of sovereign immunity as a bar for a just compensation taking claim. I think that is just one more added point on Gold Bondholders.

THE COURT: Thank you.

MR. WEISGALL: Thank you.

THE COURT: Counsel, I want to thank both sides for their able arguments. The first question to resolve is whether the parties think it is useful to file narrow briefs on the question, preserving Defendant's point that it disagrees that this is a question and disagrees that it is an underpinning of the holding, but in Enewetak what exactly the Federal Circuit meant in terms of its several mentions of being premature to judge the adequacy of the remedy, and if so, how is the remedy to be viewed in a subsequent Court action asking for examination of the adequacy of the remedy. Do you think that would be useful to brief that, or do you want to rest on your

briefs?

MR. WEISGALL: Your Honor, I think it might be. We didn't do research on that very narrow question, and there may be something out there where we could provide some --

THE COURT: I would wish that you do because I truly think that's where we start.

MR. WEISGALL: Then I think it's a good idea.

MR. VAN DYKE: We would be happy to provide it.

THE COURT: And if your briefing is the same, you're welcome to file a joint brief. How does the government feel about filing a short brief?

MS. BLEECKER: That's fine, Your Honor, if you think it would be helpful.

THE COURT: I don't want you to feel you've got to research an area that is just fruitless. I would appreciate some guidance. I think our focus has been somewhat refined, and we need to know what it means in the context of this case, what an examination

would be in terms of the adequacy.

And in that case, I think that it would be helpful to have the government set forth the metes and bounds of what it believes was really settled by the original Compact, because if I understand, Ms. Bleecker, your position is if the Court is just supposed to go into the method by which the claims were espoused, meaning the agreement, the binding nature of the original agreement, that that is of itself a political question and would be improper for the Court to look at.

So I believe it's the government's position that whatever was agreed to was agreed to by two parties, both of which are deemed competent, one of which is deemed competent perhaps because of the political question doctrine.

But let's just say assuming arguendo they're both competent and they can largely agree to what they want, and especially if it is subject to ratification of the people affected by the people affected and that we've got to look at that agreement in terms of what

is stated, and I would appreciate the government's guidance on the various references in the Enewetak Appellate decision by the Federal Circuit to the notion of continuing funding and what, if any, weight you believe they should be given.

I would ask that you brief these matters in some depth. I would ask for the briefs to be 10 pages or fewer. Do you think that will be adequate? I would think so. But each party can file a brief. And if you were to file a brief, how much time would you like? You may be tired of briefing.

MR. WEISGALL: Thirty days.

THE COURT: If you want that much time, you've got it.

MS. BLEECKER: When you say each party can file, that means that the government files --

THE COURT: Would you like more pages?

MS. BLEECKER: Well, now I'm just trying to understand. Do we file two briefs, one with respect to Bikini and one with respect to --

THE COURT: Not if you don't want to. I

think it's one question, but if that's how you view it, you can have a 20-page brief.

MS. BLEECKER: I'm just trying to understand. And you want not only our discussion about metes and bounds of what was settled but also to address --

THE COURT: What the Federal Circuit said.

MS. BLEECKER: -- what the Federal Circuit said.

THE COURT: Yes. And anything else you think bears on that issue, that I don't want to hear anything you did before. Okay. May 23. The government can file a combined brief if it wants. You filed separate briefs in this case. You can do the same. If you elect to file a combined one, that's fine. That will be your election.

MS. BLEECKER: All right.

THE COURT: In that case, the maximum would be 20 pages.

MS. BLEECKER: And these are being filed simultaneously?

THE COURT: I think they should be filed simultaneously, and I don't think we need a reply. I'll look at everything you both say. I'd also like a courtesy copy. Well, I think it should be filed, a file of the State Department report of 2005. I ask the government to file a copy so it has the status of the other exhibits. I appreciate that.

And I'd also like a copy of the government's brief in front of the Federal Circuit to which Mr. Weisgall referred. So I'd like the government to file those two filings in 10 days.

MS. BLEECKER: I would just point out Mr. Weisgall did not quote the entire sentence.

THE COURT: Okay. Do you want to read it in the record?

MS. BLEECKER: Yes. "It is of course conceivable that the fund could become depleted because of radical long-term investment difficulties or substantial unforeseen damages," and then it goes forward and quotes the changed circumstances provision. So it's --

THE COURT: Consistent with the notion of changed circumstances?

MS. BLEECKER: Correct.

THE COURT: That's important.

MS. BLEECKER: But we'll file in 10 days.

THE COURT: For the benefit of Plaintiffs, there's nothing like waiting around for the Court. I just want to let you know we've been working with you, and the government is entitled to prompt decisions too because there could be other cases that lie in the wings, and that's why we have a self-imposed rule to give decisions within 90 days of the last brief, and 90 days of the last brief won't expire until these last briefs are filed.

But because we've already essentially had 90 days, the date of the oral argument is irrelevant, I will give you a decision within 30 days of the date on which you file the supplemental briefs.

So you'll receive a decision sometime in the timeframe of May 23 to June 22, and if you don't, by all means call. I'll let you know exactly where it

is. If Plaintiffs prevail, it's going to be a very narrowly focused decision, meaning if the claims go forward, the decision will be very narrowly focused. And if the claims do not go forward, it will be confined to those subjects that are implicated in that decision and no others.

So what I'm saying is that many of the arguments that have arisen today may be answered in a fuller context later if proceedings continue, and some of those arguments if Defendant prevails at this juncture will not be addressed if it's not necessary to reach a decision if the government is to prevail.

And I think that Plaintiffs' counsel have suggested a willingness to meet with representatives of the government, and I think that that process should begin now.

If this matter is reopened, we may be eliminating some of the claims, but if it is reopened, would it go forward at least through another round of briefing on the real substance of the award and its adequacy, the answer is yes, and the third phase of

course would be whatever was left to try would be tried, and that would be at least for one of the parties a takings claim and for the other party perhaps a takings claim.

I think it's only fair to signal that if the matter is reopened that in my view, that means the status of the case at the time jurisdiction was withdrawn that under the rules of this Court, I would have the capability if I believed the circumstances warranted to look at the statute of limitations decision that Judge Harkins made vis-à-vis the Peter Plaintiffs, and there is a possibility the case would be reopened in that regard.

That is one of the reasons the government should look seriously at settlement. On the other hand, Plaintiffs know that nothing requires me to do this. It is absolutely not required. It's something that you do if the Judge feels there has really not been a correct decision, and it's a problem that arises every time you get a new Judge in the case.

And until the matter is finally concluded,

another Judge could come in here and take my place and say, I just don't like the ruling that Judge Miller entered after the supplemental briefs were filed on May 23. I think one party or the other should win, and we start at square one again.

So, when you're dealing with protracted litigation, which in this case is nobody's fault, understand there are real risks. If you think you have a victory, it could be very short-lived, and I'm not even talking about what could happen on appeal, because if we have misread in any material way what the Federal Circuit is telling us, if Plaintiffs have read too much into it and I've read too much into it, and if it's entitled to the construction that the government has given it, then in fact everything will have been a waste, and certainly we wasted the government's time, which, as I say, is another reason it should be settled.

But apart from ultimately prevailing, the government has to decide whether or not it wants these claims replayed at this time in a Court. I don't

really know about the difficulties involved, but in terms of the repercussions, those are yours to judge. I'm only interested in the legal aspects. I don't make these other policy decisions and stay away from them.

Don't give up that ability to talk to each other while this process is ongoing. There's significant risks in continuing for both sides. The only thing I can do is try to take cognizance of everything you've said. And it has been very helpful, and keep an open mind. And not to step where I should not step, and I know Ms. Bleecker thinks that I'm not aware of that. I am aware. But I think that there has been a path that was left open and has been left open in any case involving the Fifth Amendment.

I don't think the government is going to want to see a situation where a subclass of Plaintiffs is carved out for statute of limitations purposes with respect to wards of the United States that the United States is attempting to put on their own feet. You know that you've got presumptions going against the

government with respect to American Indians and tax cases.

There is a general presumption in all cases involving them of giving some laxity. There's a presumption in favor of pro se plaintiffs. You start carving out these subcategories and you get into a lot of problems.

And I know the government is also sensitive to the notion of equitable tolling. I don't think it's involved in this case. But there's a very thin line between Applegate and equitable tolling. Applegate really deals with relying on representations of the government, but these representations can be made over time, and that's the danger of an Applegate.

I will once again reflect on the Supreme Court case that says you can't rely on representations of the government, but the case could open up things that in the long run the government doesn't want opened up in a judicial forum, and the next time around the State Department can draft better agreements because whatever ambiguities in here in the

Compact that really are a matter of draftsmanship could have been avoided.

I don't think they were a matter of settlement strategies at all. I think they were mistakes made in carrying forth the ideas. Certainly the issue of funding could have been stated very decisively such that we're not trying to look at that again now. And one of the things that happens when you have documents that aren't drafted properly is you have Courts making offhand remarks about them, and the Federal Circuit may well have taken the additional $90 million to have met an effort to add funding on a periodic basis. I don't know.

But I want the government's views on how tight that settlement was. I think that's relevant to what we're looking at, and that would be helpful to me. And hopefully somebody will find a case somewhere. It's always a good starting point. I want to thank Ms. Herboso for doing double duty with a very long argument and counsel for participating.

MR. WEISGALL: On the settlement point, I

just want to thank you for pushing. You're knocking heads here is what you're doing a little bit. I mean, you're knocking us and you're knocking them. I think that's very helpful. My clients are not getting any younger. They would certainly and have always been amenable to settling this.

Take my head off for what I'm about to say, but I will be presumptuous. I think the best way you can force us to talk would be to say in your written opinion some of the things you've said here in the courtroom. I think it would help the process, and I think it's a good process. I apologize if that's --

THE COURT: Well, I will take that under advisement. One of the reasons we have arguments like this is to get out the thoughts as they occur, send messages hopefully but not put them into the written domain as part of a decision where I'm supposed to be focusing on the narrow question and giving a narrow ruling. And I try not to speak ex cathedra, but it happens sometimes, and sometimes it's called for.

Usually I make the remarks that I made today

actually off the record. I became emboldened to make them on the record because I want the parties and everybody who is involved here to understand this is potentially a long-term proposition. Remember, if we take the most efficient route, which is to enter a ruling for the government, have it appealed, and a year later be back here on something related thereto, that would clear the air.

But I am not going to rule for the government to clear the air, and that means that the government's position is not going to be appealable until we enter a final judgment. And if I've been wrong and your counsel has fortified me too much and I have not been the logical Judge that Professor Van Dyke wants, Plaintiffs will pay the price at the end of the day.

So a lot of what I say should stay in this posture because it's understanding the litigation process. It's the best process we've got, but it has its pitfalls. And one of the ones I've seen, frankly mostly not in the cases I handle, patent cases

involving claim construction. The first thing a Judge does is construe the claim. That is considered for some reason a matter of law.

Then the parties try infringement, and it could be a long trial. It could be a jury trial. We deal with patent cases against the government that do not involve juries, but I've seen cases where there was a two-month jury trial. The case is appealed. The Federal Circuit determines that one element of the claim construction was wrong. That trial is gone. Erased. Didn't happen. But it did, and enormous amounts of money are at stake, and you know concerns that people feel as strongly as in this case from a personal level.

So the system is the best we can have, but when you see the possibility of losing short-term gains in the long run, you've got to factor that in. So I want the government to be willing to talk to Plaintiffs. You can talk to them and say that we won't entertain anything unless it's in the range of X or we won't entertain anything at all, but let them

know where you stand. Do talk to them. Let them know where you stand because unless I'm held off, this opinion is coming out when I said it would. So thank you very much.

(Whereupon, at 3:44 p.m., the hearing in the above-entitled matter was concluded.)

//

//

//

//

//

//

//

//

//

//

//

1 //

2 //

REPORTER'S CERTIFICATE

DOCKET NO.: 06-289L and 06-288C

CASE TITLE: Ismael John v. United States

HEARING DATE: April 23, 2007

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Court of Federal Claims.

Date: April 23, 2007

Bernadette Herboso
Official Reporter
Heritage Reporting Corporation

Suite 600
1220 L Street, N.W.

Heritage Reporting Corporation

(202) 628-4888

Washington, D.C. 20005-4018

Heritage Reporting Corporation

(202) 628-4888