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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-1204, Republic of the Philippines v. Pimentel, et al.

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONER

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns a dispute over the ownership of the property, the Arelma assets, that the Republic of the Philippines believes were stolen by Ferdinand Marcos while he served as the Republic's president. The ownership of this property should be settled by the courts of the Republic. The Arelma assets were stolen in the Philippines, from the Philippine people, by their former president. The current dispute is between the Republic and certain of its citizens. There is --

JUSTICE KENNEDY: I just didn't hear you. You said that this dispute should be settled by --

MR. ROTHFELD: By the courts of the Republic. The question of ownership of these assets we believe is a matter as certainty of as the first

1 impression should be decided in the Republic. As I say,
2 the assets here were stolen in the Republic, from the
3 Republic's citizens, by their president. There is
4 currently a proceeding pending before the Sandiganbayan,
5 the special Philippine anti-corruption court that has
6 jurisdiction over matters of this sort, dealing
7 specifically with the assets that are at issue here.

8 JUSTICE GINSBURG: That's been pending how
9 long?

10 MR. ROTHFELD: It's been pending -- well,
11 the Republic initially filed a forfeiture petition in
12 1991 directed at a range of assets related to former
13 president Marcos. Ultimately, after the assets were
14 transferred from Switzerland to be held in escrow in the
15 Philippines, the Philippine Supreme Court in 2003 issued
16 a judgment relating to those assets because there was
17 some doubt as to whether that judgment, some question
18 about whether that judgment specifically addressed the
19 Arelma assets that are at issue here, the Republic filed
20 a motion before the Sandiganbayan in 2004 directed
21 specifically at the assets. The motion has been pending
22 since that time.

23 JUSTICE GINSBURG: So it's from 2004 to
24 2008?

25 MR. ROTHFELD: It has been, Your Honor. The

1 Republic -- that delay cannot be attributed to the
2 Republic. The Republic has filed five motions with the
3 Sandiganbayan urging it to expedite its decision. I can
4 tell you that it has a -- it is a court with a very
5 substantial docket. The division of the Sandiganbayan
6 that's considered this, these assets, considered among
7 many other cases the corruption trial of former
8 President Joseph Estrada. So I don't think that the
9 delay can at this point be deemed --

10 JUSTICE KENNEDY: Well, it gets way ahead of
11 the analysis and probably way ahead of your argument.
12 At some point I'd like you to address whether or not one
13 of the equities the Court can consider is the likelihood
14 of an earlier decision. Let's assume we project out
15 another 10 years. Does that make a difference? That
16 may come toward the end of your argument rather than
17 now, but I'd like it addressed at some point.

18 MR. ROTHFELD: Well, I certainly will, Your
19 Honor. I think it would make sense logically to
20 consider the issues that we think -- there really are
21 two related sets of considerations that should go into
22 the Court's decision as to whether this suit should be
23 dismissed, which is our submission. One relates to the
24 Republic's sovereign immunity. The second relates to
25 kind of a broader set of considerations and I think that

1 your question goes to those.

2 So I'll turn first to the sovereign immunity
3 question. The Republic asserts ownership of these
4 assets. Its, its submission is that President Marcos
5 misappropriated them while he served as the president of
6 the Republic. If that is true, then under Philippine
7 law these assets at all times were the property of the
8 Republic.

9 JUSTICE GINSBURG: Mr. Rothfeld, will you
10 explain then how it was that the Philippine Government
11 supported the litigation against Marcos that led to the,
12 what was it, the \$2 billion judgment?

13 MR. ROTHFELD: That's right.

14 JUSTICE GINSBURG: Said that it had no
15 objection to that suit. In fact, he thought it was a
16 good thing for the Philippines that that litigation go
17 forward. But if the government's position is the
18 judgment would be uncollectible because all of those
19 assets belonged to the Philippine Government and not to
20 Marcos's estate, so the -- that whole litigation would
21 have been an exercise in futility.

22 MR. ROTHFELD: Well, I think not, Justice
23 Ginsburg, and I think that there is in fact no
24 inconsistency at all. The Republic's position at that
25 time was that it had no objection to plaintiffs who were

1 victims of the Marcos regime bringing suit in the United
2 States and they had no -- the Republic had no objection
3 to the suit proceeding in this country. Specifically
4 the issue that was before the court that the Republic
5 weighed in on was whether the act of state doctrine
6 would preclude adjudication in the United States. The
7 Republic's interest was in making clear that the acts of
8 Marcos were not the acts of the Republic, they were not
9 official acts that the Republic was prepared to defend.

10 The Republic did not then and does not now
11 have any objection to citizens of the Republic
12 proceeding in the courts of the United States against
13 the estate of Marcos. The question here is whether or
14 not these assets are in the estate of Marcos. The
15 Republic's submission is that these assets belong to the
16 Republic, that they have never been part of the Marcos
17 estate, and that therefore these are sort of ships
18 passing in the night, that there can be proceedings
19 against the estate in this country or elsewhere.

20 JUSTICE SCALIA: Is there anything else in
21 the estate?

22 MR. ROTHFELD: There is litigation going on
23 in the Philippines now before the Sandiganbayan as to
24 what is in the estate, and I think that one of the
25 problems, of course, is that, as is true of many corrupt

1 regimes that have misappropriated state assets,
2 unraveling it is enormously complicated. There were
3 dummy corporations, there were shell corporations, which
4 is one of the reasons that it has taken so long.

5 JUSTICE SOUTER: Well, let me ask a slightly
6 different question from Justice Scalia's. Is it the
7 position of the Philippine Government that there are any
8 assets in the estate that the Philippine Government does
9 not claim?

10 MR. ROTHFELD: I think that there are some
11 assets. I will not say that they are very substantial
12 number of assets. Now, I should say --

13 JUSTICE SOUTER: Enough assets to satisfy
14 the claims of the individuals who -- who brought suit in
15 the United States?

16 MR. ROTHFELD: No, there are not and there
17 may never have been.

18 JUSTICE SOUTER: So the position of the
19 Philippines, going back to Justice Ginsburg's question,
20 was we have no objection and in fact I think it was we
21 support the litigation in the United States, but when it
22 comes time to collect a judgment we're claiming they
23 don't get a penny because everything belongs to us. Is
24 that a fair summary of the Philippines' position?

25 MR. ROTHFELD: I think that is not an

1 entirely fair summary, Your Honor. I think -- and
2 again let me say that there are two separate questions:
3 One is whether or not, as a matter of principle, the
4 Philippines objected to its citizens proceeding in the
5 courts of the United States to condemn the regime of
6 former President Marcos.

7 JUSTICE SOUTER: Well, they weren't just
8 suing to condemn the regime. They weren't asking for a
9 declaratory judgment. They were asking for a judgment
10 in money.

11 MR. ROTHFELD: That is true, Your Honor.
12 But the submission -- and the question is whether there
13 is some inconsistency between what the Republic said
14 then and what it says now. The submission then was not
15 that the claimants were entitled to recover assets that
16 belonged to the Republic. The submission was that
17 whatever ended up in the Marcos estate --

18 JUSTICE SOUTER: No, but we live in a
19 practical world and if in fact there were no apparent
20 assets that might satisfy that judgment that the
21 Philippine Government did not claim, then their -- then
22 their support of the -- of the earlier litigation was at
23 the very least in tension with their -- with their
24 overall position.

25 MR. ROTHFELD: Well, I think that that --

1 again, I would respectfully disagree with that. I think
2 that there was real meaning to the judgment that was
3 returned here even if there is a dispute as to whether
4 there are assets in the Marcos estate. There were two
5 settlements worked out between the Marcos estate and the
6 claimants, with the blessing of the Republic, that would
7 have paid a very substantial amount out of assets
8 recovered from the Marcos -- that were associated with
9 Marcos, recovered by the Republic, and the Republic sort
10 of blessed payment of those to the claimants here.
11 Ultimately that was vetoed by the Sandiganbayan as
12 inconsistent with Philippine law. But I think that the
13 executive branch --

14 JUSTICE SOUTER: Then why doesn't the
15 Republic take the position that, because that was vetoed
16 for reasons apart from the Republic's discretion, that
17 the current assets would be an appropriate source of
18 payment?

19 MR. ROTHFELD: There have been a number of
20 efforts in the Philippine Congress, and there is now
21 pending bills in the Philippine Congress, to compensate
22 the claimants in amounts equivalent to those
23 settlements. So I think that that is something that
24 could happen, but I think it's important to step back
25 and say, what is the issue before this Court here? And

1 I think all of these considerations are simply divorced
2 from the Rule 19 issues.

3 JUSTICE GINSBURG: There's one other point
4 of Philippine law that's unclear from the briefs. The
5 Respondents say they have no right to intervene in the
6 proceeding that's going on before the corruption court
7 and your brief suggests that there is a right to
8 intervene. What is it? Can they become part of that
9 litigation or will they not be heard by the corruption
10 court?

11 MR. ROTHFELD: Well, we quoted the relevant
12 portion of Philippine law, which is equivalent to our
13 permissive intervention, which would have permitted the
14 claimants to seek to intervene in the proceeding of the
15 Sandiganbayan. In fact --

16 JUSTICE GINSBURG: Seek to intervene, but no
17 right to intervene?

18 MR. ROTHFELD: It is not a matter of right;
19 it is permissive intervention.

20 I think it's important to bear in mind the
21 status of the claimants, though, because they're --
22 their rights are entirely derivative of the Marcos
23 estate. They don't claim the Arelma assets, which are
24 the subject of this here before this Court. If the
25 Marcos estate is held to have no right to those assets,

1 they have no right at all and they have no rights to be
2 protected.

3 So I think it's -- it is important to
4 retreat to the questions that are actually before this
5 Court now about the meaning of Rule 19 and its
6 application in a situation in which there is an absent
7 sovereign that has asserted its sovereign immunity. And
8 --

9 JUSTICE KENNEDY: Could you address that?
10 That is the issue. Sovereign immunity, is this a
11 question of where a party is just entitled to plead
12 inconsistent theories? Was this a special appearance?
13 Why is it that the Philippines can come into court and
14 say, "we have sovereign immunity, and therefore the suit
15 must be dismissed"? Would you just address that basic
16 point?

17 MR. ROTHFELD: Well, I think that that's --
18 sovereign immunity and dismissal under Rule 19 are two
19 different but closely related and essential aspects of
20 the relief of the Republic. As a matter of the
21 sovereign immunity, all agree at this point that it
22 cannot be forced to appear in this proceeding.

23 But that relief is of little good to the
24 Republic if the assets are then going to be awarded by a
25 U.S. court to someone else and they are dissipated and

1 they're gone forever. And so it's necessary to protect
2 its interest, its sovereign immunity, to make it -- to
3 effectuate it -- that the action be dismissed under Rule
4 19. And I think that it is something which this Court
5 has recognized that when there is a sovereign that
6 cannot be brought into the litigation and the
7 sovereign's interests are going to be substantially
8 undermined, the sovereign is an indispensable party and
9 dismissal is essentially automatic. That's what should
10 have happened here. That's the first mistake that the
11 district court made. And I --

12 CHIEF JUSTICE ROBERTS: Why couldn't -- why
13 couldn't the Philippines, not having been a party in
14 this action, pursued whoever did get the assets from
15 this action --

16 MR. ROTHFELD: Well --

17 CHIEF JUSTICE ROBERTS: -- in normal
18 litigation, if they objected to the resolution.

19 MR. ROTHFELD: Well, let me amend your
20 question in one respect. They were a party and of
21 course as in their -- in their capacity as a party, they
22 sought dismissal under Rule 19 as well as dismissal of
23 themselves on sovereign immunity grounds. But to answer
24 specifically --

25 CHIEF JUSTICE ROBERTS: I guess they weren't

1 there for the adjudication on the merits.

2 MR. ROTHFELD: They were not there for the
3 adjudication of the merits, that's right, because they
4 had asserted their sovereign immunity.

5 I think that there -- everyone agrees, the
6 Ninth Circuit itself acknowledged, that once the assets
7 here are disbursed to Respondent and to the plaintiff
8 class, as a practical matter they will be beyond
9 recapture. There is a class of almost 10,000 people.
10 And when the assets are gone, to reclaim them, even if
11 the Sandiganbayan rules next week that Arelma is now and
12 always has been the property of the Republic, it will be
13 as a practical matter impossible to get them back.

14 One suggestion which is made by Respondent
15 and by some of its amici is that, because the Republic
16 is not bound here, it could bring an action against the
17 former stakeholder of these assets, Merrill Lynch.
18 That, I think, is also clearly an inadequate remedy for
19 the Republic. There is no guarantee that it would be
20 able to proceed in such a proceeding sort of
21 unencumbered by the judgment here. And if what we are
22 looking for under Rule 19 -- again, there are sort of
23 two components to this: There is the sovereign immunity
24 component, which we think is essentially a per se rule
25 requiring dismissal in circumstances here.

1 If we get beyond that and we say, under Rule
2 19 what are the interests that we want to advance, the
3 principal interest of Rule 19 is that everything gets
4 accommodated in a single proceeding, that this gets
5 resolved by the whole, as the Court has described it,
6 and the only way to accomplish that is dismissal of this
7 suit. If this action is dismissed, the court's judgment
8 that the Republic is an indispensable party in
9 litigation relating to Arelma will be binding on all the
10 participants to this litigation. That will mean that if
11 anybody sues the former stakeholder Merrill Lynch in the
12 future, that action will be dismissed unless or until
13 the Republic chooses.

14 JUSTICE ALITO: Would you agree that the
15 Republic is ultimately not going to be able to collect
16 these funds unless it sues in the United States and
17 waives its immunity in that suit? And is that -- is
18 that relevant to the question of whether it should have
19 been forced to proceed in this action?

20 MR. ROTHFELD: Well, I don't think it's
21 directly relevant, but I think that if one looks at the
22 bigger picture, it is true -- if the Republic -- if this
23 action is dismissed, the Sandiganbayan rules, and let's
24 say that it rules for the Republic, the Republic becomes
25 the owner of Arelma. It is then in a position to go to

1 Merrill Lynch and say: This is our account; give it to
2 us. If Merrill Lynch declines to do that, it is true
3 the Republic will have to seek judicial action in the
4 United States, but at that point it will be seeking to
5 enforce a judgment of the Sandiganbayan. It -- the
6 proceeding there will be an enforcement action. And
7 having -- it being armed with that judgment and having
8 the Philippine courts, which should be the ones that
9 resolve this as a matter of first instance, it will be
10 an entirely different kind of proceeding. And in that
11 proceeding, unlike this one -- as I said, the other side
12 says: Well, you know, not to worry here, because you
13 could sue Merrill Lynch. But that's inconsistent with
14 the purpose of Rule 19, which is to say --

15 CHIEF JUSTICE ROBERTS: Well, is it -- is it
16 fair to the private claimants here in the United States
17 to say, wait until the Philippine court renders a
18 judgment in favor of the Philippines, and then they can
19 come in and enforce the judgment against Merrill Lynch
20 or whomever is holding the assets?

21 MR. ROTHFELD: Well, I think if the
22 Sandiganbayan rules for the Republic, the assets are the
23 Republic's assets. The Republic can seek --

24 CHIEF JUSTICE ROBERTS: Well, under the
25 determination of the Philippine court. But the court

1 here could determine that they're the private claimants'
2 assets, as it did.

3 MR. ROTHFELD: Well, it did without the
4 participation of the Philippines.

5 CHIEF JUSTICE ROBERTS: Well, you just told
6 me that the Philippines court may judge the opposite
7 without the participation of the private claimants.

8 MR. ROTHFELD: Well, but the -- but again,
9 Your Honor, it's important to remember the private
10 claimants have no claim to the Arelma assets. Their
11 interest is entirely derivative of the Marcos estate.
12 The estate --

13 CHIEF JUSTICE ROBERTS: That seems to me to
14 be an argument on the merits, rather than with respect
15 to which case should proceed first.

16 MR. ROTHFELD: Well, it goes, I think, to
17 the question of whether their claim is one which is
18 entitled to be heard in the United States. The question
19 is, when the Sandiganbayan decides this case as between
20 the two claimants that actually claim ownership of
21 Arelma, as opposed to derivative rights as to one or the
22 other of the claimants, that is the way in which it
23 makes sense to proceed: Have the Sandiganbayan decide
24 as between these two claimants, the Republic and the
25 estate. Once that's done, all else follows from that.

1 CHIEF JUSTICE ROBERTS: Would the private
2 claimants be able to undermine the added force of the
3 judgment in the Philippines, assuming a proceeding is
4 brought here, on the ground that they were not allowed
5 to participate in the proceeding in the Philippines?

6 MR. ROTHFELD: Well, I think -- I would say
7 probably not, Your Honor, because again their interests
8 are entirely derivative of the Marcos estate. And so I
9 think they may be thought to be in privity with the
10 estate, and therefore, they would not have a sort of
11 separate right to challenge that. But I think that we
12 should not anticipate what the future litigation will
13 look like in the United States.

14 JUSTICE GINSBURG: In privity with the
15 estate? You're suggesting that the plaintiffs would be
16 connected to the Marcos family that wants to get these
17 assets?

18 MR. ROTHFELD: No, I do not suggest any
19 connection between them. My only suggestion is that,
20 because their interest is entirely derivative of the
21 estate, the estate has an interest in defending its
22 interest there, and therefore somebody is there
23 litigating the question.

24 JUSTICE SCALIA: How much of an interest
25 does the estate have if it is all going to be claimed by

1 -- by these private plaintiffs?

2 MR. ROTHFELD: Well, the estate has a -- as
3 I say, these assets have been moved around or hidden. I
4 think the estate may well have an interest in keeping
5 them intact and saying that it does have rights.

6 But if I may reserve the remainder of my
7 time, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Rothfeld.

10 Mr. Kneedler.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE,

14 SUPPORTING THE PETITIONER

15 MR. KNEEDLER: Mr. Chief Justice, and
16 may it please the Court:

17 When a sovereign government cannot be made a
18 party to a case because of its immunity from suit, that
19 fact must be given great weight in determining whether
20 the suit nonetheless may proceed. That is true whether
21 the absent sovereign is the United States, one of the 50
22 States, an Indian tribe or, as here, a foreign state.

23 JUSTICE GINSBURG: When you say "great
24 weight," Mr. Kneedler, then you are not agreeing with
25 Mr. Rothfeld, who says it's automatic?

1 MR. KNEEDLER: We believe it would be
2 dispositive in most cases, we think, only if the
3 sovereign's interests would be adequately protected by
4 the judgment or in the rare case that we've identified
5 in our brief where the sovereign's interests are
6 adequately protected by another sovereign, in the case
7 of an Indian tribe being protected by the United States.

8 But other than that, or where the United
9 States is in a case against a state, the United States
10 being the national sovereign, there could be special
11 circumstances, but we think as a whole, the -- as a
12 general rule, sovereign immunity controls. And that's
13 because sovereign immunity represents a fundamental
14 policy judgment either rooted in the Constitution for
15 the United States or the States, or judgments of the
16 legislative branches that the sovereign should not be
17 required to appear in court.

18 A contrary rule allowing the suit to proceed
19 would effectively undermine that rule of immunity and
20 allow the sovereign's interest to be tried behind its
21 back.

22 JUSTICE KENNEDY: But suppose a case -- and
23 you have to do a lot of supposing. Suppose that the
24 Philippine Government was simply not amenable to the
25 process of the court, not because of foreign immunity,

1 but just because it was outside the geographic area
2 where process ran. It just can't be made a party.
3 Exactly the same analysis as here?

4 MR. KNEEDLER: I think that's probably
5 correct if the Foreign Sovereign Immunities Act governs
6 the service of process under the Act, and if the --

7 JUSTICE KENNEDY: I understand, but in my
8 hypothetical case it's just as if somebody is at the
9 North Pole and you can't serve them.

10 MR. KNEEDLER: Right. But if the sovereign
11 -- if the foreign sovereign can't be sued, I think it's
12 all the more -- I mean it can't even be reached -- it
13 may be all the more reason why that interest should be
14 given weight.

15 We think the sovereign interest in this case
16 is particularly compelling for reasons that have already
17 been stated. The Government of the Philippines claims
18 that it owns these assets. By contrast, the Respondents
19 are unsecured judgment creditors. The Government of the
20 Philippines claims it owns these, these assets, under a
21 special Philippine statute dating to 1955 that declares
22 ill-gotten gains gained toward -- during time in office,
23 forfeit to the government, and it has a strong interest
24 in having that dispute resolved in its own courts.

25 As we explain in our brief, the United

1 States strongly supports that position and that interest
2 of the United States is strongly supported by the fact
3 that it is a party to a mutual legal assistance treaty
4 with the Philippines. Such treaties are common in this
5 country. There is a comparable treaty between the
6 Philippines and the Swiss Government which led to the
7 repatriation from Switzerland to the Philippines of a
8 large --

9 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
10 getting back to your previous point, why isn't the
11 Philippine National -- why don't -- why doesn't the
12 Philippine National Bank adequately represent the
13 interest of the Republic? Under Philippine law, as I
14 understand, any recovery by the bank in this case would
15 be the property of the Philippines.

16 MR. KNEEDLER: Because the Philippines --
17 excuse me. The Philippine National Bank is an escrow
18 agent. It would have a conflict of interest in
19 representing the interests of the Government of the
20 Philippines with respect to its prior claim to the
21 assets as against the Marcos estate. PNB is holding
22 these assets in escrow pending the outcome of the very
23 litigation we are talking about in the Philippines.

24 CHIEF JUSTICE ROBERTS: Well, they are --
25 they're certainly subject to Philippine law, and I

1 understand that there's no dispute that under Philippine
2 law the assets would be taken from the Philippine
3 National Bank for the benefit of the government.

4 MR. KNEEDLER: That's true, but the
5 interests of the Philippine Government in obtaining --
6 in having its interest confirmed that it owns these
7 assets as of the time of the wrongdoing going back to
8 1972, that interest would not be advanced by PNB because
9 PNB is holding them in escrow depending -- pending the
10 outcome of that very dispute between the Marcoses and
11 the Philippine Government and couldn't be expected to
12 advance in this case the Government of the Philippines'
13 interest or claim of ownership to those assets.

14 One other international agreement I wanted
15 to mention was the Convention Against Corruption, to
16 which the United States is a party. And also there is a
17 statute passed by Congress, 2467, that provides for
18 forfeiture in the United States of assets that are
19 deemed to be forfeited pursuant to a foreign proceeding.
20 So international agreements --

21 JUSTICE GINSBURG: Doesn't that depend on
22 there being a foreign judgment, which we don't have in
23 this case?

24 MR. KNEEDLER: We -- we don't have it yet,
25 but that -- that reflects the important interest of

1 having our courts stay their hands pending the outcome
2 of the proceedings in the Philippines in which that
3 would be determined.

4 JUSTICE GINSBURG: Isn't it also a
5 requirement that in that proceeding in the foreign
6 nation that all claimants would have an opportunity to
7 be heard, which is not true here?

8 MR. KNEEDLER: Well, what -- what the
9 statute requires is that the foreign proceedings be in
10 accordance with due process and that parties claiming an
11 -- an interest in the property be entitled to be
12 present. Again, the claimants here do not claim an
13 interest in the property as an owner.

14 They are unsecured judgment creditors of the
15 -- of the Marcos estate, and it -- it might be useful to
16 think about what is true in the reverse situation, in
17 the forfeiture proceeding brought by the United States
18 in U.S. courts against a criminal defendant, for
19 example. An unsecured creditor of the -- of the
20 defendant claiming the assets is typically found not
21 even to have standing to intervene. But if it does
22 intervene, it would not have a claim superior to that of
23 the United States because it wouldn't be a bona fide
24 purchaser of the assets, and it wouldn't be without
25 knowledge of the illegal conduct.

1 JUSTICE STEVENS: Mr. Kneedler, may I ask
2 you this question: Would the case be different if there
3 were secured creditors rather than judgment creditors?

4 MR. KNEEDLER: In -- in U.S. courts a
5 secured creditor would get past the standing stage, but
6 would not -- would not get past the bona fide purchaser
7 for value without knowledge of the wrongdoing.

8 In this case it has been clear since 1986,
9 for example, that the Government of the Philippines has
10 -- has been seeking the repatriation of Arelma and its
11 assets.

12 JUSTICE SOUTER: Well, it's been doing it on
13 a fairly sporadic basis. If I remember the facts
14 correctly, first it got a stay with respect to the
15 disposition of assets, and then the stay expired and the
16 government didn't do anything about it, and then the
17 government didn't come into action again until this
18 particular claim was raised.

19 MR. KNEEDLER: Well, I think it --

20 JUSTICE SOUTER: Maybe -- let me put the --
21 sort of my response in the form of a question. In
22 drawing or refusing to draw the conclusion of
23 "indispensable party," do you claim that a court may or
24 may not consider the equitable or inequitable behavior
25 of the government?

1 MR. KNEEDLER: Well, I -- perhaps in an
2 extreme case, but I -- first of all, I think the courts
3 of the United States should be very reluctant to deem a
4 foreign government's conduct inequitable in the sense
5 that you're describing it. And I think, for the reasons
6 Mr. Rothfeld said, repatriating these assets is an
7 extremely complicated thing. But the Philippines
8 Government sought these assets in -- beginning in 1986,
9 obtained a freeze order in 1986, again in 1990. It got
10 a final determination by the district attorney in
11 Switzerland in 1995, confirmed by the federal court of
12 Switzerland in 1997, that the assets could be returned.
13 These assets, the shares, the Arelma shares, however,
14 were not actually returned until 2000 by the Swiss
15 Government.

16 JUSTICE GINSBURG: Is there any explanation
17 why the freeze that was imposed by a U.S. court in 1987
18 was simply allowed to lapse?

19 MR. KNEEDLER: That was the preliminary
20 injunction and I'm not sure what happened after that.
21 But I did want -- the proceedings in Switzerland, I did
22 want to make clear, because there was a suggestion that
23 the Philippine Government was duplicitous by encouraging
24 this suit and at the same time seeking the assets. But
25 as I just pointed out. It has been clear since 1986 and

1 through a whole series of proceedings in Switzerland and
2 in the Philippines that the Government of the
3 Philippines has been claiming all of the Marcos assets,
4 specifically including the Arelma assets --

5 JUSTICE SOUTER: Well, maybe --

6 MR. KNEEDLER: -- from the very beginning.

7 JUSTICE SOUTER: Well, maybe they have been
8 have been candid about their claims, but they -- in
9 real-world practical terms, the claim to these assets
10 and the representation at the same time that it's
11 appropriate for these people to proceed in the United
12 States for a money judgment, are at least in some
13 tension with each other, aren't they?

14 MR. KNEEDLER: I do not believe so. If we
15 thought about an analogy at the United States, if the
16 United States filed a brief in this Court saying that a
17 former Government official could be sued, did not have
18 qualified immunity and could be sued in his personal
19 capacity, or didn't -- or could be sued individually and
20 the Westfall Act did not protect him, that would in no
21 way make -- be a representation by the United States
22 that a judgment against that officer could be satisfied
23 out of assets of the United States, including assets
24 that the United States might be seeking to recover
25 from -- from the defendant.

1 And we think the Philippine Government is in
2 essentially the same position. And a finding of
3 liability in this case -- the judgment does constitute a
4 finding of liability so that with respect to -- it would
5 give these Respondents here the ability to go to
6 Philippine court, to file a claim in the probate
7 proceedings in the Philippines as these Respondents have
8 done. So the judgment, even without being satisfied,
9 serves the Respondents' interests to a great extent.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Kneedler.

12 Mr. Swift.

13 ORAL ARGUMENT OF ROBERT A. SWIFT
14 ON BEHALF OF THE RESPONDENTS

15 MR. SWIFT: Mr. Chief Justice, and may it
16 please the Court:

17 I would like to address as a first point the
18 issue you raise, which is perhaps seminal to you, and
19 that is whether there is an adequate alternative remedy
20 to the human rights victims, either in the United States
21 or in the Philippines. Our answer is, unequivocally,
22 there is no remedy.

23 Let me talk about the Philippines first.
24 Any forfeiture proceeding in the Philippines is in rem.
25 Its supreme court has so declared. These assets are in

1 the United States. There cannot be two jurisdictions
2 that share in rem assets.

3 JUSTICE SOUTER: Well, doesn't the -- maybe
4 this makes no difference, but doesn't the Philippine
5 National Bank have the -- whatever they call them, the
6 share certificates or stock certificates that represent
7 the Arelma assets at this point?

8 MR. SWIFT: That's right. Switzerland
9 confiscated those certificates from a Swiss financier
10 and transferred them to the Philippines.

11 JUSTICE SOUTER: Okay. Couldn't they --
12 couldn't they bring an in rem in the Philippines based
13 on the presence in the Philippines of those two
14 certificates?

15 MR. SWIFT: They can, and that's in fact
16 what is occurring.

17 JUSTICE SOUTER: Okay.

18 MR. SWIFT: However, it's also apparent from
19 the facts in this case that those certificates were
20 never the property of the Philippine Government, never,
21 ever. There is absolute clear evidence in this record,
22 in the joint appendix on that, which makes the whole
23 issue --

24 JUSTICE BREYER: I thought the issue in the
25 Philippines is the question of whether the money that

1 went into the stock certificates eventually belonged to
2 the people of the Philippines from the beginning or
3 belonged to Marcos personally?

4 MR. SWIFT: Well, that's --

5 JUSTICE BREYER: And you're saying that
6 there's no possibility whatsoever that a Philippine
7 court could say that this money initially belonged to
8 the people of the Philippines?

9 MR. SWIFT: They could not say that in a
10 forfeiture proceeding because --

11 JUSTICE BREYER: I'm saying whether they --
12 I don't care what the name of the proceeding is. I'm
13 saying could they decide that?

14 MR. SWIFT: Yes, sir, absolutely.

15 JUSTICE BREYER: All right. Now, if they
16 decide that, why should your clients, terribly treated
17 as they were, get the money ahead of the victims in the
18 Philippines, who also were terribly treated?

19 MR. SWIFT: Because the judgment in the
20 Philippines would not be in rem, Mr. Justice Breyer.

21 JUSTICE BREYER: I thought Justice Souter
22 just answered that. He said that the stock certificates
23 might be held to belong to the people of the
24 Philippines, in which case the stock certificates
25 represent stock in a company that has a claim against

1 Merrill Lynch, and so they will say, this certificate
2 belongs to the people of the Philippines; the people of
3 the Philippines would like you, Merrill Lynch, to pay
4 back the money that the company gave them initially.
5 And Merrill Lynch I imagine would pay it. Now that I
6 think is as I understand it. Is there something wrong
7 with my understanding?

8 MR. SWIFT: I think your understanding is
9 correct in that regard; however, the law both in the
10 Philippines and in the United States draws a clear
11 distinction between the ownership of stock and a
12 corporation's ownership of assets. Certainly Dole v.
13 Patrickson stands for that proposition.

14 The -- a judgment rendered as to the
15 certificates in the Philippines or even as to the assets
16 would not be in rem. So if that judgment came over to
17 the United States to be enforced, they would stand in
18 the same position as any other judgment creditor, not a
19 judgment creditor with a claim to specific assets, but a
20 judgment creditor as to a specific amount of money.

21 Let me answer another question which was
22 asked --

23 JUSTICE GINSBURG: I would like you to
24 address -- you seem to put heavy weight on this in rem
25 characterization. That is a judgment there's a thing.

1 But our law over the years has come to appreciate that
2 things do not have rights; people have rights in things.
3 So we have modified the once rigid notion that the suit
4 is against a thing, to recognize that it's people's
5 rights in the thing that count. And your use of that
6 label seems to forget about all the more recent
7 understanding.

8 MR. SWIFT: Justice Ginsburg, I believe
9 interpleader is, statutory interpleader, is an in rem
10 nature of a proceeding. In fact, it was the best and
11 most appropriate and the only proceeding in which all
12 claimants could be -- their claims could be heard. It's
13 a shame that the Philippine Government didn't come in,
14 as it did in twelve other cases it brought in the United
15 States, including two interpleaders, to say: Yes and
16 this is our evidence. What it suggests is that they had
17 no evidence to support it, and they want to be in their
18 own court. Why do they want to be in their own court?
19 Because it won't be defended by the Marcoses. And the
20 very rule that they cited in their reply brief -- and by
21 the way, the reply brief was the first time in all this
22 litigation they have ever asserted that the human rights
23 victims have a remedy by intervening in the
24 Sandiganbayan in the Philippines. We don't. The rule
25 that they quote says as to assets in the court.

1 JUSTICE GINSBURG: Did -- did the district
2 court in Hawaii or the Ninth Circuit ever decide what
3 the Petitioners tell us is the basic question, that is
4 do these assets belong to the Philippine Government
5 under that 1955 statute, or do they belong to the Marcos
6 estate? It seemed to me that our courts were just
7 assuming that the assets belonged to the Marcos estate
8 and that the plaintiffs in the lawsuit were creditors of
9 the Marcos estate.

10 MR. SWIFT: Your Honor is correct that there
11 was an underlying belief by the court, that the court
12 accepted as valid the Republic's claim that it owned the
13 assets, the assets were stolen. But the evidence in the
14 case, and the two lower courts specifically found on the
15 basis of that evidence, that these were Marcos assets;
16 and this finding was made after the completion of
17 discovery, after a deposition in -- in France.

18 JUSTICE GINSBURG: But it didn't say, find,
19 that: And they belong to the Marcos estate and not the
20 Philippine Government.

21 MR. SWIFT: Not the latter part of your
22 equation. They did not say that they did not belong to
23 the Philippine Government. By saying they belonged to
24 Ferdinand Marcos it was sufficient, it was sufficient
25 evidence.

1 JUSTICE BREYER: I didn't see that finding
2 in the court of appeals decision. I thought the court
3 of appeals thought that they belonged -- they couldn't
4 possibly belong to the Philippine Government or the
5 people there, because there is no way that the
6 Philippine Government could win in a suit in New York in
7 trying to recover them. But the Solicitor General has
8 provided about two or three ways, in which and so -- and
9 so have the Petitioners -- and that seems to me the
10 heart of the issue. They have said: No, no, there are
11 two or three ways in which the Philippine Government
12 might well -- it might well ask a court for the money
13 and the court would say, yes, you're entitled to it.

14 So that it seems to me, that's the heart of
15 it. What is your response to that?

16 MR. SWIFT: I'd like to go through each way
17 in which they say they can and convince you that they
18 can't. First, they could proceed in a forfeiture
19 proceeding in the Philippines. But of course that
20 wouldn't be in rem, so they couldn't get to first base
21 as to the assets. As to the share certificates, yes,
22 but of course that in effect is a nullity because they
23 never belonged to the Philippine Government. That
24 aside, we put aside that factual --

25 JUSTICE SOUTER: Wait a minute. I missed

1 your last step. If it's an in rem proceeding against
2 the share certificates what -- what difference does it
3 make whether they ever belonged to the Philippines?

4 MR. SWIFT: Because ownership of the share
5 certificates is not a right to the assets, a per se
6 right. There would have to be some additional rights.
7 The assets are ones --

8 JUSTICE SOUTER: So you're saying an in rem
9 proceeding against the certificates simply will not
10 resolve the issue; that's the -- that's the guts of the
11 answer.

12 MR. SWIFT: That's correct. The other two,
13 two types of proceedings, one could be a conversion and
14 one breach of contract, both of which would be barred by
15 statute of limitations.

16 JUSTICE BREYER: Yes, well, that isn't what
17 they say. I think, if I understand it, that they say
18 that were the share certificates in the hands of the
19 Philippine Government on the ground, that the money used
20 to create those had been taken from the Philippine
21 people unlawfully, if that's what they decide, at that
22 point the owner of the certificates, the government,
23 would say to Merrill Lynch: We own the company, the
24 company has the assets; please send us the money. And
25 Merrill Lynch would do it.

1 But if Merrill Lynch didn't do it, then they
2 would file the judgment saying, these are our share
3 certificates, in the New York court and say, will you
4 please enforce the judgment. Now, there is something
5 there that I'm not quite getting and that's why I want
6 you to respond to the line of happenings that I just
7 suggested.

8 MR. SWIFT: Well, an important fact that you
9 left out was that in the year 2000, when the Philippine
10 Government through PNB controlled the Arelma
11 certificates, a request to Merrill Lynch was made. The
12 request was refused. So if there was a breach it
13 occurred in the year 2000. Remember, after the
14 certificates were transferred from Switzerland to the
15 Philippines the PNB then created a new board of
16 directors and they went directly to Merrill Lynch.

17 The whole point of this exercise was, of
18 course, to circumvent the courts of the United States.
19 I only learned about the assets in the year 2000 and
20 then proceeded to try to recover them.

21 JUSTICE SOUTER: But may I ask you this
22 question, though. Merrill Lynch refused in the year
23 2000, but if the proceeding that Justice Breyer has just
24 been describing takes place and there is a judgment to
25 the effect that the share certificates are properly held

1 or the property of the Philippine Government, and the
2 Philippine Government now makes, or then, makes a new
3 request to Merrill Lynch, the fact that they made a
4 request that was refused in 2000, which may be too late
5 to sue on, isn't going to prevent them from suing on
6 their present adjudication that they are the true owners
7 of the share certificates and want the money.

8 MR. SWIFT: But I believe there is an
9 important part of the equation that's left out of that
10 question, and that is the rights of the Philippine
11 government as the new shareholder will not be any
12 greater than those of the prior shareholder. The prior
13 shareholder made a demand and did not receive the money.

14 JUSTICE SOUTER: Okay. You're saying -- I
15 think you're saying that the demand would be ineffectual
16 this time for the same reason it was ineffectual the
17 last time.

18 MR. SWIFT: Yes, Your Honor.

19 JUSTICE SOUTER: And the suggestion I
20 thought that Justice Breyer had made and that I made was
21 this time they can do something further. They can take
22 the judgment and go into a United States court and say:
23 We've got this judgment, there's no question that these
24 shares and what they represent are ours; so make Merrill
25 Lynch give us the money. What prevents them from doing

1 that?

2 MR. SWIFT: Nothing prevents them from
3 making the demand. But when they go into court and ask
4 for that, first of all, Merrill Lynch can do what it did
5 here, which is to file an interpleader and say: We want
6 all the claimants to come forth and make the claim.
7 Then we have a redo.

8 What we have below is a judgment, a judgment
9 that we're seeking to enforce and we contend that --

10 JUSTICE KENNEDY: Well, the difference in
11 the redo is that in the second case that's just been
12 hypothesized, the Philippine government is represented.
13 We are making these assumptions, and the Philippines
14 government says: You can make these assumptions, but
15 they may very well be wrong; we want to be represented
16 before you make those assumptions.

17 MR. SWIFT: Well, they had that right in the
18 year 2000 when they chose to exercise their sovereign
19 immunity. So, what has changed? They would have to
20 waive their sovereign immunity to go --

21 JUSTICE KENNEDY: Any party that's beyond
22 the process of the court has a right to come in. The
23 question is what happens if they are not there.

24 MR. SWIFT: Well, they were brought in.
25 They chose to exit. They then paid for the prosecution

1 of claims by PNB and Arelma, in effect acting as
2 surrogate, reflective of a question that was asked
3 earlier. Then when they were dissatisfied with the
4 result, they then want to use PNB and Arelma to upset
5 that pursuant to a Rule 19(b) motion.

6 JUSTICE BREYER: There is a huge change.
7 The change would be that they'd a judgment of that
8 special court over there that this company and the
9 assets understandably belong to us, not to the Marcoses.
10 And so this time, they go with that judgment to Merrill
11 Lynch and say: Give us the money.

12 And if they -- if they don't -- if Merrill
13 Lynch says no -- Merrill Lynch might say yes, but you'll
14 say, no, it belongs to us, so they might not. And if
15 they don't, then the Philippines are never going to get
16 the money, unless they bring the lawsuit. And once they
17 bring the lawsuit, then you have them, because then you
18 go right into the court in that lawsuit and intervene
19 and they have waived all their sovereign immunity, et
20 cetera, they can't get the money.

21 MR. SWIFT: Then you have a redo of what
22 they started out this proceeding doing --

23 JUSTICE BREYER: With a difference.

24 MR. SWIFT: -- which was judge shopping and
25 forum shopping. They were -- they were --

1 JUSTICE GINSBURG: But isn't that what --
2 that's what sovereign immunity means. I mean, they do
3 have the right to pick their forum. You say I can only
4 be sued when I consent, so I can consent where I will.

5 The problem with what you're presenting is
6 it sounds like, yes, you have sovereign immunity, you
7 don't have to be part of this lawsuit and it can't
8 affect your rights, but then when it seems to be
9 eventual judgment, it's a default judgment effectively
10 against the Philippines, because they can never get
11 those assets once they're disbursed. So, it's a -- it's
12 kind of a deceptive immunity, because by asserting the
13 immunity they are going to lose their opportunity to
14 claim these assets.

15 MR. SWIFT: Well, what Your Honor is
16 suggesting is that there should be a per se rule under
17 Rule 19(b). I don't believe it's the role of this Court
18 to change Rule 19(b).

19 JUSTICE GINSBURG: Not necessarily. I'm
20 focusing on this situation. There could be others.

21 MR. SWIFT: Well, then we have two lower
22 courts that have balanced and weighed all appropriate
23 factors. There is no suggesting that there are other
24 factors. They -- I believe that the standard of review
25 for this Court is whether or not the lower courts

1 considered the factors and engaged in an appropriate
2 balancing and weighing --

3 JUSTICE KENNEDY: In making that balancing,
4 what weight did they give to the sovereign immunity of
5 the Philippines?

6 MR. SWIFT: Significant weight. The Ninth
7 Circuit said it was a powerful factor. And then it went
8 into other factors, some of which Justice Ginsburg
9 mentioned: The 22-year delay. They have known about
10 this for a long time.

11 JUSTICE GINSBURG: I thought that the Ninth
12 Circuit went on a statute of limitations in New York.
13 It didn't give the sovereign immunity claim, it seems,
14 in the end of the day any weight, because it says we
15 don't have to worry about the Philippines being out of
16 this case because they would have no claim on the
17 merits.

18 MR. SWIFT: Let me pose a different example
19 to you, Justice Ginsburg, and that is, what if this were
20 a bankruptcy proceeding and the foreign sovereign said:
21 Oh, those assets really belong to us, they were stolen,
22 and we'll decide that in our country.

23 Now, it could be any country of the world.
24 Would the U.S. court stand for that? Are U.S. courts
25 supposed to give away and surrender and be ousted of

1 their own jurisdiction in in rem actions and farm out
2 decisions to foreign countries? And in our case we're
3 not even going to be represented, nor will the Marcoses?

4 CHIEF JUSTICE ROBERTS: So there might be a
5 different situation in your hypothetical with respect to
6 bankruptcy. In effect, there's an administrator against
7 whom the Philippines could proceed, unlike the situation
8 here, where you have a class and which the prospect of
9 the Philippines proceeding later is not realistic.

10 MR. SWIFT: Well, I submit that the
11 underlying principle is a solid one, and that is U.S.
12 courts do have in rem jurisdiction. We have 28 U.S.C.
13 1655. It's one of the oldest forms of jurisdiction we
14 have in this country. And we should not be surrendering
15 that to a foreign sovereign and farming out per decision
16 decisions about assets. These assets are not
17 transitory. They have been here 35 years.

18 JUSTICE STEVENS: Yes, but may I ask a sort
19 of -- maybe it's too elementary a question, but has any
20 court ever decided the merits of the question whether
21 the Marcos estate or the Philippine Government owns
22 these assets?

23 MR. SWIFT: The lower court -- well, not as
24 --

25 JUSTICE STEVENS: It decided there was no

1 remedy, I understand that. But has it decided the
2 merits of the basic dispute?

3 MR. SWIFT: It has, based on evidence, based
4 on depositions, that these assets belonged to Marcos.

5 JUSTICE GINSBURG: Where is that? Then why
6 were they bothering with the statute of limitations?
7 Both courts said that the action would be time barred in
8 New York. But if they made a definitive ruling that the
9 assets belonged to the Marcos estate and not the
10 Philippine Government, then that would be preclusive.

11 MR. SWIFT: I -- are you saying that --

12 JUSTICE GINSBURG: I just did not find in
13 either the district court or the court of appeals an
14 answer to that basic question: Whose assets are they?
15 It seemed to me they were assuming the assets belonged
16 to the estate and not to the Philippine Government, but
17 they made no specific finding on that issue.

18 MR. SWIFT: There are a number of findings,
19 but obviously, because the Philippine Government was not
20 a party in the case, there was no finding specific to
21 the Philippine Government. But the finding that they
22 were -- belonged to Ferdinand Marcos is sufficient. You
23 do not need the counter-finding that they did not belong
24 to the Republic.

25 JUSTICE GINSBURG: But then you're ignoring

1 a 1955 law that says anything that belongs to Marcos
2 that he didn't get legitimately belongs to the
3 government.

4 MR. SWIFT: Well, again, that's a forfeiture
5 issue. The assets have to be in the Philippines, and
6 there have been many forfeiture proceedings in the
7 Philippines as to Marcos assets.

8 To answer a question Justice Kennedy raised
9 earlier, aren't there other assets, they've have already
10 recovered over a billion dollars of assets. There is
11 still hundreds of millions, if not a billion, in the
12 Philippines.

13 You know, from the record and what I've
14 submitted, that we're not able to transfer our American
15 judgment to the Philippines. The United Nations Human
16 Rights Committee has even found a violation of
17 international law by the Republic in preventing us from
18 doing that. We've had to go to that body. Do we think
19 that we are going to get justice in a Philippine court
20 that's never adjudicated human rights violation, much
21 less our right to the assets? Think how easy it would
22 be for the Marcoses and the Philippine Government to
23 simply make a deal as to these assets.

24 CHIEF JUSTICE ROBERTS: Because aren't those
25 issues that could be addressed when the Philippines

1 attempt to enforce a judgment they would get in the
2 Philippines if they do in fact get such a judgment?

3 MR. SWIFT: Well, then we run into such
4 issues like the act of state doctrine. And we have --
5 then we will -- our defense will be undermined because
6 they will say a U.S. court cannot re-examine those --
7 that determination. So it's a catch-22 for us. We
8 proceeded as we were --

9 JUSTICE BREYER: Do you have -- I mean I
10 don't see you have a claim there as opposed to the --
11 the worst that would happen, not necessarily good for
12 your clients, but the worst that would happen would be
13 that the assets would be devoted to victims and their
14 families in the Philippines. I mean, namely to the
15 Philippine people. So I don't see some kind of
16 fundamental unfairness here, unless you can point one
17 out.

18 MR. SWIFT: Well, I --

19 JUSTICE BREYER: I mean they'll treat you
20 like another creditor and you have -- but is there some
21 terrible unfairness going on?

22 MR. SWIFT: What Your Honor is suggesting is
23 that a useful approach to this case is to say, well, if
24 the Philippine Government gets the money, then won't
25 that benefit everybody? Well, then you have to look at

1 the characteristic of the country, something I'm very
2 familiar with but which I don't want to -- I think it
3 would be inappropriate in this proceeding to talk about.

4 JUSTICE BREYER: Is there -- is there
5 something special going on, specially unfair, in respect
6 to the delays where you are treated differently than
7 other litigants in the Philippines?

8 MR. SWIFT: Yes. There was purposeful delay
9 in us being able to transfer our judgment. We are just
10 in the pleadings stage after 11 years there.

11 JUSTICE SCALIA: Counsel, what does
12 unfairness have to do with it? I mean the whole
13 doctrine of sovereign immunity rests upon unfairness.
14 It says you can't sue the sovereign even if you have a
15 valid claim. And when we say we will apply the same
16 doctrine as to foreign sovereigns, it means the same
17 thing. I'm just not terribly persuaded by the fact that
18 it has unfair consequences. The doctrine of sovereign
19 immunity always has unfair consequences. So, unless
20 you're asking us to abandon the doctrine, the fairness
21 argument does not persuade me.

22 MR. SWIFT: Well, I think the issue was
23 resolved pursuant to 19(b). Unless this Court
24 determines that there is a per se rule under 19(b), we
25 weigh factors, and it's the role of this Court to

1 determine whether or not there was -- the lower courts
2 did not make a decision based on equity and good
3 conscience, one of the broadest parameters of
4 decisionmaking provided by a lower court.

5 JUSTICE SOUTER: May I go back on exactly
6 that point on the equity to Justice Breyer's last
7 question? I thought you had given or anticipated his
8 question in something you said a moment ago, and then
9 you didn't repeat it, and I may have misunderstood you.
10 I thought you had told us that the courts of the
11 Philippines did not recognize, for enforcement purposes
12 there, the judgment that your clients had obtained in
13 the United States, and that in effect they, therefore,
14 if they were going to make a claim on assets in the
15 Philippines, they would have to start from scratch
16 again. Is that correct? Did I misunderstand you?

17 MR. SWIFT: Well, our judgment has not been
18 enforced. They asked -- initially asked for a filing
19 fee of \$8.4 million. We appealed that, after eight
20 years and some months. They finally said, yes, the
21 filing fee is \$10. So, it was sent back down where
22 there was still more delay. I mean, I'm a realist. I
23 mean, how many years is it going to take?

24 JUSTICE ALITO: So they just -- they in fact
25 are obstructing the process --

1 MR. SWIFT: That's right.

2 JUSTICE ALITO: -- trying to recognize it?

3 MR. SWIFT: And the U.N. -- the United
4 Nations Human Rights Committee has so found.

5 JUSTICE SOUTER: Let me ask you this: Did
6 the Philippine Government formally take a position in
7 raising these obstructive barriers, the \$8 million
8 filing fee, for example?

9 MR. SWIFT: It did not.

10 JUSTICE SOUTER: Okay. That was sua sponte
11 with the court?

12 MR. SWIFT: It was sua sponte with the --
13 actually raised with the Marcoses initially, and the
14 court simply said yes, it's \$8.4 million.

15 JUSTICE GINSBURG: Isn't that -- I mean it
16 sounds shocking, but I thought that in the Philippines,
17 as in many countries, the filing fee is determined by
18 what you're asking for. So it would be a percentage of
19 \$2 billion. And if they just did that automatically,
20 then you say, oh, but, but this -- the filing fee of
21 that size would mean that the Plaintiffs can't sue. But
22 that's -- but it wasn't they picked whatever figure,
23 filing fee, out of a hat; it was a percentage of what
24 was sought in the litigation right?

25 MR. SWIFT: That's -- you're correct in your

1 analysis. The -- except there was another provision of
2 the fee statute which we went under and which they
3 ultimately -- the Philippine Supreme Court said that we
4 were correct.

5 CHIEF JUSTICE ROBERTS: Counsel, before you
6 sit down, you haven't mentioned anything about your
7 argument that the Philippines don't have the right to
8 raise this. Are you throwing in the towel on that one?

9 MR. SWIFT: Absolutely not. We think that
10 argument is definitive. First, on one hand, with regard
11 to the Philippine Government and its PCGG: They were
12 not parties to the judgment. Therefore under Karcher,
13 Marino, Devlin --

14 CHIEF JUSTICE ROBERTS: Well, the
15 Philippines National Bank and Arelma were, and of course
16 they've appealed. And I understand the law to be they
17 can raise these arguments. We don't have need to have
18 an independent basis for the Philippines.

19 MR. SWIFT: That's true, but we've also
20 pointed out that Arelma and PNB have thrown in the towel
21 as to the merits. Remember, they're parties that are
22 separate parties. They had claims on the merits. Their
23 claims were resolved against them inter se, and so they
24 no longer have a dog in the fight.

25 JUSTICE GINSBURG: Yes, they do because if

1 they are able to successfully knock out the judgment,
2 then they are back to square one. Then they -- they
3 lost on the merits, but that judgment would be wiped
4 out.

5 MR. SWIFT: Well, perhaps under Rule 19(b)
6 the lower court may still rule that there is a -- a
7 definitive judgment as to them against other creditors.
8 And in fact that -- there has been --

9 JUSTICE GINSBURG: If there was no authority
10 of the court to proceed, then the judgment is -- is as
11 though it were never made.

12 MR. SWIFT: Well, that's perhaps one way of
13 looking at it, Justice Ginsburg. I submit to you that
14 the -- the decision I would respectfully request you
15 look at is Horizon Bank and Trust Company versus
16 Massachusetts, where the same facts occurred. The First
17 Circuit -- Massachusetts did the same thing the Republic
18 of the Philippines did here. It did the two-step dance:
19 We're sovereign, we're indispensable. It was denied by
20 the lower court. The lower court then, since the United
21 States was a party and the State didn't have immunity as
22 to that, it went into the merits determination.
23 Massachusetts appealed only appealed only the 19(b)
24 decision. And the Court of Appeals held that because
25 they had not appealed the merits decision, the same as

1 here, therefore, there was no longer a live controversy,
2 and live controversy is a requirement of standing in
3 this Court, or power to appeal in this Court.

4 So, in addition, although there isn't a lot
5 of case law in this Court on this particular point, I
6 would refer you to the Ashcroft v. Mattis decision
7 because the same principle was applied there where there
8 was no appeal permitted to this Court. Finally, the
9 one thing that I have not really addressed is Merrill
10 Lynch's interest. The whole nature of "interpleader" is
11 that the stakeholder should have an adequate remedy.
12 Merrill Lynch has significant business interests, as do
13 many banks, many insurance companies, in getting a
14 resolution. This matter, in itself, has gone on for
15 eight years. There have been over a dozen appeals in
16 this particular piece of litigation.

17 Doesn't -- isn't there a significant
18 business interest that has to be weighed in that
19 equation so that Merrill Lynch -- only a stakeholder
20 will continue to have to defend, defend, defend,
21 interplead and so forth?

22 I submit to you that there is a policy
23 judgment that has to be made by this Court as to the
24 rules with regard to interpleader and in rem proceedings
25 and whether this Court is prepared to surrender

1 jurisdiction to foreign courts to make --

2 JUSTICE GINSBURG: If -- if the proceeding
3 can't go forward because of sovereign immunity, that
4 judgment would shield Merrill Lynch from any other
5 claim. It could say to any other claimant: Sorry, a
6 binding judgment has been issued saying this matter
7 can't be settled without the Philippines being in it.
8 So I don't really get your: Merrill Lynch is going to
9 be subject to repeated proceedings. They will be armed
10 with a judgment that says, suit can't go on without the
11 Philippines being there.

12 MR. SWIFT: Well, let me -- let me take you
13 on, on that point. We have one other remedy, and that
14 is execution. Execution doesn't require joinder of all
15 parties. It's a singular proceeding that people can
16 join in, but we would have the right to execute, and you
17 can bet that that is exactly what we will do.

18 So, to some extent, what is being argued
19 here is somewhat besides the point because if that money
20 goes back to Merrill Lynch, we can, and will, execute on
21 that.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Rothfeld, you have three minutes remaining.

24 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD
25 ON BEHALF OF THE PETITIONER

1 MR. ROTHFELD: Thank you, Your Honor.

2 A couple of points. First of all, there is
3 no doubt that the Republic has a substantial interest in
4 the assets that are at stake here. And, therefore, its
5 sovereign immunity, at least in the context of this
6 case, should be dispositive and should have led to
7 dismissal under Rule 19.

8 There -- this Court in the Provident case
9 noted that there are certain compelling, substantive
10 considerations that are dispositive under Rule 19 that
11 make it unnecessary to consider any other balancing
12 consideration. Sovereign immunity is one such
13 consideration. And because the Republic has immunity,
14 has asserted immunity --

15 JUSTICE STEVENS: You agree that the Ninth
16 Circuit gave sovereign immunity great weight in the
17 balancing?

18 MR. ROTHFELD: I think it gave it no weight
19 at all. I think it said that, yes, in theory, sovereign
20 immunity is entitled to weight. But in this case we are
21 going to ignore it completely because we believe that if
22 the Republic appears in New York and asserts its
23 interests, it will lose under statute of limitation
24 grounds. That is a completely inappropriate way of
25 treating it.

1 Once the sovereign immunity was asserted and
2 there was a substantial interest in the asset here, as
3 there undoubtedly was, that should have been the end of
4 the matter.

5 The second point is there is no question
6 that, ultimately, this is a dispute between the Marcos
7 estate and the Republic. There is no question that the
8 claims of the Respondents here are entirely derivative
9 of the Marcos estate; and, therefore, that is something
10 that has to be decided first: Whether this belongs to
11 the estate, the Respondents, or the Republic. And that
12 is a determination that should be made in the courts of
13 the Philippines.

14 It is not a question of surrendering the
15 jurisdiction of U.S. courts. There is a general
16 consensus that stolen assets, assets stolen by corrupt
17 leaders, should be returned to the nation of origin, and
18 determination as to ownership should be made by the
19 courts of that nation. That's stated on the U.N.
20 Convention on Corruption to which the U.S. and the
21 Philippines are a party.

22 All of the nations that have an interest in
23 the relevant assets, not only the Republic but the
24 United States and Switzerland, all agreed that it is
25 appropriate for the Sandiganbayan to make that

1 determination as between the Republic and the estate.

2 If it's ruled for the estate, the Respondent
3 can attempt to collect as a judgment creditor. If it
4 goes to the Republic, the Republic can assert its
5 interest directly with Merrill Lynch as the owner of
6 Arelma. If Merrill Lynch declines to pay, it can in a
7 number of ways try to enforce its -- either with the
8 assistance of the United States according to U.S.
9 statute, in which case the Sandiganbayan's factual
10 determinations would be dispositive, or it can bring an
11 action under -- under New York law. That is the only
12 way in which there could be a single proceeding that
13 resolves everybody's interests.

14 In this proceeding, as all agree, the
15 Republic is free, for whatever it is actually worth, to
16 sue Merrill Lynch. That is precisely what Rule 19 is
17 designed to avoid, duplicative litigation, the
18 possibility of duplicative liability.

19 If the Sandiganbayan rules, the Republic
20 comes here and initiates an action, everybody who has a
21 claim can be brought into that action. As Justice
22 Ginsburg noted, there is no possibility that Merrill
23 Lynch could be subjected to duplicative liability
24 because this Court's judgment would determine that the
25 Republic is an indispensable party.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Rothfeld. The case is submitted.

3 [Whereupon, at 11:04 a.m., the case in the
4 above-entitled matter was submitted.]

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