ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Lessors of Abchakan Village,	)	ASBCA No. 61787
Logar Province, Afghanistan	)	
	)	
Under Contract No. DACA-AED-5-09-9650 *et al.*	)	

APPEARANCES FOR THE APPELLANTS:	Keith J. Feigenbaum, Esq. Michael E. Barnicle, Esq. Peter Vogel, Esq. Jessica Nejberger, Esq. Arnold & Porter Kaye Scholer LLP Chicago, IL Charles B. Lewis, Esq. Duane Morris LLP Chicago, IL
APPEARANCES FOR THE GOVERNMENT:	Michael P. Goodman, Esq. Engineer Chief Trial Attorney Cara M. Mroczek, Esq. Rebecca L. Bockmann, Esq. Engineer Trial Attorneys U.S. Army Engineer District, Middle East Winchester, VA

OPINION BY ADMINISTRATIVE JUDGE SWEET

Appellants claim that the Army Corps of Engineers (government) breached express or implied-in-fact leases—and its duty of good faith and fair dealing—by failing to vacate land that appellants purportedly owned in Afghanistan and had leased to the government. We denied the government's first motion to dismiss on the grounds that appellants' representative was not a proper representative. *Lessors of Abchakan Village, Logar Province, Afghanistan*, ASBCA No. 61787, 21-1 BCA ¶ 37,953 at 184,326-27. On October 18, 2021, the government filed a second motion to dismiss, arguing that we do not possess jurisdiction because the Afghanistan Courts have not finally decided who owned the land, so this appeal is not ripe. The government also argues that we do not possess jurisdiction under the act of state or the political question doctrines because the Government of the Islamic Republic of Afghanistan (GIRoA) asserted its ownership of the land. In the alternative, the government moves for judgment on the pleadings on the grounds that appellants failed

to plead a legal basis sufficient to establish their ownership of the land.[1] Appellants oppose those motions.

Ripeness is an issue that we address on a motion to dismiss. ***, ASBCA No. 60318, 2016 WL 692676 (Feb. 2, 2016); *Triad Mechanical, Inc.*, ASBCA No. 57971, 12-1 BCA ¶ 35,015 at 172,059. Under the doctrine of ripeness, a tribunal will not hear a case if it involves uncertain or contingent future events. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). Here, the appeal does not involve an uncertain or contingent future Afghanistan Court Decision because there is no reasonable probability of such an Afghanistan Court Decision. Therefore, the appeal is ripe for review, and we deny the motion to dismiss for lack of jurisdiction based upon ripeness.

The act of state doctrine goes to the merits of a claim, and is not a jurisdictional defense. *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004); *World Wide Minerals Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 (D.C. Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 451 (2d Cir. 2000). Likewise, the political question doctrine is an issue of justiciability, not jurisdiction. *Aviation & Gen. Ins. Co., LTD v. United States*, 882 F.3d 1088, 1094 (Fed. Cir. 2018). Therefore, we deny the government's motion to dismiss for lack of jurisdiction based upon the act of state and the political question doctrines, and instead address those doctrines in connection with the government's motion to dismiss for failure to state a claim.

Regarding the government's motion to dismiss for failure to state a claim, we convert that motion to one for summary judgment because the parties rely upon materials outside of the pleadings.[2] *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920-21. As discussed below, we grant the government summary judgment because the appellants have failed to raise a genuine issue of material fact suggesting that they owned the land, and to hold otherwise would violate the act of state doctrine. Therefore, the appeal is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

I. Leases

1. On April 23, 2009, the government entered into Leases Nos. DACA-AED- 5- 09-9650 through DACA-AED-5-09-9663 (Leases) with appellants to lease

[1] The government makes its argument that appellants have failed to state a claim as an alternative argument in the event that we find the appeal is ripe.

[2] We have provided the parties with notice of a potential conversion, and an opportunity to be heard on that issue.

real property (Land) in Afghanistan for the expansion of Forward Operating Base (FOB) Shank (R4, tabs 4-17; Compl. ¶¶ 34-61). In each lease, appellants:

> [W]arrants that [appellants are] the rightful and legal owner[s] of the herein described premises and [have] the legal right to enter into this lease and perform its obligations. If the title of [appellants] shall fail, or it be discovered that [appellants] did not have authority to lease to the [government], the [government] shall have the option to terminate this lease. [Appellants], [appellants'] heirs, executors, administrators, successors, or assigns agree to indemnify the [government] by reason of such failure and to refund all rental paid by the [government]. Further, the [government] shall have the option to withhold rents pending the resolution of any and all ownership issues and discrepancies.

(R4, tabs 4-17 at ¶ 4 (emphasis omitted))

2. The Leases were for one year, from January 1, 2009 to December 31, 2009 (R4, tabs 4-17 at ¶ 2).

II. Performance and the Land Ownership Dispute

3. On July 14, 2009, the government paid rent for the period from January 1, 2009 through December 31, 2009 (compl. ¶ 85). The complaint alleges that "[f]or calendar year 2011 through the present, the Government or its assignee . . . enjoyed the full use of the Premises," but failed to pay rent (*id*. at ¶¶ 99, 159).

4. The government learned that the GIRoA claimed to own the Land (compl. ¶¶ 95, 112, 120).

5. Therefore, in August 2010, the government issued letters to appellants stating that:

> In accordance with paragraph 4 [of the Lease], this letter provides written notification that your ownership documents have come into question. Although this lease has expired, you must submit official, verifiable documentation to this office. Verifiable documentation means approved by the legal system of the Islamic Republic of Afghanistan. If it is determined that your claim of ownership was false, all rental monies paid to you

> under [the Lease] must be refunded to the United States, in accordance with paragraph 4 of the lease.

(R4, tabs 18-31)

6. On November 17, 2012, the government sent a letter to appellants, indicating that the land ownership had been in dispute for several years. The letter stated that "[b]ecause of those concerns, the United States Government has stopped all lease actions and payments until the land ownership is clearly and legally identified." (R4, tab 2 at 156; compl. ¶ 112).

7. On September 30, 2014, the United States and the GIRoA entered into a Bilateral Security Agreement (BSA) (gov't second mot. to dismiss and motion for judgment on the pleadings, (gov't mot.) at ex. 1).[3] Under the BSA, "Afghanistan hereby provides access to and use of the agreed facilities and areas, as defined in paragraph 7 of Article 1" (*id*. at Art. 7(1)). The BSA Article 1(7) defined "agreed facilities and areas" as:

> [T]he facilities and areas in the territory of Afghanistan provided by Afghanistan at the locations listed in Annex A, and such other facilities and areas in the territory of Afghanistan as may be provided by Afghanistan in the future, to which United States forces . . . shall have the right to access and use pursuant to this Agreement.

(*id*. at Art. 1(7)) Annex A listed several facilities—not including Camp Dhalke or FOB Shank[4]—and stated that "[a]greed facilities and areas also include other facilities and areas, if any, of which United States forces have the use as of the effective date of

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[3] While the copy of the BSA attached to the government's motion is not executed (mot. ex. 1), it is clear that the government and the GIRoA entered into a BSA with a provision that allowed Afghanistan to provide facilities in the future based upon the Declaration, which indicated that the GIRoA was authorizing Camp Dhalke and FOB Shank as locations for the use of United States Forces in accordance with the BSA (gov't second MTS at ex. 3).

[4] FOB Shank was amongst the largest coalition bases in Afghanistan. In 2014, the government turned it over to the GIRoA, and it fell into disuse, except for a small portion of the base. The government subsequently used a different small portion of FOB Shank, which was known as Camp Dhalke. J.P. Lawrence, *Welcome to "Zombieland:" A Former US Army Base Rots in the Hands of Overwhelmed Afghans*, STARS AND STRIPES (March 1, 2019), www.stripes.com/ news/welcome-to-zombieland-a-former-us-army-base-rots-in-the-hands-of-overwhelmed-afghans-1.570893.

this Agreement and other facilities and areas at other locations in Afghanistan as may be agreed and authorized by the Ministry of Defense [(MOD)]" (*id*. at Annex A).

8. Appellants and the GIRoA litigated their dispute over the Land before the Maidan-Wardak Appellate Court. That Court issued a decision (Maidan- Wardak Decision) in 2015, holding that appellants proved that they owned the Land based upon a deed, and tax and water rights documents. (App. resp. to second MTD (app. resp.) at ex. 1 ¶ 29 (Hakimi Decl.)).

9. The GIRoA appealed the Maidan-Wardak Decision to the Afghanistan Supreme Court (Supreme Court) (gov't mot. at exs. 5(a)-5(b)). Under the GIRoA, the Supreme Court headed the judicial branch (gov't mot. at ex. 6 ¶ 3(a) ([redacted] Decl.)).

10. In an email dated August 21, 2017, Robert Aranha of the United States Navy stated that "there is no land use agreement for [FOB] Shank[.]" Not surprisingly, the August 21, 2017 email did not address whether the act of state doctrine applies. (App. resp. at ex. 6).

11. On December 19, 2017, the GIRoA sent the government a declaration to authorize Camp Dhalke and FOB Shank as an agreed facility and area for the use of United States Forces (Declaration) pursuant to the BSA (gov't mot. at ex. 3). The Declaration "authorizes Camp Dhalke and the expansion into FOB Shank as a location in Afghanistan as an Agreed Facility and Area for the use of U.S. Forces in accordance with" the BSA (*id.*). In the Declaration, the GIRoA:

> [C]ovenants that it has the legal authority over the land necessary to effect this agreement and authorization. Any and all claims made against the Camp Dhalke and FOB Shank land or regarding the ownership of this land are the responsibility of the GIRoA and shall be resolved in full by GIRoA.

(*Id*.) Tariq Shah Bahrami, the GIRoA Minister of Defense, signed the Declaration (*id*.).

12. On February 11, 2018, Contracting Officer (CO) Marlin Mason sent an internal email stating that:

> With regards to the document signed by [MOD, Construction and Property Management Directive (CPMD)] that states Shank is property of MOD and that we can construct. This document has no value. There have been multiple occasions when the Minister of

Defense has refused to sub delegate his authority to CPMD to assert ownership and allow construction by the United States. There have been past agreements between the United States and the Minister of Defense that have stated that only the Minister of Defense can sign such an agreement and the agreement must be in the form of a License For Construction. . . .

The blanket [License for Construction (LFC)] process would not apply for the below reasons:

The blanket LFC process is expired.

The base was built as a US Base and not an [the Afghan National Security Forces (ANSF)] Base. The blanket LFC process was to be used when a LFC had previously been obtained using the CSTC-A FRAGO 11-518.

Other factors to be considered.

Alleged court documents support FOB Shank as private property. The fact that the United States had leases in effect would suggest that the land was thought to be private lands.

The CPMD document has no enforceability or validity. In fact, we have seen this attempted previously to get the United States to construct on private lands.

. . . .

While there is financial risk, the bigger risk is one of [the government] supporting a violation of the 5th Amendment of the United States Constitution by taking lands without providing just compensation. While the project is for ANSF, [the government] will be the ones that took the right to use from the alleged owners when we are doing the construction that construction enabled the ANSF to continue to utilize the lands. I would not recommend awarding any construction projects at FOB Shank until the competing claims of ownership have been resolved and the process as outlined in FRAGO 11-518 followed and all documents provided to [the government].

(App. resp. at ex. 3) The February 11, 2018 email did not address whether the act of state doctrine applies (*id*.).

13. The Supreme Court issued a decision on February 20, 2018 (Supreme Court Decision) (gov't mot. at exs. 5(a)-5(b)). Before the Supreme Court, [redacted] represented appellants (*id*. at 1). The parties actually litigated the issue of whether appellants owned the Land, and resolution of that issue was necessary to the Supreme Court Decision (*id*. at 1, 6-9). In particular, the Supreme Court found that the deed was insufficient to establish that appellants owned the Land because a delegation reported that the handwriting on the Land deed did not match the handwriting on the deeds registered before or after the Land deed, so the Land deed appeared to be fraudulent (*id*. at 7-8). The Supreme Court also found that appellants' 14 days of water rights and 48/35 AFN in taxes were insufficient to establish ownership of the Land because those could not cover the claimed 12,510 acres of purportedly arable Land (*id*. at 3, 8). On the contrary, a report by a delegation found that the Land was desert, rocky slope, hilly and not cultivatable, which constituted public land (*id*. at 8). Likewise, the Supreme Court noted that, while in power previously, the Taliban had determined that the Land was not cultivatable, and therefore was public land (*id*. at 4). Thus, the Supreme Court "repealed" the Maidan-Wardak Decision and remanded to the Appellate Court of Government Property Seizure for the Central Region (*id*. at 9).

14. Appellants have produced no evidence – and we have found none in the record – that would support a finding that: (1) the Supreme Court Decision was rendered under a judicial system that failed to provide impartial tribunals or procedures compatible with fundamental principles of fairness; (2) appellants failed to receive notice in sufficient time to enable them to defend; (3) the Supreme Court Decision was rendered in circumstances that raise substantial doubts about the integrity of the rendering court with respect to the judgment; (4) the specific proceedings were incompatible with fundamental principles of fairness; (5) the GIRoA did not provide reciprocity; or (6) any other factors identified in the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW (Restatement)§ 484 were present. There is no evidence of the preclusive effect of final judgments in Afghanistan (*id*.; gov't mot. at ex. 6 ¶3(a) ([redacted])).

15. As of August 14, 2020, the Appellate Court for Government Property Usurpation for the Central Region had not been established (gov't mot. at ex. 6 ¶ 6(a)).[5] Therefore, according to appellants' expert, the case between the GIRoA and

[5] Afghanistan law is an appropriate subject for expert testimony. *Sharifi v. United States*, 987 F.3d 1063 (Fed. Cir. 2021); FED. R. CIV. P. 44.1. Contrary to appellants' vague assertions (app. surreply at 5), we find that the declaration of

appellants was transferred to the Appeals Court for Government Land Usurpation Cases (Appeals Court).

16. On May 14, 2018, Elaine Williams of the Corps sent an internal email recommending against proceeding with any construction at Camp Dhalke and FOB Shank "until the ownership is resolved. None of the ownership documents produced by CPMD to date is definitive." There was no identification of the ownership documents to which the May 14, 2018 email was referring; let alone that they included the Declaration. Nor did the May 14, 2018 email address whether the act of state doctrine applies. (App. resp. at ex. 5)

17. On October 3, 2018, the GIRoA sent the government a Validation[6] regarding Camp Dhalke and FOB Shank (Validation) (gov't mot. at ex. 4). In the Validation, the GIRoA:

> [D]eclares, acknowledges and validates its prior Declaration of 19 December 2017 authorizing the use of FOB Shank and Camp Dhalke, asserting GIRoA land ownership over this area, and accepting full responsibility for any and all land claims that may arise over the use of this area, including accepting for resolution any such land claims filed against the United States Government.

(*id*.). The Validation reiterated the GIRoA's assertion that it owned the Land, indicated that the GIRoA assumed full responsibility for any and all Land claims, and stated that the GIRoA would continue to assert ownership in the court proceedings (*id*.). The Validation also stated that the GIRoA "understands the United States will refer any and all such land claims arising from [the Camp Dhalke and FOB Shank project] to GIRoA . . . for resolution and that the United States will not be responsible for processing, defending, or paying any judgment that may arise from any such land claim" (*id*.). Minister of Defense Bahrami signed the Validation (*id*.).

18. On August 6, 2021, the Appellate Court of Logar Province purportedly issued a letter finding that appellants owned the Land (Logar Letter) (app. resp. at ex. 1 ¶¶ 33-34 (Hakimi Decl.), ex. 2 at 10-11). Five calendar days (or three business

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[redacted], the government's expert, is credible and not conclusory (gov't mot. at ex. 6 ([redacted] Decl.)).

[6] The October 3, 2018 document is entitled "Ministry of Defense Validation and Declaration of GIRoA Land Ownership," and it validates and reaffirms the December 19, 2017 Declaration (gov't mot. at ex. 4). We use the term "Validation" to refer to the October 3, 2018 document to distinguish it from the December 19, 2017 Declaration.

days) later—on August 11, 2021—the Appeals Court purportedly dismissed the GIRoA's claims (Purported Appeals Court Decision) based upon the Logar Letter (*id*.).

19. The government's expert [redacted], [redacted], noted that the GIRoA Ministry of Justice's prosecutor was not informed of any hearing, despite a requirement that he be present at the hearing (gov't reply at ex. A ¶ 17 ([redacted] Decl. II)). Therefore, the GIRoA was not provided notice or an opportunity to be heard in the case, the Purported Appeals Court Decision was not rendered using procedures compatible with fundamental principles of fairness, and the GIRoA did not receive notice of the proceedings in sufficient time to enable it to defend. Indeed, the prosecutor was not even aware that the Appeals Court had issued a decision (*id*.).

20. [redacted] also opined that the five calendar days (or three business days) between the issuance of the Logar Letter, and the Purported Appeals Court Decision that relied upon that letter raises substantial doubts about the credibility and integrity of the Purported Appeals Court Decision because five calendar days (or three business days) was insufficient for the Appeals Court to receive and consider the Logar Letter. (gov't reply at ex. A ¶¶ 9, 14 ([redacted] Decl. II)). As [redacted] explained, it took over a week for a letter to even arrive in Kabul from Logar Province (*id*. ¶ 10). Then, the Kabul Appellate Court—which would have received the Logar Letter—would have had to register the Logar Letter in its database and send the Logar Letter to the Appeals Court, which usually took more than a day (*id*. ¶ 13). After that, the assigned Judge would have had to consult with the Chief Judge, provide the parties a copy of the Logar Letter at a brief hearing or by delivering them a copy of the Logar Letter, give the parties an opportunity to respond, and hold a final hearing (*id*. ¶ 14). And all of this purportedly was occurring during the imminent collapse of the GIRoA, when provinces rapidly were falling to the Taliban, and most government employees were not showing up for work due to safety concerns (*id.* ¶¶ 22-23).[7] Indeed, the Appeals Court purportedly issued its Decision a mere four calendar days (or two business days) before the fall of Kabul and the GIRoA and failed to address the issues identified in the Supreme Court Decision (gov't mot. at exs. 5(a)-5(b), pp. 7-8; response ex. 2, pp. 8-11).

21. In any event, the GIRoA did not have a chance to appeal the Purported Appeals Court Decision to the Supreme Court before the fall of the GIRoA. Instead, on February 21, 2022, the Supreme Court—now under the control of the Taliban—

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[7] On August 6, 2021, the Taliban captured its first provincial capital. On August 15, 2021, Taliban forces entered Kabul, and the GIRoA collapsed. Ruby Mellen, *The Shocking Speed of the Taliban's Advance: A Visual Timeline*, WASHINGTON POST (https://washingtonpost.com;world/2021/08/16/Taliban-timeline/).

issued a fatwa (Fatwa)[8] finding that appellants owned the Land (app. surreply at ex. 2; *see also* ex. 1 ¶ 11 (Hakimi Decl. II)).

22. The Fatwa was not issued by a judicial system that provides impartial tribunals or procedures compatible with fundamental principles of fairness. The Taliban replaced all of the GIRoA Judges with Taliban loyalists, who lack judicial qualification because they have no prior judicial experience or formal legal or judicial education (gov't surreply at ex. B ¶ 13 ([redacted] Decl. III)). Instead, the new Judges have informal religious training (*id.*). There is no due process in the Taliban's Courts—there is no right to appeal; separation of the functions of prosecutor, attorney, and Judge; transparency; or right to review the record (*id.* ¶ 14). Moreover, because there is no evidence that the GIRoA received notice of the appeal or had the right to be heard, there is no evidence that the Fatwa was rendered using procedures compatible with fundamental principles of fairness, or that the GIRoA received notice of the proceedings in sufficient time to enable it to defend. Nor is there any evidence that a Taliban Court would recognize a comparable United States Judgment. (App. surreply at ex. 1 ¶ 11 (Hakimi Decl. II)) On the contrary, none of that is likely in light of the fact that the Taliban has been hunting for people who worked with the United States (gov't surreply at ex. B ¶ 16 ([redacted] Decl. III)).

III. Procedural History

23. On April 13, 2018, appellants filed a claim with the CO for rent from 2010 to 2019, alleging that the government breached the implied duties to vacate the premises and of good faith and fair dealing (R4, tab 2 at 11-14).

24. On September 4, 2018, the CO issued a final decision (COFD) denying the claim (R4, tab 3).

25. Appellants then filed this appeal. Appellants allege that the government breached express or implied-in-fact contracts, and the duty of good faith and fair dealing, by failing to vacate the property upon the expiration of the Leases (compl. ¶¶ 153-202).

DECISION

We grant the government summary judgment because appellants have failed to raise a genuine issue of material fact suggesting that they owned the Land, and to hold otherwise would violate the act of state doctrine.

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[8] A fatwa is a legal ruling or opinion given by a recognized authority on Islamic law (app. surreply at ex 1, ¶ 11 n.1 (Hakimi Decl. II)).

IV. Summary Judgment Standard

We will grant summary judgment only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). All significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In deciding summary judgment motions, we do not resolve controversies, weigh evidence, or make credibility determinations. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Moreover, we draw all reasonable inferences in favor of the non-movant. *Id*. A genuine issue of material fact arises when the non-movant presents sufficient evidence upon which a reasonable fact-finder, drawing the requisite inferences and applying the applicable evidentiary standard, could decide the issue in favor of the non-movant. *C Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993).

VI. Appellants Have Failed to Raise a Genuine Issue of Material Fact Suggesting That They Owned the Land

The government is entitled to judgment as a matter of law on appellants' claims because appellants has failed to raise a genuine issue of material fact suggesting that they owned the Land. In order to establish the existence of either an express or implied-in-fact contract,[9] an appellant must show: (1) a mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the government representative whose conduct is relied upon. *Engineering Solutions & Products, LLC*, ASBCA No. 58633, 17-1 BCA ¶ 36,822 at 179,466 (citing *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990)). When the alleged contract is an express or implied lease, an appellant must establish that he owned the leased property in order to establish the mutuality of intent and unambiguous offer and acceptance elements. *See Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,922. Indeed, here, appellants warranted in the Lease that they were the rightful owners of the Land, and agreed that the government had the right to terminate the Leases and withhold rent in the event that appellants' title failed (SOF ¶ 1).

Appellants attempt to establish their ownership of the Land by pointing to: (1) the Purported Appeals Court Decision and the Fatwa (app. resp. at 1; app. surreply

[9] While appellants also allege a breach of the duty of good faith and fair dealing, that duty only arises when there is a contract, *Cooper/Ports America, LLC*, ASBCA Nos. 61349, 61350, 19-1 BCA ¶ 37,285 at 181,405-406 (quoting *Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012)), and it cannot be used to expand or contradict the contractual duties. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010).

at 1); and (2) a deed, and tax and water rights documents (collectively Documents) (app. resp. at 13; app. resp. at ex. 1 (Hakimi Decl.) ¶¶ 14-24).[10] As discussed below, those do not raise a genuine issue of material fact suggesting that appellants owned the Land.

A. The Purported Appeals Court Decision and the Fatwa

The Purported Appeals Court Decision and the Fatwa fail to raise a genuine issue of material facts suggesting that appellants owned the Land because we decline to recognize those decisions. The Supreme Court has recognized that a tribunal should not recognize a foreign judgment unless:

> [T]here has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.

Hilton v. Guyot, 159 U.S. 113, 202 (1895). Based upon *Hilton*, the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW (RESTATEMENT) § 481,[11] provides that a

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[10] To the extent that appellants still rely upon the Maidan-Wardak Decision, (app. resp. at 1, 13), that would not raise a genuine issue of material fact suggesting that appellants owned the Land because the Supreme Court repealed the Maidan- Wardak Decision (SOF ¶ 13). To the extent that appellants also rely upon government emails (app. resp. 7), those emails fail to raise a genuine issue of material fact that appellants—as opposed to the GIRoA—owned the Land, for the reasons discussed herein.

[11] While RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §§ 483-84 was recently issued, its predecessor,—RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482—also prohibited a tribunal from recognizing foreign judgments that were rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process, and permits a tribunal not to recognize a judgment when a party did not receive notice in sufficient time to enable him to defend or the judgment was contrary to public policy. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 is "oft-cited." *Mulugeta v. Ademachew*, 407 F. Supp. 3d 569, 582-83 (E.D. Va. 2019);

tribunal should recognize a final, conclusive, and enforceable judgment of a court of a foreign state determining a legal controversy, except as provided in RESTATEMENT §§ 483-84, and § 489.[12] RESTATEMENT § 483(a) mandates that we not recognize the judgment of a foreign court if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness." Moreover, RESTATEMENT § 484 gives us the discretionary power to not recognize a foreign judgment if, inter alia: (1) a party did not receive notice of the proceeding in sufficient time to enable it to defend, *id*. at § 484(a); (2) "the judgment was rendered in circumstances that raise substantial doubts about the integrity of the rendering court with respect to the judgment," *id*. at § 484(g); (3) "the specific proceeding in the foreign country leading to the judgment was not compatible with fundamental principles of fairness," *id*. at § 484(h); or (4) "the courts of the state of origin would not recognize a comparable [United States] judgment" (*id*. at § 484(i)).

For the reasons discussed below, we decline to recognize the Purported Appeals Court Decision and the Fatwa, so those decisions cannot raise a genuine issue of material fact suggesting that appellants owned the Land.

i. The Purported Appeals Court Decision

We exercise our discretionary power and decline to recognize the Purported Appeals Court Decision under RESTATEMENT § 484. The proceedings leading to the Purported Appeals Court Decision were not compatible with fundamental principles of fairness, and the GIRoA did not receive notice of the proceedings in sufficient time to enable it to defend its Supreme Court victory, because the Appeals Court failed to provide the GIRoA with notice and an opportunity to be heard (SOF ¶ 19). Indeed, the GIRoA was unaware of the Purported Appeals Court Decision (SOF ¶ 19).

Moreover, the Purported Appeals Court Decision was rendered in circumstances that raise substantial doubts about the integrity of the rendering court with respect to the judgment. While the August 11, 2021 Purported Appeals Court Decision relies

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see also, e.g., *Vimar Seguros v. Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *de Csepel v. Republic of Hungary*, 714 F.3d 591, 607 (D.C. Cir. 2013); *Gabbanelli Accordions & Imports, LLC v. Gabbanelli*, 575 F.3d 693, 697 (7th Cir. 2009); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1213 (9th Cir. 2006); *Diorinou v. Mezitis*, 237 F.3d 133, 143 (2d Cir. 2001). Courts also have started to rely upon RESTATEMENT (FORTH) OF FOREIGN RELATIONS LAW §§ 483-84. *Mulugeta*, 407 F. Supp. 3d at 582- 83.

[12] RESTATEMENT § 489 is not applicable here because it addresses tax and penal law. Nor is enforceability applicable here because it only applies to money judgments. *Id*. at § 487, cmt. 3.

upon the August 6, 2011 Logar Letter, the five calendar days (or three business days) between the issuance of the Logar Letter and the Purported Appeals Court Decision was insufficient for the Appeals Court to receive and consider the Logar Letter, let alone to provide the parties a full and fair opportunity to be heard on the Logar Letter (SOF ¶ 20). Further, the fact that the Appeals Court issued the Purported Decision a mere four calendar days (or two business days) before the fall of Kabul and the GIRoA—when most government officials were not reporting to work due to safety fears—and failed to address the issues identified in the Supreme Court Decision are additional circumstances that raises substantial doubts about the integrity of the Purported Appeals Court Decision (SOF ¶ 20). Therefore, we decline to recognize the Purported Appeals Court Decision.

ii. The Fatwa

We must decline to recognize the Fatwa under RESTATEMENT § 483 because the Fatwa was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness. The Taliban replaced all GIRoA Judges with Taliban loyalists, who lack judicial qualifications (SOF ¶ 22). Moreover, there is no due process in the Taliban's Courts—there is no right to appeal; separation of the functions of prosecutor, attorney, and judge; transparency; or right to review the record (SOF ¶ 22).

Alternatively, we would exercise our discretion and decline to recognize the Fatwa under RESTATEMENT § 484 because the judgment was rendered in circumstances that raise substantial doubts about the integrity of the Taliban Supreme Court with respect to the judgment. We take judicial notice of the intense hostility the Taliban have for the United States and former GIRoA. This has manifested itself, as we noted, in the fact that the Taliban has been hunting for people who had worked with the United States (SOF ¶ 22). Under such circumstances, it would be absurd to think that the Taliban rendered a fair decision about whether its former enemy—the GIRoA—owned land used for a base to combat the Taliban. That is particularly true in light of the ramification of that decision of potentially requiring the Taliban's other enemy—the United States—to pay rent for that Land. And indeed, the inconsistency between the Fatwa's determination that appellants owned the Land when the GIRoA was in power and an earlier Taliban determination that the Land was public land when the Taliban previously was in power confirms our suspicions about the integrity of the Fatwa (SOF ¶¶ 13, 21). Finally, there is no evidence that a Taliban Court would recognize a comparable United States Judgment (SOF ¶ 22).[13] Thus, we decline to recognize the Fatwa.

[13] We are not relying upon the Reciprocity Act, 28 U.S.C. § 2502, as a bar to this appeal because that Act only applies to the United States Court of Federal Claims. *Ferreiro v. United States*, 350 F.3d 1318, 1321-22 (Fed. Cir. 2003).

Moreover, since the President has declined to recognize the Taliban government of Afghanistan, our recognizing the Fatwa would violate the political question doctrine. Political questions are nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 210 (1962). A case raises a political question when there is:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The President is "the sole organ of the federal government in the field of international relations." *Belk v. United States*, 858 F.2d 706, 710 (Fed. Cir. 1988) (quoting *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 320 (1936)). While every case or controversy which touches upon foreign relations does not lie beyond judicial cognizance, *Langenegger v. United States*, 756 F.2d 1565, 1569 (Fed. Cir. 1985), "[i]ssues involving foreign relations frequently present questions not [meant] for judicial determination." *Belk*, 858 F.2d at 710. In particular, "[w]hat government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *People of Bikini v. United States*, 554 F.3d 996, 1000-01 (Fed. Cir. 2009) (quoting *United States v. Pink*, 315 U.S. 203, 229 (1942)); *see also Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 28 (2015) (holding that the power to recognize foreign states resides in the President alone).

Here, the President has declined to recognize the Taliban as the official, legitimate government of Afghanistan. *Owens v. Taliban*, No. 22-CV-1949, 2022 WL 1090618 at *1 (S.D.N.Y. Apr. 11, 2022). Indeed, the political branches have labeled the Taliban as a terrorist organization. *Kakar v. United States Citizenship and Immigration Services*, 29 F.4th 129, 131 (2d Cir. 2022) (citing Consolidated

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Rather, we are relying upon the lack of reciprocity as one of the discretionary factors under the RESTATEMENT § 484 to decline to recognize a foreign judgment. In any event, even without the lack of reciprocity, we still would not recognize the Fatwa for the reasons discussed above.

Appropriations Act of 2008 (Pub. L. No. 110-161, § 691(d), 121 Stat. 2365 (2007)). If we were to recognize a decision of the Taliban Supreme Court, then that would express a lack of the respect due to the President's determination not to recognize the Taliban as the government of Afghanistan, and improperly intrude upon the issue of what government is to be regarded as the representative of Afghanistan, which the Constitution has committed to the political branches.

In sum, appellants' argument boils down to a request that we recognize a Fatwa issued by the Supreme Court of the unrecognized, terrorist Taliban regime instead of a decision issued by the Supreme Court of our ally, the GIRoA. That we cannot do under the political question doctrine. *See Bikini*, 554 F.3d 1000-01.

B. The Documents

The Documents do not raise a genuine issue of material fact suggesting that appellants owned the Land. In *Sharifi v. United States*, 987 F.3d 1063, 1068-69 (Fed. Cir. 2021), the Court recognized that certain deeds, and water rights and tax documents can establish proof of land ownership in Afghanistan in certain instances. However, by listing "documents of a legal court" as the first document that may serve as proof of land ownership, *Sharifi* strongly suggests[14] that such documents are the best evidence of land ownership, such that when—as here with the Supreme Court Decision (finding ¶ 13)— there is a document of a legal court finding that appellants do not own the land, appellants may not resort to deeds, and water rights and tax documents, in an attempt to have us second-guess that document of a legal court. *Sharifi*, 987 F.3d at 1068-69. Indeed, as discussed below, such second-guessing of the Supreme Court Decision would violate RESTATEMENT § 487 and the issue preclusion doctrine. In any event, as discussed further below, even if we were to consider the Documents, they fail to raise a genuine issue of material fact suggesting that appellants owned the Land.

i. The Supreme Court Decision Precludes us From Concluding That the Documents Raise a Genuine Issue of Material Fact Suggesting That Appellants Owned the Land

The Supreme Court Decision precludes us from concluding that the Documents raise a genuine issue of material fact suggesting that appellants owned the land. Under the RESTATEMENT § 487,[15] "[a] foreign judgment entitled to recognition under § 481 is given the same preclusive effect by a court in the United States as the judgment of a

[14] We note that, unlike in this case, there was no document of a legal court indicating that appellants did not own the land in *Sharifi*, 987 F.4d at 1068-69.

[15] Because there is no evidence about Afghanistan preclusion law (SOF ¶ 15), we presume it is the same as in this forum. RESTATEMENT § 487.

sister State entitled to full faith and credit," including collateral estoppel (issue preclusion) effect. *Id*. at § 487, § 487 cmt. c; *see also, e.g., Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007); *Shen v. Leo A. Daly Co.*, 222 F.3d 472, 476 (8th Cir. 2000). Here, the Supreme Court Decision has preclusive effect because it is entitled to recognition under RESTATEMENT § 481, and all of the elements of issue preclusion are present.

a. The Supreme Court Decision is Entitled to Recognition Under RESTATEMENT § 481

The Supreme Court Decision is entitled to recognition under RESTATEMENT § 481 because it was a final and conclusive judgment, and there is no exception under RESTATEMENT §§ 483-84 mandating or suggesting that we not recognize the Supreme Court Decision. First, the Supreme Court Decision was a final and conclusive judgment. Under RESTATEMENT § 487 cmt. 3, we look to Afghanistan law to determine finality. Under Afghanistan law, "[w]here a higher court overrules the decision of the lower court, this decision is final," and a Supreme Court "decision is final." Conor Foley, *A Guide to Property Law in Afghanistan*, NOR. REFUGEE COUNCIL, at 78 (2d ed.).[16]

[16] Even if we were to look to the law of this forum, we would conclude that the Supreme Court Decision was final and conclusive. While a supreme court's reversal and remand for further proceedings generally is not a final decision until a new final judgment is entered by the trial court, *Fresenius USA, Inc. v. Baxter Int'l., Inc.*, 721 F.3d 1330, 1342 (Fed. Cir. 2013) (quoting 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FED. PRACTICE AND PROCEDURE § 4432 (2d ed. 2002)), there is room for occasional exceptions to that rule. Wright & Miller § 4432. The unique circumstances of this case qualify for such an occasional exception. The Supreme Court Decision realistically is going to be the final and conclusive recognizable decision on who owned the Land because the Taliban overthrew the GIRoA before the lower court could issue a recognizable decision on remand (SOF ¶¶ 13, 20-21). Moreover, the fact that the Supreme Court Decision is the best evidence of who owned the Land supports the conclusion that we should recognize it. Both precedent and the parties' course of conduct recognize the importance of Afghanistan Court Decisions in establishing ownership. *Sharifi v. United States*, 143 Fed. Cl. 806, 816 (2019), *aff'd* 987 F.3d 1063, 1068-69 (Fed. Cir. 2021); SOF ¶¶ 5, 8). Indeed, given the intricacies and difficulties of determining land ownership in Afghanistan under the GIRoA, *Sharifi*, 143 Fed. Cl. at 816—to say nothing of the added difficulties imposed by the Taliban's seizure of power—any attempt by the Board at this point to determine who owned the Land based upon the Documents and other primary evidence certainly would produce results inferior to the Supreme Court Decision.

Nor do any of the exceptions in RESTATEMENT §§ 483-84 to the general rule that we recognize final and conclusive judgments of foreign courts apply to the Supreme Court Decision. RESTATEMENT § 483 does not mandate that we decline to recognize the Supreme Court Decision because there is no evidence suggesting that the Supreme Court Decision was rendered under a judicial system that failed to provide impartial tribunals or procedures compatible with fundamental principles of fairness (SOF ¶ 14). On the contrary, appellants also rely upon GIRoA Court Decisions—namely the Maidan- Wardak Decision and the Purported Appeals Court Decision (app. resp. 1, 13). Moreover, there is no suggestion that any of the discretionary factors identified in RESTATEMENT § 484 apply to the Supreme Court Decision (SOF ¶ 14). Thus, the Supreme Court Decision is entitled to recognition under RESTATEMENT § 481.

b. The Issue Preclusion Elements Are Present

Moreover, all of the issue preclusion elements are present here. Under issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *DCO Constr., Inc.*, ASBCA Nos. 52701, 52746, 02-1 BCA ¶ 31,851 at 157,404 (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). The elements of issue preclusion are that: "(1) the issue previously [litigated] is identical with that now presented[;] (2) the issue was 'actually litigated' in the prior case[;] (3) the determination of that issue was necessary to the earlier judgment[;] and (4) the party being precluded was fully represented in the prior action." *SMS Agoura Sys., Inc.*, ASBCA No. 51441, *et al.*, 99- 2 BCA ¶ 30,524 at 150,740 (citing *Thomas v. GSA*, 794 F.2d 661, 664 (Fed. Cir. 1986)).

Here, the issue adjudicated before the Supreme Court is identical with that now presented—namely whether the Documents are sufficient to establish that appellants owned the Land (SOF ¶ 13); app. resp. at 13; app. resp. at ex. 1 ¶¶ 14-24 (Hakimi Decl.)). Moreover, the parties actually litigated the issue of whether appellants owned the Land, and the determination of that issue was necessary to the Supreme Court Decision (SOF ¶ 13). Finally, appellants were fully represented in the prior action by [redacted] (SOF ¶ 13)—the same individuals who represent them here.[17]

[17] Having successfully argued that [redacted] are adequate representatives and our agreement with that argument being necessary to our denial of the government's first motion to dismiss, *Lessors of Abchakan Village*, ASBCA No. 61787, 21-1 BCA ¶ 37,953, the law of the case doctrine would preclude appellants from now arguing that [redacted] were inadequate representatives. *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed.

Lessors of Abchakan Village, Logar Province, Afghanistan, ASBCA No. 61787, 21- 1 BCA ¶ 37,953 at 184,327, n.6. Thus, the Supreme Court's Decision that the Documents were insufficient to establish that appellants owned the Land precludes us from concluding otherwise.

ii. The Documents Fail to Raise a Genuine Issue of Material Fact Suggesting That Appellants Owned the Land

Even if we were not precluded from reaching the issue, we nevertheless would grant summary judgment to the government because no reasonable fact-finder could conclude that the Documents establish that appellants owned the Land. Deeds and tax and water rights documents may be relevant to determining who owned land in Afghanistan. *Sharifi v. United States*, 143 Fed. Cl. 806, 817 (Fed. Cl. 2019) (citing Foley, *A Guide to Property Law in Afghanistan*, at 34-36; *An Introduction to the Law of Afghanistan*, STAN. AFG. LEGAL EDUC. PROJECT, at 117-18 (3d ed. 2011); Liz Alden Wily, *Land Rights in Crisis: Restoring Tenure Security in Afghanistan*, AFG. RES. & EVALUATION UNIT at 34, 111-12 (Mar. 2003)) *aff'd* 987 F.3d 1063, 1068-69 (Fed. Cir. 2021).

However, here, no reasonable fact-finder could conclude that the Land deed established that appellants owned the Land because the Land deed's handwriting differs from the handwriting on prior and subsequent deeds, so the Land deed contains indicia of fraud (SOF ¶ 13); *see also An Introduction to the Laws of Afghanistan*, STAN. AFG. LEGAL EDUC. PROJECT at 159 (4th ed. 2017) (noting that a major deficiency with Afghanistan's deed system is that the GIRoA did not take responsibility for errors, so parties could not rely upon the accuracy of a deed until an Afghanistan Court has resolved a dispute about the deed); Foley, *A Guide to Property Law in Afghanistan* at 36 (recognizing that forgery is a problem with official records and documents in Afghanistan). Likewise, no reasonable fact-finder could rely upon the tax and water rights documents to conclude that appellants owned the Land because the taxes and water rights evidenced in those documents were insufficient to cover the Land (SOF ¶ 13). Therefore, the documents fail to raise a genuine issue of material fact suggesting that appellants owned the Land.

III. The Act of State Doctrine

A. The Act of State Doctrine Precludes us From Concluding That Appellants Owned the Land

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Cir. 2001). The fact that appellants did not have legal representation before the Supreme Court does not prevent us from applying issue preclusion. *Hunt v. United States*, 52 Fed. Cl. 810, 814-15 (2002).

Even if we were to find that, notwithstanding the Supreme Court decision, appellants were the owners of the property, we would not be able to provide appellants with the relief that they seek because that would violate the act of state doctrine by requiring us to declare invalid an official act of the GIRoA performed within its territory.[18] The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (abrogated by statute)[19] (holding that the act of state doctrine proscribed a challenge to the validity of a Cuban expropriation decree). The act of state doctrine bars a claim or defense if "the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (holding that the act of state doctrine did not bar an action alleging that a company obtained a contract from the Nigerian government through bribery). Act of state issues only arise when a court must decide—*i.e.*, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. *Id.*; *see also In re: Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 788-89 (S.D.N.Y. 2005) (holding that the actions of the Minister of Defense and Aviation of Saudi Arabia performed in his official capacity were official actions).

Here, as discussed above, the outcome of the case turns upon whether appellants or the GIRoA owned the Land. However, the GIRoA has taken the official act within its territory of asserting its ownership of the Land. In the BSA, the GIRoA provided the government access to and use of the agreed facilities and areas, which included the Land. Moreover, the Declaration expressly indicated that the GIRoA

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[18] The government did not waive its act of state or political question doctrines arguments by failing to raise those as affirmative defenses in its answer (app. surreply at 3-4). Under the Board Rules, we "may permit either party to amend its pleading upon conditions fair to both parties." Board Rule 6(d). To the extent that the act of state and the political question doctrines are affirmative defenses, we would find that permitting the government to amend its answer to include such affirmative defenses would be fair to both parties. Given the early stage of this appeal and the fact that appellants have had ample opportunity to respond to the government's act of state and political question doctrines arguments, appellants have not suffered prejudice from any failure to raise those arguments in the answer.

[19] The Second Hickenlooper Amendment to the Foreign Assistance Act of 1964 abrogated *Sabbatino*, but that Amendment only applies to the expropriation of property belonging to the citizens of another country, and not to citizens of the expropriating country. *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 711 (2021).

"covenants that it has the legal authority over the land necessary to effect this agreement and authorization." (SOF ¶ 11). Likewise, in the Validation, the GIRoA "assert[ed] GIRoA land ownership over this area" (SOF ¶ 17). Because the relief sought depends upon appellants showing that they—and not the GIRoA—owned the Land, *Thai Hai*, 02- 2 BCA ¶ 31,971 at 157,922; (SOF ¶ 1), granting that relief would require us to declare invalid that GIRoA official act of asserting its ownership over the Land. Therefore, the act of state doctrine bars appellants' claims.

Moreover, granting appellants the relief that they seek would require us to declare invalid the GIRoA's official act of waiving its citizens' claims against the United States related to the Land. The fact that an international treaty or agreement waives a claim is a defense to that claim. *S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473, 478-79 (1964) (holding that a treaty with a foreign government that waived the claims of its citizens against the United States was a defense to various claims); *Pauly v. United States*, 152 Ct. Cl. 838, 844 (1961) (same).

Here, as in *S.N.T. Fratelli Gondrand* and *Pauly*, the GIRoA undertook to relieve the government of any claim related to the Land. The Declaration issued pursuant to the BSA expressly indicated that "[a]ny and all claims made against the Camp Dhalke and FOB Shank land or regarding the ownership of this land are the responsibility of the GIRoA and shall be resolved in full by GIRoA" (SOF ¶ 7). Likewise, in the Validation, the GIRoA: (1) "accept[ed] full responsibility for any and all land claims that may arise over the use of this area, including accepting for resolution any such land claims filed against the United States Government;" (2) assumed full responsibility for any and all claims regarding the Land; and (3) indicated that it "understands the United States will refer any and all such land claims arising from [the Camp Dhalke and FOB Shank project] to GIRoA. . . for resolution and that the United States will not be responsible for processing, defending or paying any judgment that may arise from any such land claim" (SOF ¶ 17). Those international treaties and agreements relieving the government of claims related to the Land are a defense to appellants' claims related to the Land. *S.N.T. Fratelli Gondrand*, 166 Ct. Cl. at 479; *Pauly*, 152 Ct. Cl. at 844. Questioning the validity of the GIRoA's waiver of its citizens' claims against the government would violate the act of state doctrine.

B. Appellants' Arguments to the Contrary are Meritless

Appellants raise numerous meritless arguments as to why the act of state doctrine purportedly does not apply. Appellants first argue that the BSA is irrelevant because Camp Dhalke and FOB Shank were not agreed use facilities and areas (app. resp. at 7; app. surreply at 8-9). That is incorrect. The BSA Article 1(7) defined agreed facilities and areas as including the facilities identified in Annex A and "areas in the territory of Afghanistan as may be provided by Afghanistan in the future, to

which United States forces . . . shall have the right to access and use pursuant to this Agreement." (SOF ¶ 7). Moreover, the BSA Annex A stated that "[a]greed facilities and areas also include other facilities and areas, if any, of which United States forces have the use as of the effective date of this Agreement and other facilities and areas at other locations in Afghanistan as may be agreed and authorized by the Ministry of Defense." (SOF ¶ 7). The GIRoA MOD provided—and agreed with and authorized the use of—Camp Dhalke and FOB Shank through the Declaration and the Verification (SOF ¶¶ 11, 17). Moreover, the complaint alleges that "[f]or calendar year 2011 through the present, the Government or its assignee . . . enjoyed the full use of the Premises" (SOF ¶ 3). Thus, Camp Dhalke and FOB Shank were agreed use facilities and areas subject to the BSA.

Second, appellants argue that the government's existing use of the Land could not have established that it was subject to the BSA because then the government would not have had to request the Declaration and the Validation (app. surreply at 9-10). However, the fact that the government and/or the GIRoA may have been overly-cautious and sought multiple avenues for subjecting the Land to the BSA in order to avoid any doubt is a fact supporting—instead of undermining—the conclusion that the Land was subject to the BSA.

Third, appellants argue that the BSA cannot establish property rights because it is not one of the seven types of documents identified as proof of land ownership in *Sharifi*, 987 F.3d at 1068-69 (app. resp. at 7; app. surreply at 9). However, unlike the present case, *Sharifi* did not involve the act of state doctrine because the GIRoA did not assert that it owned the land or waive its citizens' claims against the government. 987 F.3d at 1068-69. Thus, *Sharifi* is not useful in analyzing the act of state doctrine.

Fourth, appellants argue that the August 21, 2017 email, the February 11, 2018 email, and the May 14, 2018 email (collectively, Emails) discredit the notion that the GIRoA owned the Land (app. resp. at 4-7). That argument is meritless because the emails do not address the Declaration or the Validation, which are the documents that assert the GIRoA's ownership of the Land (SOF ¶¶ 10-12, 16-17). The August 21, 2017 email predates the Declaration and the Validation[20] (SOF ¶¶ 10-11, 17). Likewise, the February 11, 2018 email and the May 14, 2018 email predated the

[20] In any event, even if the August 21, 2017 email addressed the Declaration and the Validation and it were accurate, it merely opined that there were no land use agreements (SOF ¶ 10). The government's use of the Land in the past and the GIRoA's provision of access to the government still would establish that Camp Dhalke and FOB Shank were agreed facilities and areas subject to the BSA (SOF ¶¶ 3, 7, 11, 17).

Verification and did not address the Declaration (SOF ¶¶ 12, 16-17).[21] Rather, the February 11, 2018 email merely concluded that different documents—namely the CPMD and the LFC—did not establish that the GIRoA owned the Land (SOF ¶ 12).[22] And the May 14, 2018 email merely stated that "[n]one of the ownership documents produced by the CPMD to date is definitive," without indicating that those ownership documents included the Declaration (SOF ¶ 16). In any event, we would not be bound by the government's factual findings or legal conclusions, *Modular Devices, Inc.*, ASBCA No. 33708, 87-2 BCA ¶ 19,798 at 100,157-58, particularly because the emails did not address whether the act of state doctrine applies (SOF ¶¶ 10, 12, 16).

Fifth, appellants argue that the Minister of Defense lacked the authority to adjudicate or determine land ownership rights (app. surreply at 7, 10-11 (citing ex. 1 ¶¶ 24-34). However, the February 11, 2018 email—upon which appellants also rely—recognized that the Minister of Defense had the authority to assert land ownership (SOF ¶ 12). In any event, that type of questioning of the official acts of a foreign government is precisely the type of conduct that the act of state doctrine is designed to protect against. *Sabbatino*, 376 U.S. at 401. Rather, as Mr. Hakimi acknowledges, if appellants wished to challenge the GIRoA's assertion of ownership, it was for the Afghanistan Courts to resolve any such challenge. (app. surreply at ex. 1 ¶¶ 24-34 (Hakimi Decl. II)); *see also Langenegger v. United States*, 756 F.2d 1565, 1572-73 (Fed. Cir. 1985) (holding that "one who owns land in a foreign country looks to the laws of that country to determine his incidents of ownership including his rights in the event of expropriation").

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[21] The February 11, 2018 email also stated that the fact that the government had Leases would suggest that it thought the Land was private (SOF ¶ 12). However, the government subsequently learned—and informed appellants—that appellants' ownership documents had come into question and might be false (SOF ¶¶ 4-6). In light of the Supreme Court's subsequent holding that appellants' deed indeed contained indicia of fraud, no reasonable fact-finder could rely upon the fact that the government had Leases to conclude that appellants owned the Land.

[22] Indeed, CO Mason's rationale for that conclusion—namely that the GIRoA Minister of Defense did not sub-delegate his authority to assert ownership to the CPMD (SOF ¶ 12)—supports the conclusion that CO Mason would find that the Declaration and the Validation validly asserted the GIRoA's right to the Land because the Minister of Defense, himself, signed the Declaration and the Validation (SOF ¶¶ 11, 17). Moreover, CO Mason's concerns were animated by a potential Fifth Amendment Takings Claim and the Maidan-Wardak Decision (SOF ¶ 12). As discussed above, a potential taking is not a basis for ignoring the act of state doctrine, and there is no basis for a takings claim. Moreover, the Supreme Court subsequently overruled the Maidan-Wardak Decision (SOF ¶ 13).

Sixth, appellants argue that enforcing the BSA would violate the GIRoA Constitution, which prohibited the confiscation of private property without just compensation (app. resp. at 6-7; app. surreply at 9, ex. 1 ¶¶ 18-23 (Hakimi Decl. II); Compl. ¶ 7). Again, that is the type of inquiry into the validity of the public acts of a recognized foreign sovereign power that the act of state doctrine precludes. *Sabbatino*, 376 U.S. at 401. In any event, takings only occur when the government interferes with a person's reasonable investment-backed expectations. *Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988). A person reasonably should expect that a government might compromise his claims against a foreign government because governments frequently compromise private claims to avoid friction. *Dames & Moore v. Regan*, 453 U.S. 654, 679, 683 (1981); *Abrahim-Youri v. United States*, 139 F.3d 1462, 1467-68 (Fed. Cir. 1997); *Belk v. United States*, 858 F.2d 706, 709-10 (Fed. Cir. 1988); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 243-49 (1983); *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1394 (Ct. Cl. 1970). Thus, a government compromising a private citizen's claims against a foreign government does not constitute a takings. *Id*.

Seventh, appellants argue that the act of state doctrine does not apply because it is the government's conduct—and not the GIRoA's conduct—that is at issue here (app. surreply at 6). However, the issue before us in this motion is ownership of the property *see Thai Hai*, 02-2 BCA ¶ 31,971 at 157,922; (SOF ¶ 1), and our consideration of that issue is directly affected by the actions of GIRoA, making the act of state doctrine applicable. As discussed above, we cannot resolve that issue without questioning the validity of the GIRoA's assertions in the Declaration and the Validation that the GIRoA—and not appellants—owned the Land.

Eighth, appellants argue that the GIRoA could not assume the government's claims because one party (the government) may not assign or delegate its contractual duties (to pay rent) to a third-party (the GIRoA) without the agreement of the other party (appellants) (app. surreply at 7; *citing Fay Cmp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 949-50 (W.D. Wash. 1986) (citing RESTATEMENT (SECOND) OF CONTRACTS § 328(1))). Here, the government did not assign or delegate its duties to pay rent to the GIRoA. Rather, the GIRoA: (1) took the official act of asserting its ownership over the Land, which precludes us from awarding appellants damages for unpaid rent for failing to vacate the Land; and (2) extinguished any claims that appellants had for unpaid rent against the government (SOF ¶¶ 7, 11, 17). Appellants have not—and cannot—point to a single case where a tribunal ignored the act of state doctrine or an international treaty or agreement on the grounds that the act, treaty, or agreement assigned duties to a third-party government (app. surreply at 7). That is because international treaties and agreements between sovereign nations are not contracts. *De Archibold v. United States*, 499 F.3d 1310, 1314-15 (Fed. Cir. 2007). Thus, the RESTATEMENT (SECOND) OF CONTRACT'S concepts of assignment and

novation are simply not applicable to acts of a foreign state, or international treaties and agreements between sovereign nations.

Finally, appellants argue that the government may seek reimbursement for any amount paid to appellants from the GIRoA (app. surreply at 8). That is beside the point. While the Declaration and the Validation gave the government the right to reimbursement from the GIRoA for any rent paid on the Land, the 0085 Contract also gave the government the right to withhold rent if appellants did not own the Land (SOF ¶ 1), and we cannot question the GIRoA's assertion that it—and not appellants—owned the Land under the act of state doctrine. Thus, the government is not limited to paying the rent and seeking reimbursement from the GIRoA; it also may withhold rent.

CONCLUSION

For the foregoing reasons, we grant the government summary judgment. The appeal is denied.

Dated: October 13, 2022

James R. Sweet

JAMES R. SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 61787, Appeal of Lessors of Abchakan Village, Logar Province, Afghanistan, rendered in conformance with the Board's Charter.

Dated: October 13, 2022

for Jamnye D. Allen

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals