No. _____

In The
Supreme Court of the United States

TEMOR S. SHARIFI,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: June 11, 2021

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Question Presented

Petitioner was born in Afghanistan. He immigrated to the United States and became a United States citizen. His siblings and other relatives remained in Afghanistan and petitioner had real property in Afghanistan.

Whether a United States citizen can be denied his Fifth Amendment rights to just compensation for property taken by the United States based upon foreign law.

Petitioner's Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Federal Rules of Appellate Procedure the following individual and entity have an interest in this litigation, Petitioner and the United States.

Statement of Related Cases

There are no related cases pending or upcoming.

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Appendix:

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OTHER AUTHORITIES

Opinions Below

The opinion of the United States Court of Appeals for the Federal Circuit is unreported. The opinion of the United States Court for Federal Claims is unreported.

Petition for a Writ of Certiorari

COMES NOW, the petitioner, Temor S. Sharifi, and hereby petitions this Honorable Court for a writ of certiorari.

Jurisdictional Statement

The opinion and judgment of the United States Court of Appeals for the Federal Circuit was entered on February 10, 2021(App. 1a-16a). This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1) and the petition is timely filed.

Where there is a taking of private property for public use, the owner's claim for compensation is based upon the Fifth Amendment of the Constitution within the meaning of the Tucker Act and is therefore within the jurisdiction of this Court to hear and determine.

Constitutional and Statutory Provisions Involved

Fifth Amendment, United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any

> person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tucker Act 28 U.S.C. Sec. 1491(a)(1)

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Statement of the Case

Petitioner owned land in Afghanistan which he inherited from his father and grandfather. The original land lot consisted of approximately 38 jeribs in Deh-e-Kowchay, Arghandab District, Kandahar in Afghanistan. The real estate had been acquired by Petitioner's grandfather, Haji Muhammed Sharif, approximately 100 years ago. Afghan government

records showed that the land on which Combat Outpost Millet was built belonged to Haji Muhammed Sharif, Petitioner's grandfather as stated in Petitioner's Amended Complaint Exhibit A. This fact was verified, signed and sealed by Arghandab Governor, Shah Mohammad Ahmadi in Petitioner's Amended Complaint Exhibit A. The land was passed down to Petitioner's father, Haji Abdul Ghafur Khan. Petitioner's father is deceased and the land passed to his heirs, Haji Abdul Latif, Abdul Razaq, Ahmad Shah, Raa Gul, Ziwar Gul, Temor Shah Sharifi, Bibi Masuma, and Bibi Jamila. The siblings subdivided the land among themselves by an Inheritance Agreement in April 2004, which was attached to Petitioner's Amended Complaint as Exhibits B and C. In or about October 2010, Petitioner discovered that the United States Army wanted to use his land. At that time, Petitioner was contacted by his brother Abdul Razaq who lived in Afghanistan, and was advised by him that one Captain Reed of the United States Army contacted him regarding leasing Petitioner's land. Petitioner's brother, met with Captain Reed in Captain Reed's office on two occasions to discuss the price for leasing the land, but the matter was never resolved with Captain Reed and Captain Reed never communicated with him again as stated in Petitioner's Amended Complaint.

Subsequently, Petitioner learned that houses and trees on his property had been demolished by the Army. Petitioner had leased his property to a tenant who resided on the property and farmed the land prior to the Army taking the land. Petitioner instructed his brother not to return to the Army base for security purposes and to protect his family. Petitioner contacted Captain Reed directly by telephone and

stated that he would provide proof of ownership of the land, which he did. That documentation was later verified by the District Governor for Arghandab District. Eventually, Petitioner discovered that the Army used his land to construct Combat Outpost Millet in Deh-e-Kowchay, Arghandab District, Kandahar in Afghanistan. Combat Outpost Millet was built entirely on Petitioner's property and he was not compensated for the use of his land as stated in the Amended Complaint.

Petitioner instituted this action against the United States for an unconstitutional taking of property by filing a complaint on August 31, 2016. The United States then filed a Motion for a More Definite Statement on October 24, 2016. The Court granted defendant's motion. Following that order, Petitioner filed an amended complaint on February 15, 2017. Thereafter, the defendant filed a motion to dismiss on April 10, 2017. The Court of Federal Claims granted defendant's motion to dismiss and plaintiffs amended complaint was dismissed on July 11, 2019. Whereupon, Petitioner filed an appeal.

The appellate court affirmed the lower court's decision. The Federal Circuit Court stated that the government records attached to petitioner's amended complaint do not constitute proof of land ownership under Afghan law because according to the government's expert on Afghan law provincial and district governors are not authorized by the laws of Afghanistan to look into civil claims like property law issues regarding ownership and inheritance.

Reasons for Granting the Writ

The courts below erred in denying Petitioner his constitutional rights as a United States citizen based on Afghan law. Afghan law is not superior to the United States Constitution especially for United States citizens. Because Petitioner is a United States citizen, he is entitled to just compensation for the land taken by the United States to build Combat Outpost Millet in Afghanistan. It does not matter whether the land was situated in Afghanistan or the United States. Where there was a taking by the United States of land that was owned by a United States citizen that citizen is entitled to just compensation.

Argument

Petitioner owned land in Afghanistan which he inherited from his father. The original land lot consisted of approximately 38 jeribs in Deh-e-Kowchay, Arghandab District, Kandahar in Afghanistan. The real estate had been acquired by Petitioner's grandfather, Haji Muhammed Sharif, approximately 100 years ago. Afghan government records showed that the land on which Combat Outpost Millet was built belonged to Haji Muhammed Sharif, Petitioner's grandfather. This fact was verified, signed and sealed by Arghandab Governor, Shah Mohammad Ahmadi is in the Amended Complaint Exhibit A. The land was passed down to Petitioner's father, Haji Abdul Ghafur Khan. Petitioner's father is deceased and the land passed to his heirs, Haji Abdul Latif, Abdul Razaq, Ahmad Shah, Raa Gul, Ziwar Gul, Temor Shah Sharifi, Bibi

Masuma, and Bibi Jamila. Pursuant to custom, the siblings subdivided the land among themselves by agreement in April 2004.

The Inheritance Agreement along with the diagram of Petitioner's plot of land was provided to the Army in 2011. At that time, Petitioner clearly advised the U.S. military personnel that he owned the property where COP Millet was situated. The fact that the Arghandab Governor, Shah Mohammad Ahmadi later confirmed that the property on which COP Millet was situated belonged to Petitioner's grandfather Haji Muhammed Sharif was sufficient to establish that Petitioner had a vested interest in the property on which COP Millet was built.

If this was merely a case of attempted fraud as Major Reed tries to imply, there would have been no reason for Petitioner's brother to contact Petitioner who was not in Afghanistan but half a world away. Additionally, Major Reed admits meeting with two individuals about the land, which corroborates Petitioner's claim that one Capt. Reed met with his brother.

This is comparable to the situation in *Yaist v. United States*, 656 F.2d 616, 623 (Court of Claims 1981), where the lower court recognized that under Florida law the courts have held that the equitable owner gets the benefit or loss of condemnation or eminent domain. In that case the plaintiff did not record his deed or Agreements for Deed and was still held to be the equitable owner of the property and as such was entitled to just compensation from the government. Furthermore, the plaintiff's documents

in that case were still considered valid even though they were not recorded until after the government had entered into an agreement to purchase the land. The concern regarding the recording of the documents was whether or not the government had notice of the prior sale of part of the same land that was being purchased by the government. The Court concluded that the government had constructive notice of another party's possible interest in the land due to certain irregularities in the transaction. In this case too, there were irregularities in the transaction, including but not limited to, no signature of a landowner on the documents and the statement by a government official of his intent to purchase the property in the future. Moreover, the heirs made an official request of the government to identify the property and the government gave an official response identifying Petitioner's grandfather as being the registered owner of the land on which the United States outposts was situated.

Here, the Petitioner has been the equitable owner since his father's death as an heir to his father's property, and both legal and equitable owner since 2004 when the heirs entered into an inheritance agreement. The inheritance agreement was valid from the date of its execution in 2004 even though it was not registered with the government until a later date. See also 2 Nichols, *Law of Eminent Domain* § 5.21[1] (rev. 3d ed. 1980). This proposition is consistent with federal law which has established that compensation can be paid only to the person who owns or has an interest in the property at the time it is taken. *United States v. Dow*, 357 U.S. 17, 20-21, 78 S. Ct. 1039, 1043-1044, 2 L. Ed. 2d 1109 (1958); *Thomas v. United States*, 205 Ct. Cl. 623, 631-

32, 505 F.2d 1282, 1286 (1974). Indeed, the defendant had actual notice that the Afghan government did not own the land since missing from the License for Construction was the signature of the "Owner of Land." The line for the "Owner of Land" to sign the document was blank. . To be sure, the language of the License for Construction specifically states in the introductory paragraph of that agreement that the Arghandab Governor wants to buy the very same property, thus, giving the defendant actual notice that the Afghan government did not own the property. Contrary to the defendant's position, Petitioner's deceased grandfather does not continue to own the land even though the property is still in his name. The inheritance agreement with Petitioner's name has been registered with the government.

The United States Agency for International Development (USAID) authorized and contracted a study of law in Afghanistan. The results were published in an article titled *Afghanistan Rule of Law Project*, USAID (2005) (this article can be found on the Internet at pdf.usaid.gov/pdf_docs/Pnadf590.pdf). This extensive study examined all types and areas of law in Afghanistan. Among its findings it concluded:

> Although recent general analyses have approached Afghanistan as a recovering failed state and society, a system of governance has not been entirely lacking throughout its years of crisis. A network of local institutions outside the purview of the state provided some system of governance, even as the state has collapsed or struggled under the weight of wars and political violence. This traditional network of civil society developed over centuries, and to

> some degree it has always been at least as strong as the formal institutions of government. *Supra* at p.3

The report went on to define and explain the traditional system of law as follows:

> The "informal justice sector" or "customary law sector" covers a wide variety of cluster of norms and practices, often uncodified and orally transmitted, usually combined together in varying mixes. This includes customary law (such as the Pashtun code known as "Pashtunwali"), local understanding of Islamic legal traditions (including their sectarian variants and their particular ethnic manifestations), and even some modern laws. *Supra* at p.3

This independent and unbiased report found the informal or customary law sector to be at least as strong as the formal institutions of the government. One reason for this conclusion has been stated, in pertinent part:

> The informal process thus operates relatively unhampered by logistical or budgetary constraints. The sustainability of the system has helped it to evolve over time and survive during years of political crisis and the collapse of the central authority and the absence of its legal system. *Supra* at p.30

Thus, it was natural for Petitioner and the other heirs to follow the customs in the area and enter into an inheritance agreement since there was no dispute among the heirs. The widespread use and

acceptance of customary practices in Afghanistan has made the informal practices just as valid as the formal practices. Accordingly, the Petitioner's inheritance agreement was a valid, legal, and acceptable distribution of inherited property among the descendents. Indeed, as stated in the *Afghanistan Rule of Law Project:*

> Marriages and inheritance, especially throughout rural Afghanistan, occurs based on the traditional doctrine concept of "trusteeship". Marriage agreements often take place without any registration to a government office; at the time of agreement or disagreement, it solely relies on the support of family network.
>
> *Supra* at p.33.

In this case, the Petitioner legally established his equitable and legal ownership to the subject property, as well as his property interests through the inheritance agreement.

Furthermore, it was found that resolving land disputes through the informal system rather than the formal system utilizing the courts was not limited to rural areas of Afghanistan because " [t]he data from Nangarhar, Logar, Herat, Jawzjan, and Kabul suggest that the Jirga remains the most popular process for resolving property disputes." *Supra* at p.38.

In *Walker v. Gish*, 260 U.S. 447, 450 (1923), the Supreme Court recognized the validity of "a custom [that] had grown up" thus, where Petitioner and his family follow custom with regard to their

grandfather's property, such custom should not be ignored or disregarded. Finally, Petitioner sufficiently identified his property. Thus, there is no legal basis for denying petitioner his Fifth Amendment right to just compensation in this situation where he clearly established his legal rights and equitable interests in the land taken by the United States under United States law.

Conclusion

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Dated: June 11, 2021

APPENDIX

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ENTERED FEBRUARY 10, 2021

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TEMOR S. SHARIFI,
Plaintiff – Appellant

v.

UNITED STATES,
Defendant – Appellee

2019-2382

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01090-BAF, Senior Judge Bohdan A. Futey.

Decided: February 10, 2021

CAROLYN L. GAINES, Philadelphia, PA, argued for plaintiff-appellant.

JOHN LUTHER SMELTZER, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by JEFFREY B. CLARK, ERIC GRANT, ERIKA KRANZ, EDWARD CARLOS THOMAS.

Before O'MALLEY, WALLACH, and TARANTO,
Circuit Judges.

O'MALLEY, *Circuit Judge*.

Temor S. Sharifi appeals from a decision of the United States Court of Federal Claims ("Claims Court") dismissing his claims against the United States for failing to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). *Sharifi v. United States*, 143 Fed. Cl. 806 (2019). For the reasons explained below, we affirm.

I. BACKGROUND

This appeal concerns land in Afghanistan that Sharifi alleges the U.S. Army took when it built Combat Outpost Millet ("COP Millet") in 2010. After Sharifi filed a complaint with the Department of Defense and received no response, he brought the underlying Fifth Amendment takings claim against the government in the Claims Court.

According to Sharifi's original complaint, approximately 100 years ago, Sharifi's grandfather acquired a land lot in Deh-e-Kowchay, Arghandab District, Kandahar in Afghanistan. J.A. 25–26, ¶¶ 4–5.[1] The land then passed to Sharifi's father, and when Sharifi's father died, Sharifi and his siblings subdivided the land among themselves. J.A. 26, ¶ 5. Sharifi leased his property to a tenant, who used the land for farming.

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[1] J.A." refers to the Joint Appendix, available at Dkt. No. 37. "S.A." refers to the government's Supplemental Appendix, available at Dkt. No. 31.

Around October 2010, then-Captain Walter A. Reed of the U.S. Army spoke twice with one of Sharifi's siblings about leasing Sharifi's land.[2] Sharifi later learned that the Army had demolished houses and trees on his property and constructed COP Millet on his land and that of his neighbors. J.A. 26–27, ¶¶ 8, 13. At some point, Sharifi also directly contacted Captain Reed to provide proof of ownership of the land in the form of documentation that "had been verified by the District Governor for Arghandab District." J.A. 26, ¶ 11.

In response to Sharifi's complaint, the government moved for a more definite statement. The government asserted that Sharifi's complaint was "vague and ambiguous" because it did not specifically identify the property interest that the United States allegedly took, as required by Rule 9(i) of the RCFC. J.A. 30. In particular, the government claimed that Sharifi had not provided a legal description of the land, a deed, or other document that would allow the United States to identify the location of the land lot that Sharifi's grandfather acquired. J.A. 30. And Sharifi had not provided a legal description of his property interest, official documentation describing the portion of property conveyed to him, or a sufficient description of where his portion of the land lot is located. J.A. 30–31.

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[2] The government attached a declaration by now- Major Reed as an exhibit to its motion to dismiss, contesting Sharifi's account of these October 2010 conversations. The Claims Court declined to wade into this factual dispute and accepted Sharifi's allegations about the conversations as true. *Sharifi*, 143 Fed. Cl. at 809 n.4

The Claims Court granted the government's motion, instructing Sharifi to file an amended complaint "specifically identifying the land that he owns" that the United States took. *Sharifi v. United States*, No. 16-1090L, 2017 WL 461554, at *1 (Fed. Cl. Feb. 1, 2017). The Claims Court explained that Sharifi could either attach as an exhibit the proof of ownership he allegedly provided Captain Reed or describe in some other way the specific location of the land that he (and not his neighbors) owned. *Id.* According to the Claims Court, that Afghanistan had its own customs and practices regarding the formalities employed in recognizing property ownership "should not prevent [Sharifi] from providing more specific information concerning the location of his land." *Id.*

In his amended complaint, Sharifi alleged that government records, verified by the District Governor of Arghandab, showed that his grandfather owned the land on which the Army built COP Millet. J.A. 35, ¶ 5. Ownership of the land passed to Sharifi and his siblings, who subdivided the land by a 2004 inheritance agreement. J.A. 35, ¶ 6. Sharifi no longer alleged that the Army took his neighbor's land to construct COP Millet. Sharifi attached three exhibits to his amended complaint. Exhibit A consists of the Afghan government records allegedly showing that Sharifi's grandfather owned the taken land. These records are letters sent to and received from Sharifi and his siblings, the District Governor of Arghandab, and the Governor of Kandahar. One letter from the District Governor of Arghandab to the Governor of Kandahar reads, "I have verified all the ownership

documents and the land belongs to [Sharifi's grandfather]."[3] J.A. 46 (Sharifi's translation).

Exhibit B is the 2004 inheritance agreement that subdivided the land lot of Sharifi's grandfather among Sharifi and his siblings. And Exhibit C is a letter exchange with the District Governor of Arghandab, in which Sharifi requested verification that he owned the taken land, and the District Governor verified Sharifi's ownership. Exhibit C also includes a drawing of the land Sharifi and his siblings allegedly own.

The government moved to dismiss Sharifi's amended complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the RCFC.[4] The government argued that, *inter alia*, Sharifi had not established a valid property interest in the allegedly taken land because Sharifi's government records were inadequate to support a claim of ownership under Afghan law. The government also attached six declarations to its motion to dismiss, including

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[3] The government also submitted a translation of this letter: "The land of the Late [Sharifi's grandfather] is confirmed." S.A. 89. We need not determine which translation is more accurate because we reach the same result under either translation.

[4] The government also moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the RCFC. The Claims Court only analyzed the government's Rule 12(b)(6) motion. *Sharifi*, 143 Fed. Cl. at 811–12, 817. On appeal, the government does not argue that the Claims Court lacked subject matter jurisdiction over Sharifi's claim. We see no basis for holding the Claims Court lacked subject matter jurisdiction either. *See* 28 U.S.C. § 1491(a).

several witness declarations and an expert declaration on Afghan law.

The Claims Court agreed with the government, dismissing Sharifi's amended complaint for failure to show a cognizable property interest. *Sharifi*, 143 Fed. Cl. at 817. The court first determined which types of documents Afghan law recognized as proof of land ownership, mindful that it is "very difficult to determine . . . the legitimate owners of land and property in Afghanistan," in part because "for much of Afghanistan's recent history people have had no alternative but to use customary documents to validate land and property transfers as there has been no functioning official judicial system." *Id.* at 816 (internal quotations and citation omitted). The court then adopted the Law of Land Management Affairs, revised by the Taliban in 2000 and by the Afghan government in 2008, which recognized seven types of documents that may serve as proof of land ownership. *Id.* at 816–17. Because neither of the letters from the District Governor of Arghandab verifying ownership fit into any of these seven categories, the court held that Sharifi's letters did not constitute proof of land ownership under the laws of Afghanistan. *Id.* at 817.

The Claims Court acknowledged that "formal registration and titling has never been widespread" in Afghanistan. *Id.* (internal quotations and citation omitted). But the court concluded that, for the most part, Afghan law only recognizes land ownership based on formal documents. *Id.* That certain communities rarely follow Afghan property law and instead use informal customs to facilitate land transactions "puts [Sharifi] in an unfortunate bind,

but not the sort of bind this Court is empowered to resolve by disregarding those laws entirely." *Id.* Because Sharifi had not shown that his grandfather owned the allegedly taken land, the court did not address whether the 2004 inheritance agreement validly transferred the property interest of Sharifi's grandfather to Sharifi. *See id.*

On July 11, 2019, the Claims Court entered judgment dismissing Sharifi's amended complaint. Sharifi timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

A. Standard of Review

We review the grant of a motion to dismiss *de novo*. *Athey v. United States*, 908 F.3d 696, 705 (Fed. Cir. 2018). To survive a motion to dismiss, a complaint must contain sufficient facts, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The tenet that a court must accept as true all allegations in a complaint is inapplicable to legal conclusions, however. *Id.*

B. The Claims Court Did Not Convert the Government's Motion to Dismiss to a Motion for Summary Judgment

Before we reach the merits of Sharifi's appeal, we first address the government's contention that we should review the Claims Court's decision as a grant of summary judgment. According to the government, the Claims Court's "consideration of matters outside

the pleadings essentially transformed the motion to dismiss into a motion for summary judgment." Appellee's Br. 17. The government relies on Rule 12(d) of the RCFC, which provides:

> If, on a motion under RCFC 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

According to the government, the exhibits that Sharifi attached to his amended complaint, as well as the declarations and exhibits attached to Sharifi's briefing of the Rule 12(b)(6) motion, constituted evidence that converted the government's motion to dismiss to a motion for summary judgment.

We disagree. The exhibits that Sharifi attached to his amended complaint are not "matters outside the pleadings" that require the Claims Court to treat a Rule 12(b)(6) motion as a motion for summary judgment. The Claims Court also did not rely on Sharifi's declarations and other exhibits attached to his briefing to dismiss his amended complaint for failure to state a claim. *See Sharifi*, 143 Fed. Cl. at 816–17; *see also Easter v. United States*, 575 F.3d 1332, 1335 (Fed. Cir. 2009) ("Whether to accept extra-pleading matter on a motion for judgment on the pleadings and to treat the motion as one for summary judgment is within the *trial court's* discretion." (emphasis added)).

Indeed, the Claims Court consistently applied the correct standard to review a motion to dismiss—accepting all well-pleaded factual allegations as true and drawing all reasonable inferences in favor of Sharifi. *See Sharifi*, 143 Fed. Cl. at 809 n.4 ("At this early stage, the Court may not wade into these factual disputes and accepts plaintiff's allegation that Commander Reed expressed some interest in leasing the land from its owner."); *id.* at 813 ("The plaintiff has alleged facts that, if proven, would show the United States was involved in the construction of COP Millet to a sufficient degree to find a Fifth Amendment taking."); *id.* at 814 ("[The government's] argument may carry the day at summary judgment but, at this stage, would require fact-finding that is inappropriate in evaluating a motion to dismiss."); *id.* at 816 (accepting "at this stage as true" the alleged fact that the District Governor of Arghandab verified that Sharifi's grandfather owned the land in question); *see also id.* at 817 (granting the government's motion to dismiss).

Nor did the court's determination of Afghan law governing land ownership convert the government's motion to dismiss into a motion for summary judgment. Rule 44.1 of the RCFC broadly permits the Claims Court to consider any relevant material to determine foreign law:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible

> under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Rule 44.1 of the RCFC conforms to Rule 44.1 of the Federal Rules of Civil Procedure, which "provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties." *See* Fed. R. Civ. P. 44.1 note (1966).

Under Rule 44.1, a court may "engage in its own research and consider any relevant material" it finds. *See id.* ("The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail."). There is no requirement that a court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law. *See id.* ("To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.").

Here, the Claims Court followed Rule 44.1 when it considered its own research and testimony from both parties about Afghan law and the prevalence of informal customs. Its reliance on these materials to determine a question of law did not convert the government's motion to a motion for summary judgment. Accordingly, we review the Claims Court's decision *de novo* as a grant of a motion to dismiss, not a motion for summary judgment.

C. The Claims Court Correctly Dismissed Sharifi's Amended Complaint for Failure to State a Claim

Turning to the merits, the Fifth Amendment provides that "private property" may not be "taken for public use, without just compensation." U.S. Const. amend. V. To claim a Fifth Amendment taking, a plaintiff must show a "cognizable property interest." *Alimanestianu v. United States*, 888 F.3d 1374, 1380 (Fed Cir. 2018). The Constitution does not create or define the scope of property interests compensable under the Fifth Amendment. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003). "Instead, 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)).

First, the independent source of law relevant here is the law of Afghanistan. Neither party disputes the Claims Court's determination of the civil law governing land ownership in Afghanistan. Oral Arg. at 11:27–13:20, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=19-2382_11062020.mp3. Based on the government's expert declaration and the court's own research, at least as of 2008, seven types of documents may serve as proof of land ownership: (1) documents of a legal court; (2) a decree issued by the emirate and the prime ministry, if registered; (3) tax receipts; (4) proof of water rights; (5) customary deeds from before 1975, witnessed before 1978; (6) registered title documents; or (7) title documents

obtained by court order. *Sharifi*, 143 Fed. Cl. at 816–17.

We agree with the Claims Court that the government records attached to Sharifi's amended complaint as Exhibit A do not constitute proof of land ownership under Afghan law. As the government's expert on Afghan law explained, "provincial and district governors are not authorized by the laws of Afghanistan to look into civil claims," like property law issues regarding ownership and inheritance, "or [to] issue instruction for that purpose." S.A. 75, ¶ 6(c), (f). In his opening brief, Sharifi does not identify the type of proof of ownership under which the government records fall. Without explanation, Sharifi characterizes these records as "sufficient" to establish Sharifi's vested interest in the allegedly taken land. Appellant's Br. 6. When asked at oral argument to identify which of the seven types of documents Sharifi pled he could provide, Sharifi also did not mention the government records. We therefore find Sharifi's factual allegations about these records insufficient to show he or his grandfather had a cognizable property interest under Afghan law in the allegedly taken land.

We also agree with the Claims Court that we need not address the 2004 inheritance agreement because the amended complaint has not shown a cognizable property interest. The 2004 inheritance agreement is inadequate to show that Sharifi owned the allegedly taken land because there is no document recognized by Afghan law as proof of land ownership that shows the decedent—here, Sharifi's father—owned the land Sharifi inherited. Oral Arg. at 21:23–22:06.

Nevertheless, at oral argument, Sharifi asserted that the 2004 inheritance agreement constitutes proof of land ownership in the form of a registered title document because the agreement attached a diagram of the plot to the agreement and because Sharifi allegedly registered the agreement. Oral Arg. at 7:32–9:04. We are unpersuaded that Sharifi alleged sufficient factual allegations about the 2004 inheritance agreement to show that it is a proof of ownership recognized under Afghan law. Indeed, the agreement is "registered" only insofar as the District Governor of Arghandab verified the agreement at some point after Sharifi and his siblings executed the agreement. But under Afghan law, the District Governor is not authorized to certify inheritance agreements; only courts are. S.A. 76, ¶ 6(i).

Sharifi's reliance on *Yaist v. United States*, 656 F.2d 616 (Ct. Cl. 1981), is misplaced. In *Yaist*, the Court of Claims considered whether a plaintiff was entitled to just compensation for the taking of property to which the plaintiff allegedly held equitable title. *Id.* at 622–23. The *Yaist* court found equitable title under Florida law, applying the doctrine of equitable conversion. *Id.* *Yaist* is inapplicable here because Afghan law, not Florida law, defines the dimensions of the requisite property rights for purposes of establishing a cognizable taking. *See Maritrans*, 342 F.3d at 1352. And Sharifi provides no support for determining that Afghan law recognizes a doctrine of equitable conversion.

Finally, Sharifi contends that we should recognize his property interest based on customary law in Afghanistan, *i.e.*, informal customs. Sharifi relies on a 2005 field study by the United States Agency for

International Development ("USAID study"),[5] which discussed the use of customary law in Afghanistan. But as Sharifi admitted to the Claims Court, Kandahar Province and Arghandab District were not among the areas surveyed, and the study did not suggest an understanding that those areas followed customary law and traditions. S.A. 103 (8:4–14). Sharifi also conceded at oral argument that he had no reason to doubt that the civil law governing land ownership is currently applicable and has been applicable since 2008, two years before the alleged taking. *See* Oral Arg. at 12:01–13:20. On this record, we hold that customary law in Afghanistan cannot establish a cognizable property interest on which Sharifi can base his takings claim.

In sum, we find that the government records attached to Sharifi's amended complaint as Exhibit A and the 2004 inheritance agreement do not constitute proof of land ownership under the laws of Afghanistan. Even accepting as true all factual allegations in Sharifi's amended complaint, the amended complaint does not contain sufficient facts to state a plausible takings claim. *See Ashcroft*, 556 U.S. at 678.

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[5] *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies*, U.S. Agency for Int'l Dev. (Apr. 30, 2005), https://pdf.usaid.gov/pdf_docs/Pnadf590.pdf.

III. CONCLUSION

For these reasons,[6] the Claims Court's decision dismissing Sharifi's amended complaint is affirmed.

AFFIRMED

COSTS

No costs.

[6] We do not reach the government's alternative arguments. Because we agree with the Claims Court that Sharifi's amended complaint did not plead sufficient facts to show a cognizable property interest in the allegedly taken land, we vacate the remainder of the Claims Court's opinion.

ENTERED FEBRUARY 10, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TEMOR S. SHARIFI,
Plaintiff – Appellant

v.

UNITED STATES,
Defendant – Appellee

2019-2382

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01090-BAF, Senior Judge Bohdan A. Futey.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

February 10, 2021 — /s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

ENTERED: July 11, 2019

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 16-1090

TEMOR S. SHARIFI,	) Takings Clause:
Plaintiff,	) Act of State) Doctrine; Real) Property
v.	) Cognizable) Property Interests;) Foreign Law.
THE UNITED STATES,	)
Defendant.	)

Carolyn L. Gaines, Philadelphia, PA, for plaintiff.

Edward Carlos Thomas, IV, U.S. Department of Justice, Environment and Natural Resources Division, Washington, D.C., for defendant.

OPINION

FUTEY, *Senior Judge*

This case is before the Court on defendant's motion to dismiss plaintiff's amended complaint ("Am. Compl."), which was filed on February 15, 2017, pursuant to rules 12(b)(1) and 12(b)(6) of the Rules of

the Court of Federal Claims ("RCFC"). Defendant filed its motion on April 10, 2017. Plaintiff filed a response on May 11, 2017, and the defendant filed its reply on May 30, 2017. After hearing oral argument on the motion, the Court ordered supplemental briefing. Defendant filed its supplemental brief on October 24, 2017, and the plaintiff filed a response on November 21, 2017.

The plaintiff, a United States citizen, seeks damages for a taking of real property by the United States in Afghanistan. In its motion to dismiss, the defendant makes four arguments: First, the defendant argues that the United States may not be held liable for a taking carried out by an international military coalition. Second, the defendant argues that plaintiff's lawsuit is barred by the act of state doctrine. Third, the defendant urges dismissal because plaintiff has failed to "identify the specific property interest alleged to have been taken by the United States" as required by RCFC 9(i). Lastly, the defendant argues that plaintiff has not shown he is the owner of the land.

The matter is now ripe for disposition.

I. BACKGROUND

a. Factual Background[1]

The amended complaint alleges as follows: Approximately 100 years ago, plaintiff's grandfather—

[1] Specific dates for events are provided, except where the amended complaint specifies only to the nearest month and no primary document bearing the applicable date has been filed. *See, e.g.*, Am. Compl. ¶ 16.

Haji Mohammad Sharif—acquired 38 jeribs[2] in Deh-e-Kowchay, Arghandab District, Kandahar in Afghanistan. ECF No. 10 ("Am. Compl.") ¶¶ 4–5. Plaintiff's grandfather then allegedly passed the land down to plaintiff's father—Haji Abdul Ghafur Khan. *Id.* ¶ 6. In April 2004, after plaintiff's father died, plaintiff and his siblings entered into an agreement to subdivide the land. *Id.*; *see also id.* Ex. A (inheritance agreement).[3]Plaintiff then leased his land to a tenant, who used it for farming. *Id.* ¶ 10.

In October 2010, Walter A. Reed—a United States Company Commander—recommended that the United States Army ("U.S. Army") establish a command outpost near Deh-e-Kowchay. Gov't Ex. 3. Commander Reed investigated ownership of the field where the U.S. Army wished to construct an outpost, but the identity of the owner or owners was "unknown." *Id.* Plaintiff alleges that Commander Reed then met twice with plaintiff's brother to discuss the possibility of leasing plaintiff's land. Am. Compl. ¶¶ 7–8.[4] At some point, plaintiff instructed his brother not

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[2] A jerib is a "unit of land measurement equivalent to 2,000 square metres or one fifth of a hectare." Liz Alden Wily, Land, People, and the State in Afghanistan 2002–2012, Afg. Res. & Evaluation Unit, at 2 (Feb. 2013).

[3] Defendant disputes the legal effectiveness of plaintiff's inheritance agreement as well as his proof of land ownership. *See* Gov't Ex. 6. The Court addresses those arguments later in this Opinion.

[4] Then-Commander (now-Major) Reed remembers these conversations differently. According to Commander Reed, he communicated to two individuals "that [he] had no authority to bind the U.S. government in either a lease or an offer to purchase the land." Gov't Ex. 3. Commander Reed also informed his

to return to the U.S. Army base where he had met with Commander Reed "for security purposes and to protect his family." *Id.* ¶ 11.

On October 18, 2010, the government of Afghanistan granted the U.S. Army a one-year "License for Construction" (hereinafter "license" or "license agreement") to build a combat outpost. Gov't Ex. 3. The license applies to land "outside the village of Deh-e-Kowchay . . . described in Exhibit A and depicted on the map at Exhibit B."[5] *Id.* The license "warrants that [the government of Afghanistan] is the rightful and legal owner of the herein described premises." *Id.* The license also provides that, "If the title of the [government of Afghanistan] shall fail, or if it be discovered that the [government of Afghanistan] did not have authority to issue this License the [United States] shall have the option to terminate this Right-of-Entry and the [government of Afghanistan] agrees to indemnify the [United States] by reason of such failure." *Id.*

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counterparties that "they needed to prove to the proper official in the Arghandab District government that they owned the land because the land was committed to use by U.S. and Afghan forces by the Arghandab District government." *Id.* At this early stage, the Court may not wade into these factual disputes and accepts plaintiff's allegation that Commander Reed expressed some interest in leasing the land from its owner. *See Athey v. United States*, 908 F.3d 696, 705 (Fed. Cir. 2018) ("The court must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant.").

[5] The defendant did not include either "Exhibit A" or "Exhibit B" in its submissions to this Court, so the precise geographic scope of the license is unclear.

The license also appears to contemplate a future acquisition of additional land by the District Governor of Arghandab ("District Governor"). *Id.* It goes on to state, "Upon purchase we will move the necessary establishments to new boundary line." *Id.* Whether such an acquisition—or corresponding adjustment in boundary lines—ever took place is unclear.

The signature block of the license indicates that one individual signed on behalf of the "Government of the Islamic Republic of Afghanistan," and another individual signed on behalf of "The United States of America." *Id.* A third line, labeled "Owner of Land," is blank. *Id.*

In October and November 2010, the U.S. Army, the Afghan National Army, the Afghan National Police, private contractors, and other elements of the International Security Assistance Force ("ISAF")[6] built Combat Outpost Millet ("COP Millet"). Gov't Ex. 3.

The plaintiff later discovered that the U.S. Army had demolished houses and trees to construct COP Millet. Am. Compl. ¶¶ 9, 14. He telephoned Commander Reed with the intent to provide proof of ownership. *Id.* ¶ 12. Plaintiff also spoke with other U.S. Army personnel. *Id.* ¶ 13.

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[6] The United Nations Security Council formed the ISAF on December 20, 2001 "to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment." U.N. Docs. S/RES/1386 (Dec. 20, 2001).

On December 7, 2010, plaintiff wrote a letter to the Governor of Kandahar ("Governor") requesting compensation for the U.S. Army's occupation of his land. *Id.* Ex. A. On January 3, 2011, the Governor referred plaintiff's request to the District Governor. *Id.* The District Governor responded by verifying that Haji Mohammad Sherif (plaintiff's grandfather) owned the land in question. *Id.*

On June 3, 2012, plaintiff wrote a letter to the District Governor again requesting compensation. *Id.* Plaintiff also petitioned the Governor asking for assistance. *Id.* On July 17, 2012, the Governor again referred plaintiff's request to the District Governor. *Id.* Sometime thereafter, the District Governor responded that the U.S. Army had taken the property in question but had not paid rent or other compensation.[7] *Id.*

In September 2012, then-Commander Barry F. Huggins executed a "Statement of Intent for the Transfer of COP Millet." Gov't Ex. 5. The statement memorialized the ISAF's intent to turn over COP Millet to the Afghan Uniform Police on September 25, 2012. *Id.* The statement bears Huggins's signature, in his capacity as a Colonel in "2/2 SBCT."[8] *Id.*

In December 2012, plaintiff filed a complaint with the United States Department of Defense but did not receive a response. Am. Compl. ¶ 16. On December 12, 2016, plaintiff sent a letter to the District

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[7] It is not clear if the District Governor was aware of the existence of the license agreement.

[8] "2/2 SBCT" stands for 2nd Stryker Brigade Combat Team, 2nd Infantry Division. *See* Gov't Ex. 5.

Governor, together with a sketch of plaintiff's land, asking that the District Governor verify plaintiff's ownership. *Id.* Ex. A. The District Governor responded by verifying plaintiff's ownership. *Id.*

b. Procedural Background

On August 31, 2016, plaintiff filed a complaint in this Court. ECF No. 1. On October 24, 2016, defendant filed a motion for a more definite statement pursuant to RCFC 12(e). ECF No. 5. On November 10, 2016, plaintiff filed a response, and on November 21, 2016, defendant filed a reply. ECF Nos. 6, 7. On February 1, 2017, the Court granted defendant's motion for a more definite statement and directed plaintiff to file an amended complaint. ECF No. 8.

On February 15, 2017, plaintiff filed an amended complaint. ECF No. 10. The amended complaint requests $1,400,000.00, plus interest, as just compensation for the taking of plaintiff's property. Am. Compl. ¶ 19. The amended complaint also requests costs and attorney's fees. *Id.*

On April 10, 2017, defendant filed a motion to dismiss ("Gov't Mot."), together with accompanying exhibits and declarations ("Gov't Ex. 1–6"). ECF No. 13. On May 11, 2017, plaintiff filed a response ("Pl.'s Resp."), and on May 30, 2017, defendant filed a reply ("Gov't Reply"). ECF Nos. 14, 15.

On September 19, 2017, the Court heard oral argument on the defendant's motion ("9/19/17 Tr."). ECF No. 19. That same day, the Court ordered supplemental briefing "addressing *Turney v. United*

States, 115 F. Supp. 457 (Ct. Cl. 1953), as well as the relevant laws of Afghanistan." ECF No. 17.

On October 24, 2017, defendant filed a supplemental brief ("Gov't Supp. Br."), and on November 21, 2017, plaintiff filed a response ("Pl.'s Supp. Br."). ECF Nos. 23, 24. On December 1, 2017, plaintiff moved for leave to file additional exhibits with his supplemental brief. ECF No. 25. On December 4, 2017, the Court granted the motion to file additional exhibits. ECF No. 26.

On July 10, 2018, the Court again heard oral argument on the motion to dismiss ("7/10/18 Tr."). ECF No. 32. On May 3, 2019, the case was transferred to the undersigned. ECF No. 33.

II. DISCUSSION

The defendant moves to dismiss the amended complaint for four independent reasons. First, defendant argues that the United States may not be held liable for a taking carried out by the ISAF and/or the government of Afghanistan. Gov't Mot. at 6–8. Second, defendant argues that plaintiff's lawsuit is barred by the act of state doctrine. *Id.* at 8–10. Third, defendant urges dismissal because plaintiff has failed to "identify the specific property interest alleged to have been taken by the United States" as required by RCFC 9(i). *Id.* at 10–12. Lastly, defendant argues that plaintiff has not shown he is the owner of the land identified in the amended complaint. *Id.* at 12–17. The Court addresses each of these arguments in turn.

a. Legal Standard

Rule 12(b)(6) permits a party to file a motion to dismiss for "failure to state a claim upon which relief can be granted." RCFC 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual allegations that, if true, would state a claim to relief that is plausible on its face." *Athey*, 908 F.3d at 705 (internal quotations omitted). "The court must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant." *Id.*

The Fifth Amendment provides that "private property" may not be "taken for public use, without just compensation." U.S. Const. amend. V. "To state a claim for a taking, [plaintiffs] must establish: (1) that they had a cognizable property interest, and (2) that their property was taken by the United States for a public purpose." *Alimanestianu v. United States*, 888 F.3d 1374, 1380 (Fed. Cir. 2018).

"Takings claims typically come in two forms: *per se* or regulatory." *Id.* "To find a *per se* taking, there must be either a permanent physical invasion, or a denial of all economically viable uses of the property." *Id.* (citations omitted). "When the Government commits a *per se* taking, it has a categorical duty to pay just compensation." *Id.* "A regulatory taking involves a restriction on the use of property that [goes] 'too far.'" *Id.* (internal quotations omitted) (modification in original). "To determine whether a Government action goes 'too far,' courts have traditionally utilized a three-pronged factual inquiry

illuminated by *Penn Central Transportation Co. v. City of New York*, which looks to: 'the character of the governmental action,' 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and '[t]he economic impact of the regulation on the claimant.'" *Id.* at 1380–81 (modification in original).

The amended complaint appears to allege a *per se* taking. *See* Am. Compl. ¶ 9 ("houses and trees" were "demolished"). The Court, however, does not need to decide which legal framework applies at this stage because none of defendant's arguments for dismissal turns on the *per se* versus regulatory distinction.

b. The United States May Have Taken Private Property to Construct Combat Outpost Millet

The defendant argues the United States is not liable, because the construction of COP Millet was carried out by the ISAF together with the government of Afghanistan. Gov't Mot. at 6–8. Plaintiff responds that the United States took his property, as evidenced by the license between the United States and the government of Afghanistan. Pl.'s Resp. at 3–5.

In support of its position, defendant invokes *Standard-Vacuum Oil Co. v. United States*, 153 F. Supp. 465 (Ct. Cl. 1957), for the proposition that the United States cannot be held liable for takings committed by international military coalitions, even if the United States is a member of that coalition. Gov't Mot. at 7.

Standard-Vacuum dealt with the status of certain property in Japan after World War II. During the war, the Japanese government seized the plaintiff's property. 153 F. Supp. at 465. After the Japanese government surrendered, the Supreme Commander for the Allied Powers established procedures for individuals like the plaintiff to recover seized property. *Id.* at 466. The plaintiff then filed requests in accordance with those procedures. *Id.* In response, the Supreme Commander for the Allied Powers directed the Japanese government to restore title to the plaintiff, but temporarily retained possession of some items that were being used by occupation forces. *Id.*

The Court of Claims held that "all action taken was by the Supreme Commander for the Allied Powers, not by the United States." *Id.* On that basis, the court held that "[t]here was no taking by the United States and thus the Government is not liable under the [F]ifth [A]mendment." *Id.* "To hold otherwise," the court reasoned, "would be to open the door to claims of not only citizens but noncitizens alike for all occupancy by the Allied Powers, thus causing the United States to bear almost the entire financial burden, not only of the war but also of the peace." *Id.* at 466–67.

In response, plaintiff relies on *Turney*, the case this Court asked the parties to address in supplemental briefing. *Turney* dealt with a takings claim arising out of the disposal of military surplus in the Philippines after World War II. The facts are complex; suffice to say that a central question in the

case was whether the United States was responsible for a taking carried out by the government of the Philippines when it imposed an embargo on the export of certain radar equipment. 115 F. Supp. at 463. The Court of Claims held that the United States was liable, because "relations, at the time, between our Government and the Philippine Government, were close." *Id.* As evidence of close relations, the Court of Claims cited the following facts:

> Our armed forces had just liberated the Philippines from the Japanese. Our Government had given one hundred million dollars worth of surplus property to the Philippines, including the property at the Leyte Air Depot, and had sold the property for the account of the Philippine Government. When we requested that Government to place an embargo upon the exportation of any of the property, it, naturally, readily complied. That put irresistible pressure upon the corporation to come to terms with the United States Army, the terms being that the radar equipment would be segregated in charge of the Army and would not be disposed of until a final agreement was reached as to its disposition. The final agreement turned the property back to the Army in exchange for a receipt, and with a

> reservation of the right to sue for its value.

Id. at 463–64.

In their supplemental briefs, the parties debate whether *Standard-Vacuum* or *Turney* is more analogous to this case. *See* Pl.'s Supp. Br. at 1–4; Gov't Supp. Br at 3–6. But neither party analyzes the facts using the Federal Circuit's more recent test for whether the United States is liable for takings committed by international entities. *See Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297, 299 (Fed. Cir. 1987).

"One seeking just compensation from the United States for actions of an international organization must show 'sufficient direct and substantial United States involvement.'" *Id.* (quoting *Langenegger v. United States*, 756 F.2d 1565, 1571 (Fed. Cir. 1985)). "That required showing depends on the sum of two factors: (1) the nature of the United States' activity, and (2) the level of benefit the United States has derived." *Id.*

The plaintiff has alleged facts that, if proven, would show the United States was involved in the construction of COP Millet to a sufficient degree to find a Fifth Amendment taking. The United States was a signatory to the license agreement with the government of Afghanistan that authorized entry onto the land in question. Gov't Ex. 3. And, the United States derived a clear benefit from that license agreement; namely, the ability to construct COP Millet as housing and protection for its forces. *See id.*

("COP Millet was intended to be used as a patrol base from which soldiers could patrol the sector.").

The defendant's reliance on *Standard-Vacuum* assumes the United States was acting as a mere agent of the ISAF when it entered into the license agreement. In fact, however, no mention of the ISAF appears on the license. Gov't Ex. 3. Defendant asks the Court to take notice of the fact that on July 31, 2006, the ISAF took command of the southern region of Afghanistan, including Kandahar. Gov't Mot. at 7 (citing *ISAF's mission in Afghanistan (2001-2014) (Archived)*, NATO (updated Sept. 1, 2015), *available at* https://www.nato.int/cps/en/natohq/topics_69366.htm). Assuming the information on the NATO website is accurate, the ISAF's leadership role in Kandahar at the time of the alleged taking does not exclude the possibility of independent activities undertaken by the United States. *Cf. Progress toward Security and Stability in Afghanistan*, U.S. Dept. of Defense, at 27 (Jan. 2009), *available at* https://dod.defense.gov/Portals/1/Documents/pubs/OCTOBER_1230_FINAL.pdf ("U.S. forces are deployed to Afghanistan either as part of Operation Enduring Freedom (OEF), or the [ISAF]."). Drawing all reasonable inferences in plaintiff's favor, a reasonable fact-finder could find that the United States entered into the licensing agreement on its own behalf, even if it did so to facilitate the construction of COP Millet by the ISAF. Consequently, plaintiff has plausibly alleged that the United States was directly and substantially involved in the taking of the disputed land.

In its reply brief, defendant argues that—during the relevant time period—United States forces in Kandahar operated exclusively under the direction of the ISAF. Gov't Reply at 4; Gov't Supp. Br. at 4. That argument may carry the day at summary judgment but, at this stage, would require fact-finding that is inappropriate in evaluating a motion to dismiss. *See Athey*, 908 F.3d at 705; *see also Glob. Freight Sys. Co. W.L.L. v. United States*, 130 Fed. Cl. 780, 789 (Fed. Cl. 2017) (denying a motion to dismiss because the question of "'direct and substantial [United States] involvement' requires a factual assessment which cannot be made on the basis of the allegations at this early stage of litigation").

The defendant's other arguments on the question of the United States' involvement are insufficient to justify dismissal. For example, defendant argues that Afghanistan should be liable for any taking because COP Millet was constructed "with the full knowledge and support of the Afghan government." Gov't Mot. at 7. That is not the law. In *Turney*, there was no doubt that the United States took the plaintiff's property with the full knowledge and support of the government of the Philippines, but the Court of Claims nevertheless found the United States liable. *See* 115 F. Supp. at 463.

The defendant next argues that "the Afghan forces stationed at COP Millet outnumbered the ISAF forces," and that "Afghanistan "has been [] the sole occupant [of COP Millet] since September 2012." Gov't Mot. at 7–8. But, "[i]t is [] an accepted principle that it is not essential for the government to have taken

property for its own use for a taking to be found." *Langenegger*, 756 F.2d at 1570 (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)). The United States may not take property and subsequently avoid its obligation to pay just compensation by placing that property at someone else's disposal.

c. The Act of State Doctrine Does Not Bar Plaintiff's Claims

The act of state doctrine bars United States courts "from declar[ing] 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). It is "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs[.]" *Id.* at 404 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). "Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts." *Republic of Austria v. Altman*, 541 U.S. 677, 700 (2004). The party asserting the applicability of the act of state doctrine bears the burden of proof. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694–95 (1976); *see also Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).

In *Kirkpatrick*, the Supreme Court made clear that the act of state doctrine "is not some vague doctrine of abstention but a '*principle of decision* binding on federal and state courts alike.'" *Kirkpatrick*, 493 U.S. at 406 (original emphasis) (quoting *Sabbatino*, 376 U.S. at 427); *see also Kashef v. BNP Paribas S.A.*, 2019 WL 2195619, at *4 (2d Cir. May 22, 2019) ("[The act of state doctrine] is not a categorical rule of abstention that prohibits courts from deciding cases or controversies whenever issues of foreign relations arise."). "Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Kirkpatrick*, 493 U.S. at 406 (original emphasis). In addition, even if the doctrine is technically available, there are instances when "the policies underlying the act of state doctrine may not justify its application" and it should not be invoked. *Id.* at 409; *see also Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1072–73 (9th Cir. 2018) ("The Supreme Court has indicated that even when the two mandatory elements [of the act of state doctrine] are satisfied, courts may appropriately look to additional factors to determine whether application of the [] doctrine is justified."). In *Sabbatino*, the Supreme Court articulated three possible factors that may weigh against application of the doctrine:

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed

> principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered.

Sabbatino, 376 U.S. at 428 (cleaned up).

The defendant argues that the act of state doctrine bars the Court from adjudicating plaintiff's claim, because finding for plaintiff would require the Court to invalidate the license agreement, within which the government of Afghanistan represented that "it is the rightful and legal owner of [the property] and has the legal right to enter into this License." Gov't Ex. 3. Defendant contends that, because "a threshold issue in a Fifth Amendment takings case is whether a plaintiff owns the land allegedly taken," for the Court to rule for plaintiff, it would have to invalidate the license agreement. Def. Mot. at 9; Def. Reply at 6.

The plaintiff responds that the act of state doctrine does not apply, because it "is not seeking to invalidate the actions of a foreign sovereign." Pl. Resp. at 6. In addition, the license is ambiguous as to whether the Afghan government did warrant it owned the land. *Id.*

The Court does not decide whether the act of state doctrine applies, because, assuming that it does, defendant has not met its burden to show that the policies underlying the doctrine justify its application in this case. *See Alfred Dunhill*, 425 U.S. at 694–95; *see also Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 350 (C.D. Cal. 1997) ("When applying the *Sabbatino* test, the party asserting the applicability of the act of state doctrine bears the burden of proof.").

Sabbatino's first factor cautions against applying the doctrine when there is a high "degree of codification or consensus concerning a particular area of international law[,]" so that a court need not focus "on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." 376 U.S. at 428 (cleaned up). Defendant has offered nothing suggesting how international law and international justice are implicated by the Court ruling on a takings claim against the United States by a United States citizen, albeit on foreign soil.

Similarly, regarding the second *Sabbatino* factor, defendant has not shown the importance of the implications, if any, on United States foreign relations

of potentially finding the license agreement invalid. Indeed, the fact that the license itself contemplates that the government of Afghanistan "did not have authority to issue this License" in the indemnity clause, Gov't Ex. 3, and the alleged fact, which the Court at this stage accepts as true, that the District Governor verified that plaintiff's grandfather owned the land in question, Am. Compl. Ex. A., suggest that potentially finding the license agreement invalid does not have meaningful foreign policy implications.

As to the third *Sabbatino* factor, while the government of Afghanistan is still in existence, this alone does not warrant applying the act of state doctrine. *See Unocal*, 176 F.R.D. at 353–54 (finding that, despite the foreign government's continued existence, "the balance [of the *Sabbatino* factors] weighs against invocation of the act of state doctrine"). Because defendant has failed to prove that "passing on the validity" of the license agreement may "hinder the conduct of foreign affairs" the Court declines to invoke the act of state doctrine. *Kirkpatrick*, 493 U.S. at 405 (citations omitted).

d. Plaintiff has Failed to Plead Ownership of the Disputed Land

To claim a Fifth Amendment taking, a plaintiff must show "a cognizable property interest." *Alimanestianu*, 888 F.3d at 1380; *see also Acceptance Ins. Companies, Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) ("First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be

the subject of the taking."). "The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003). "Instead, 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)). In this case, the independent source of law that plaintiff invokes is the law of Afghanistan.

Rule 44.1 of this Court states, "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." RCFC 44.1. The purpose of Rule 44.1 is "to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1873 (2018) (quoting 9A Alan Wright et al., *Federal Practice & Procedure* § 2444 (3d ed. updated Apr. 2019)) (describing the identically-worded Rule 44.1 of the Federal Rules of Civil Procedure).

The defendant contests the validity of plaintiff's property interest in two ways. First, defendant challenges the validity of plaintiff's proof of ownership. Gov't Mot. at 12–15. Second, defendant challenges the

effectiveness of plaintiff's inheritance agreement with his siblings. *Id.* at 15–16. The Court begins with the first issue, plaintiff's proof of ownership.

The Court proceeds cautiously, mindful of the fact that it is "very difficult to determine . . . the legitimate owners of land and property in Afghanistan," and that "for much of Afghanistan's recent history people have had no alternative but to use customary documents to validate land and property transfers as there has been no functioning official judicial system." Conor Foley, *A Guide to Property Law in Afghanistan*, Nor. Refugee Council, at 34, 36 (2d ed. 2011).

The Law on Land Management Affairs, revised by the Taliban in 2000 and again by the government of Afghanistan in 2008, states that seven types of documents may serve as proof of land ownership: (1) documents of a legal court; (2) a decree issued by the emirate and the prime ministry, if registered; (3) tax receipts; (4) proof of water rights; (5) customary deeds from before 1975, witnessed before 1978; (6) registered title documents; or (7) title documents obtained by court order. *See id.* 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).

The plaintiff has not proffered any document that fits into any of the seven categories listed above. Instead, plaintiff has submitted two letters from the District Governor: one letter that purports to verify

plaintiff's grandfather's ownership of the property, and another that purports to verify plaintiff's present-day ownership. Am. Compl. at Ex. A; *see also* ECF No. 25-1 (supplemental exhibit). A letter from a District Governor does not constitute proof of land ownership under the laws of Afghanistan. Consequently, plaintiff has not shown "a cognizable property interest." *Alimanestianu*, 888 F.3d at 1380.

In an attempt to surmount his lack of legally effective documentation, plaintiff invokes the prevalence of informal custom in Afghanistan as the predominant means of facilitating land transactions. Pl.'s Resp. at 9–10. It appears, based on the Court's research, that plaintiff is correct that "formal registration and titling has never been widespread." Erica Gaston & Lillian Dang, *Addressing Land Conflict in Afghanistan*, U.S. Inst. of Peace, Special Rep. 372, at 7 (June 2015); *see also* Yohannes Gebremedhin, *Land Tenure and Administration in Rural Afghanistan: Legal Aspects*, Terra Inst., at 26 (Sept. 2007). Nevertheless, "for the most part Afghan law only recognizes land ownership based on formal documents." Gaston & Dang, *supra*, at 7. The fact that Afghan property law is rarely followed in certain communities puts plaintiff in an unfortunate bind, but not the sort of bind this Court is empowered to resolve by disregarding those laws entirely.

Because plaintiff has not shown a cognizable property interest, the Court does not need to address defendant's argument that the amended complaint fails to meet the specific pleading requirements of RCFC 9(i), *i.e.*, that a party "must identify the specific

property interest alleged to have been taken." The Court also does not need to address whether plaintiff's inheritance agreement with his siblings was valid, even though the siblings did not submit their agreement to a court for approval.

III. CONCLUSION

For the above stated reasons, the following is hereby ordered:

1. Defendant's motion to dismiss is **GRANTED**.

2. Plaintiff's amended complaint is **DISMISSED**.

The Clerk is directed to enter judgment accordingly. No costs.

IT IS SO ORDERED.

s/ Bohdan A. Futey
Bohdan A. Futey
Senior Judge

ENTERED JULY 11, 2019

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 16-1090 L

TEMOR S. SHARIFI

Plaintiff

v. **JUDGMENT**

THE UNITED STATES

Defendant

Pursuant to the court's Opinion, filed July 11, 2019, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed. No costs.

Lisa L. Reyes
Clerk of Court
By: s/Anthony Curry
Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.