IN THE SUPREME COURT OF THE UNITED STATES

No. 25A906

SECRETARY OF DEFENSE, APPLICANT

v.

LESSORS OF ABCHAKAN VILLAGE, LOGAR PROVINCE, AFGHANISTAN

APPLICATION FOR A FURTHER EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General respectfully requests a further 30-day extension of time, to and including April 24, 2026, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The court of appeals entered its judgment on May 16, 2025, and denied rehearing en banc on November 25, 2025. By order dated February 16, 2026, the Chief Justice extended the time within which to file a petition for a writ of certiorari to March 25, 2026. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The opinion of the court of appeals (App., infra, 1a-17a) is reported at 137 F.4th 1301. The court's order denying rehearing (App., infra, 18a-19a) is unreported. The opinion of

the Armed Services Board of Contract Appeals (App., infra, 20a-44a) is available at 2022 WL 17331987.

1. This case arises from the United States' use of land in Afghanistan and the government's alleged failure to pay rent to certain residents of Abchakan Village in Logar Province, Afghanistan (the Lessors) -- respondents here -- who claim they own the land. App., infra, 5a. In 2009, the Lessors leased to the United States land on which the United States built Forward Operating Base (FOB) Shank. Ibid. For the 2009 calendar year, the United States paid approximately $2.6 million in rent. Ibid.

In late 2009, the Government of the Islamic Republic of Afghanistan (GIRoA) filed a lawsuit in Afghanistan alleging that the land at issue belonged to the GIRoA and that the Lessors' documents purportedly establishing ownership were fraudulent. App., infra, 6a. In August 2010, the United States notified the Lessors that their ownership of the land had been questioned and requested documentation of ownership; then in November 2012, the United States notified the Lessors that it would not make payments until the land-ownership issue was resolved. Ibid.

In 2014, the United States and the GIRoA entered into a bilateral security agreement, which included a provision giving the United States a right to access and use certain "agreed facilities and areas." App., infra, 6a (citation omitted). The agreement listed several facilities; though the agreement did not include FOB Shank, it envisioned use of "other facilities and areas at

other locations in Afghanistan as may be agreed and authorized by the Minister of Defense." Ibid. (citation omitted). Also in 2014, the United States turned over FOB Shank to the GIRoA but established Camp Dhalke on part of the land that FOB Shank occupied. Ibid.

While this was occurring, GIRoA's lawsuit asserting its ownership of the land proceeded in the Afghanistan court system. App., infra, 6a. In 2015, an Afghan appellate court issued a decision in favor of the Lessors. Ibid. Based on the Lessors' purported ownership documents (a deed, as well as tax and water documents), the court stated that GIRoA's claims "were not proved." Id. at 6a-7a (citation omitted). The GIRoA appealed to the Afghanistan Supreme Court. Id. at 7a.

In 2017, while the matter was pending before the Afghanistan Supreme Court, the GIRoA sent the United States a declaration from the GIRoA's Minister of Defense. App., infra, 7a. In the declaration, the Minister of Defense "authorize[d] Camp Dhalke and its expansion into FOB Shank . . . as an Agreed Facility and Area for the use of U.S. Forces in accordance with" the bilateral security agreement. Ibid. (brackets and ellipsis in original; citation omitted). The declaration also stated that the "GIRoA covenants that it has the legal authority over the [L]and necessary to effect this agreement and authorization" and that "[a]ny and all claims made against the Camp Dhalke and FOB Shank land or regarding the ownership of this [L]and are the responsibility of

GIRoA and shall be resolved in full by GIRoA." Ibid. (brackets in original; citation omitted).

In February 2018, the Afghanistan Supreme Court repealed the appellate court's 2015 decision and remanded the case. App., infra, 7a. The court determined that the GIRoA had not been "given the opportunity to prove [its] claims reflecting [the] fraudulent deed document" and that "th[e] case require[d] . . . a thorough investigation." Ibid. (brackets in original; citation omitted). The case was remanded to the Special Appeals Court for Government Land Usurpation Cases (Land Court). Ibid.

In October 2018, the GIRoA Ministry of Defense issued another declaration. App., infra, 7a. That declaration "acknowledge[d] and validate[d]" the 2017 declaration "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 th[e] area, including accepting for resolution any such land claims filed against the United States Government." Ibid. (citation omitted).

On August 11, 2021, the Land Court dismissed the GIRoA's claims to the land. App., infra, 7a. On August 15, four days after the Land Court's decision, the Taliban took over Kabul and the GIRoA fell. Ibid.; see id. at 6a n.3. "The fall of [the] GIRoA raised questions about whether the Taliban would 'implement judgments issued by the courts of the previous administration,'" including the Land Court's 2021 decision. Id. at 7a-8a (citation

omitted). Around six months later, the Afghanistan Supreme Court -- by then under Taliban control -- issued a fatwa ("a legal ruling or opinion given by a recognized authority on Islamic law") directing that the Land Court's 2021 decision dismissing the GIRoA's claims "be implemented." Id. at 8a & n.5.

2. The procedural history of this case began in April 2018, when the Lessors submitted a claim to the U.S. Army Corps of Engineers "demanding approximately $28 million from the Corps for unpaid rent, interest, and deferred payment losses." App., infra, 8a. That claim was denied, and the Lessors appealed to the Armed Services Board of Contract Appeals (Board) and filed a complaint. Ibid.

The Board granted summary judgment to the United States on two grounds. App., infra, 8a. First, the Board held that the Lessors failed to show "a genuine issue of material fact suggesting that they owned the land." Id. at 30a. With respect to that issue, the Board treated the Afghanistan Supreme Court's 2018 remand decision as "final and conclusive," id. at 36a; the Board did not recognize the legitimacy of the 2021 Land Court decision and the 2022 fatwa because, among other reasons, there were reasons to doubt the integrity of the proceedings, see id. at 32a-35a. Further, the Board determined that "no reasonable fact-finder" could credit the Lessors' ownership documents. Id. at 38a.

Second, the Board determined that to give the Lessors "the relief that they seek" "would violate the act of state doctrine."

App., infra, 39a. In the Board's view, "the GIRoA has taken the official act within its territory of asserting its ownership of the Land." Ibid. And the Board would have to "declare invalid" that official act, including as reflected in the 2017 and 2018 declarations, to rule for the Lessors. Id. at 40a. Moreover, the Board reasoned that if it granted the Lessors relief, it would have to "declare invalid the GIRoA's official act of waiving its citizens' claims against the United States related to the Land." Ibid.

3. a. The Lessors appealed to the Federal Circuit, which vacated the Board's decision and remanded for further proceedings. App., infra, 1a-17a. First, the court of appeals held that there is a genuine dispute of material fact regarding "[o]wnership of the Land." Id. at 10a. The court explained that there is insufficient record evidence to support the Board's non-recognition of the 2021 Land Court decision, which had favored the Lessors. Id. at 10a-11a. The court then determined that the Board erred in giving the 2018 Afghanistan Supreme Court decision preclusive effect because it was not "a final, conclusive, and enforceable judgment." Id. at 11a (citation omitted); see id. at 11a-12a. The court also found that the Board erred in resolving factual disputes regarding the Lessors' documents purporting to show their ownership of the land. Id. at 12a-13a.

Second, the court of appeals held that the Board erred by determining that the 2017 and 2018 declarations "trigger[] the act

of state doctrine." App., infra, 14a; see id. at 13a-14a. The court first held that the declarations' statements regarding GIRoA's ownership of the land "were not official sovereign acts" because the declarations "do not take or expropriate the Land as an official act," but instead "recognized that ownership was an ongoing controversy." Id. at 14a. Next, with respect to the declarations' purported waiver of the Lessors' claims, the court held that "[n]either the Board nor the government has identified any precedent applying the act of state doctrine in such a situation." Ibid. The court additionally explained that the "GIRoA's assumption of responsibility in the Declarations is not a distinctly sovereign act" but is instead something that "individuals or entities can undertake in their private capacity." Id. at 15a. Finally, while the court agreed that the declarations' expansion of the bilateral security agreement to include Camp Dahlke and FOB Shank as agreed facilities "is an official act of GIRoA," the Board could still "determine that the U.S. government was required to pay rent * * * without concluding any part of the Declarations is invalid." Ibid. The court of appeals also noted that "the general principles underlying" the act of state doctrine are not at play in this case because the GIRoA "is no longer in existence." Ibid.

The court of appeals declined to address the merits of the government's arguments that there was no mutual intent to contract between the Lessors and the U.S. government and that the GIRoA had

"espous[ed]" and "extinguish[ed]" the claims of its nationals by taking responsibility for land claims filed against the United States. App., infra, 16a; see id. at 16a-17a. The court explained that the Board did not rely on those grounds and that the government had not raised before the Board "whether there is espousal and extinguishment in this case." Id. at 17a.

b. The court of appeals subsequently denied the government's petition for rehearing en banc. App., infra, 18a-19a.

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed to continue consultation within the government and to assess the legal and practical effect of the court of appeals' ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

MARCH 2026

APPENDIX

LESSORS OF ABCHAKAN VILLAGE, Logar Province, Afghanistan, Appellants

v.

SECRETARY OF DEFENSE, Appellee

2023-1523

United States Court of Appeals, Federal Circuit.

Decided: May 16, 2025

Background: Lessors of land in Afghanistan filed suit against United States, challenging United States Army Corps of Engineers' denial of certified claim for $28 million for unpaid rent for use of land for United States military base in Afghanistan, interest, and deferred payment losses, under lease agreements executed by Corps. The Armed Services Board of Contract Appeals, 2022 WL 17331987, granted government summary judgment. Lessors appealed.

Holdings: The Court of Appeals held that:

(1) Board correctly placed burden on lessors to show they owned land;

(2) Board erred by resolving land ownership issue at summary judgment stage;

(3) Board erred in determining Afghanistan Supreme Court's remand decision created issue preclusion;

(4) Board erred in determining lessors' documents failed to raise genuine issue of material fact suggesting they owned land;

(5) Board erred in determining act of state doctrine barred lessors' request for relief; and

(6) government's alternative grounds for affirming Board's decision were barred.

Vacated and remanded.

1. Public Contracts ⚿364(7)
United States ⚿785(7)

Court of Appeals reviews de novo the Armed Services Board of Contract Appeals' conclusions of law, including grants of summary judgment, and the interpretation of a government contract.

2. Summary Judgment ⚿45(2), 75

Summary judgment is appropriate when the record, examined in a light most favorable to the non-movant, indicates that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

3. Evidence ⚿849

When one party has superior access to the evidence needed to prove a fact, that party must bear the burdens of proof.

4. United States ⚿307

Armed Services Board of Contract Appeals correctly placed burden of proof on lessors regarding ownership of land leased by United States Corps of Engineers for United States military base in Afghanistan, in lessors' suit seeking to recover $28 million for unpaid rent for use of land, interest, and deferred payment losses, since lessors claimed to be owners of land, they resided in Afghanistan, and they had superior access to evidence, as compared to United States government, to prove their ownership of land in Afghanistan.

5. Summary Judgment ⚿153
United States ⚿307

Genuine disputes of material fact remained as to ownership of land that United States rented in Afghanistan for United States military base under lease agreements executed by United States Army Corps of Engineers, thus precluding summary judgment on claim by lessors, as alleged owners, for $28 million from Unit-

ed States for unpaid rent for use of land, interest, and deferred payment losses.

6. Res Judicata ⚿82(1)

Issue preclusion only applies if the relevant issue was decided in a prior action that has been finally adjudicated on the merits.

7. Judgment ⚿830.1

Afghanistan Supreme Court's decision, remanding Government of Islamic Republic of Afghanistan's (GIRoA) claim of ownership of land that United States rented in Afghanistan for United States military base because further investigation was required, did not give rise to issue preclusion regarding ownership of land for which lessors, as alleged owners, sought $28 million from United States for unpaid rent, interest, and deferred payment losses, since Afghanistan Supreme Court's remand decision was not final adjudication on merits of land ownership.

8. Summary Judgment ⚿153
United States ⚿307

Genuine disputes of material fact remained as to whether lessors' deed contained indicia of fraud and whether lessors' tax and water rights documents were sufficient show their ownership of land in Afghanistan rented under lease agreements executed by United States Army Corps of Engineers for United States military base, thus precluding summary judgment on lessors' claim for $28 million from United States for unpaid rent for use of land, interest, and deferred payment losses.

9. International Law ⚿342

Under the "act of state 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.

See publication Words and Phrases for other judicial constructions and definitions.

10. International Law ⚿342

There is a factual predicate for the act of state doctrine to apply: the suit must require the court to declare invalid, and thus ineffective as a rule of decision for the courts of the United States, the official act of a foreign sovereign.

11. International Law ⚿342, 354

The act of state doctrine, under which the courts of one state will not question the validity of public acts performed by other sovereigns within their own borders, is typically applied to tangible acts, like the expropriation of property.

12. International Law ⚿355
United States ⚿305

Government of Islamic Republic of Afghanistan's (GIRoA) statements in declarations, indicating that land in Afghanistan rented by United States for United States military base was public land owned by GIRoA, were not official sovereign acts to which act of state doctrine applied, so declarations were not official sovereign acts that would need to be declared invalid any decision by Armed Services Board of Contract Appeals to grant lessors' requested relief seeking $28 million from United States for unpaid rent for use of land, interest, and deferred payment losses, since declarations did not take or expropriate land as official act but, rather, appeared to recognize that ownership of land was ongoing controversy.

13. International Law ⚿355
United States ⚿305

Any waiver of lessors' claims to ownership of land in Afghanistan rented to United States for United States military base, by Government of Islamic Republic of Afghanistan's (GIRoA) declarations that it assumed responsibility for resolving in full any and all claims made against land rented to United States or regarding own-

ership of that land, was not kind of sovereign act to which act of state doctrine applied, so declarations were not official sovereign acts that would need to be declared invalid any decision of Armed Services Board of Contract Appeals to grant lessors' requested relief seeking $28 million for unpaid rent for use of land, interest, and deferred payment losses, since assumption of responsibility in declarations was same type that individuals or entities could undertake in their private capacity.

14. International Law ⚿355
United States ⚿305

Although Government of Islamic Republic of Afghanistan's (GIRoA) declarations that expanded bilateral security agreement providing United States access to and use of land in Afghanistan for United States military base and camp constituted official sovereign act, granting lessors' requested relief of recovering unpaid rent, interest, and deferred payment losses for use of that land would not require Armed Services Board of Contract Appeals to declare invalid that official sovereign act, and thus act of state doctrine did not apply to bar lessors' requested relief, since Board's enforcement of United States' obligation to pay rent would simply trigger GIRoA's promise in declaration to accept full responsibility for any and all land claims that might arise over use of that land.

15. Administrative Law and Procedure ⚿1932

It is a simple but fundamental rule of administrative law that reviewing courts must judge the propriety of agency action solely by the grounds invoked by the agency.

16. Administrative Law and Procedure ⚿1932

An agency's discretionary order may be upheld only on the same basis articulated in the order by the agency itself.

17. Administrative Law and Procedure ⚿1932

Under the rule of administrative law that reviewing courts must judge the propriety of agency action solely by the grounds invoked by the agency, there is an exception in narrow circumstances where there is not the slightest uncertainty as to the outcome' of the agency's proceedings on remand, such as where the agency was required to take a particular action.

18. United States ⚿307

United States government's argument that lessors could not establish mutual intent to contract, as alternative ground for affirming Armed Services Board of Contract Appeals' grant of summary judgment for government on lessors' claim for $28 million for unpaid rent for use of land for United States military base in Afghanistan under lease agreements executed by United States Army Corps of Engineers, was barred under rule of administrative law that reviewing courts were required to judge propriety of agency action solely by grounds invoked by agency, since Board did not invoke government's intent to contract as basis for any part of its decision.

19. United States ⚿307

Exception to rule of administrative law that reviewing courts were required to judge propriety of agency action solely by grounds invoked by agency did not apply to allow United States government's argument that lessors could not establish mutual intent to contract, as alternative ground for affirming Armed Services Board of Contract Appeals' grant of summary judgment for government on lessors' claim for $28 million for unpaid rent for use of land for United States military base in Afghanistan under lease agreements executed by United States Army Corps of Engineers, since Board was not required to make any particular decision about government's in-

tent to contract, and government failed to show there was not slightest uncertainty as to outcome of Board's proceedings on remand.

20. International Law ⚿222

"Espousal" occurs when one sovereign asserts the private claims of its nationals against another sovereign.

See publication Words and Phrases for other judicial constructions and definitions.

21. International Law ⚿222

Once it has espoused a claim, the sovereign has wide-ranging discretion in disposing of the espoused claim, including waiving it entirely, in other words, extinguishing the claim.

22. United States ⚿307

United States government's argument that Government of Islamic Republic of Afghanistan's (GIRoA) declarations espoused and extinguished lessors' claims for unpaid rent from United States for land in Afghanistan for United States military base by accepting for resolution any such land claims filed against United States, as alternative ground for affirming Armed Services Board of Contract Appeals' grant of summary judgment for government on lessors' claim for $28 million for unpaid rent, was barred under rule of administrative law that reviewing courts were required to judge propriety of agency action solely by grounds invoked by agency, since Board relied on act of state doctrine, not espousal or extinguishment, as ground for its decision.

23. United States ⚿307

Exception to rule of administrative law that reviewing courts were required to judge propriety of agency action solely by grounds invoked by agency did not apply to allow United States government's argument that Government of Islamic Republic of Afghanistan's (GIRoA) declarations espoused and extinguished lessors' claims for unpaid rent from United States for land in Afghanistan for United States military base by accepting for resolution any such land claims filed against United States, as alternative ground for affirming Armed Services Board of Contract Appeals' grant of summary judgment for government on lessors' claim for $28 million for unpaid rent, since Board was not required to determine whether there was espousal and extinguishment, and government failed to show there was not slightest uncertainty as to outcome of Board's proceedings on remand.

Appeal from the Armed Services Board of Contract Appeals in No. 61787, Administrative Judge J. Reid Prouty, Administrative Judge James R. Sweet, Administrative Judge Richard Shackleford.

William Perdue, Arnold & Porter Kaye Scholer LLP, Washington, DC, argued for appellants. Also represented by Michael Barnicle, Peter Vogel, Chicago, IL; Elizabeth A. Long, William Sharon, New York, NY; Keith J. Feigenbaum, Paul Hastings LLP, Washington, DC.

Anthony F. Schiavetti, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellee. Also represented by Brian M. Boynton, Vincent De Paul Phillips, Jr., Martin F. Hockey, Jr., Patricia M. McCarthy.

Before Moore, Chief Judge, Cunningham, Circuit Judge, and Mazzant, Chief District Judge.[1]

1. Honorable Amos Mazzant, Chief District Judge, United States District Court for the Eastern District of Texas, sitting by designation.

Per Curiam.

Lessors of Abchakan Village, Logar Province, Afghanistan ("the Lessors" or "Appellants") appeal a decision of the Armed Services Board of Contract Appeals ("Board") granting the U.S. government summary judgment and denying the Lessors' appeal. *Lessors of Abchakan Vill., Logar Province, Afghanistan*, ASBCA No. 61787, 22-1 BCA ¶ 38,234, 2022 WL 17331987 (Oct. 13, 2022) ("*Decision*") (J.A. 1–26).[2] For the reasons explained below, we vacate the judgment and remand for further proceedings consistent with this opinion.

I. Background

This appeal concerns the U.S. government's occupation and use of land in Afghanistan and the government's alleged failure to pay the Lessors for use of the land. In this section, we first provide an overview of the party interactions giving rise to this appeal; we then describe relevant proceedings in the courts of Afghanistan and agreements between the United States and the former government of Afghanistan; and we then turn to the procedural history before the Board.

A.

The Lessors are residents of Abchakan Village in Logar Province, Afghanistan. Appellants' Br. 1; J.A. 428. On April 23, 2009, the Lessors leased to the United States real property ("the Land") for a United States military base, known as Forward Operating Base Shank ("FOB Shank"), located in Logar Province. *Decision* at 2–3. Representatives for the United States Army Corps of Engineers executed the relevant lease agreements on behalf of the United States. J.A. 115–98. A U.S. government report indicates that before entering into the lease agreements, the United States military had occupied portions of the Land for over two years without paying rent. J.A. 1324 (negotiations report relating to the Land stating back rent was "[n]egotiated . . . for the past 2.5 years of occupation of FOB Shank located [at a specified location] down to $0"); J.A. 1325 (memorandum recommending approval of funding request to pay lease rents and explaining "[t]he United States has no formal real estate interest in the areas occupied and has trespassed on private property").

The lease agreements had a one-year term covering calendar year 2009. *Decision* at 3; *see also* J.A. 115–98. On July 14, 2009, the U.S. government paid rent in the amount of approximately $2.6 million for the lease period. *Decision* at 3; *see also* J.A. 436. In November 2009, the U.S. government sent the Lessors correspondence entitled "Written Notification of Intent to Lease FOB Shank Land from 1JAN10 Through 31DEC10," which "request[ed] to continue leasing the [L]and on which FOB Shank is located from 1JAN10 to 31DEC10." J.A. 2089. The Lessors allege that "[f]or calendar years 2011 through [October 15, 2018], the [U.S.] [g]overnment or its assignee occupied the [Land] and enjoyed the full use of the [Land] without Lessor interference." J.A. 437, 447; *see also Decision* at 3. The U.S. government does not dispute that "the United States continued to operate FOB Shank" through at least 2014 and that the United States "later established Camp Dhalke on a portion of what was then FOB Shank." Appellee's Br. 5–6; *Decision* at 4 n.4. The Lessors also allege, and the U.S. government does not dispute, that the U.S. government did not pay the Lessors rent after the July

2. Because the reported version of the Board's decision is not paginated, citations in this opinion are to the version of the Board's decision included in the Joint Appendix. For example, *Decision* at 1 is found at J.A. 1.

14, 2009, payment. *See Decision* at 3–4; *see also* Appellants' Br. 1; Appellee's Br. 4–5; J.A. 436–38.

In December 2009, a provincial justice department of the Government of the Islamic Republic of Afghanistan ("GIRoA")[3] filed a civil lawsuit ("the Afghan lawsuit") in a court of Afghanistan, alleging that the Land belonged to GIRoA and that the Lessors' ownership documents were fraudulent. J.A. 439; *see also* J.A. 1233, 1292. In August 2010, the U.S. government sent letters to the Lessors stating:

> [T]his 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 State[s.]

J.A. 2392; *see also Decision* at 3–4. On November 17, 2012, the U.S. government sent a letter to the Lessors, indicating that the Land ownership had been in dispute for many years. *Decision* at 4; J.A. 1783. 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." J.A. 1783.

B.

Relevant to this appeal are several proceedings in the courts of Afghanistan, as well as interactions between the United States and GIRoA.

On September 30, 2014, the United States and GIRoA entered into a Bilateral Security Agreement. *Decision* at 4. Under the Bilateral Security Agreement, GIRoA "provide[d] access to and use of the agreed facilities and areas, as defined in paragraph 7 of Article 1." J.A. 1178; *Decision* at 4. The Bilateral Security Agreement Article 1(7) defined "[a]greed facilities and areas" as "the 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." J.A. 1171; *Decision* at 4. Annex A listed several facilities not including FOB Shank but envisioned use of "other facilities and areas at other locations in Afghanistan as may be agreed and authorized by the Minister of Defense." J.A. 1197; *Decision* at 4–5. By 2014, FOB Shank "was the third largest U.S. base in Afghanistan . . ., housing nearly 5,200 personnel." J.A. 1925; *see also Decision* at 4 n.4. In 2014, the United States turned FOB Shank over to GIRoA. *Decision* at 4 n.4. As noted above, however, the United States later established Camp Dhalke on a part of what was then FOB Shank. *Id.*

Meanwhile, the Afghan lawsuit proceeded. According to a declaration submitted on behalf of the Lessors, in 2009, an Afghan provincial court dismissed GIRoA's claims, and GIRoA then appealed that decision. *See* J.A. 1292. A series of appeals and decisions of Afghanistan courts followed. In 2015, an Afghan appellate court issued a decision in the Lessors' favor. *Decision* at 5; J.A. 249, 1784, 2092. Based on the Lessors' purported ownership documents, which include a deed and tax and

3. GIRoA was the government in control of Afghanistan at the time the leases were executed. In August 2021, the Taliban overthrew GIRoA. *See Decision* at 9 n.7 ("On August 6, 2021, the Taliban captured its first provincial capital. On August 15, 2021, Taliban forces entered Kabul, and the GIRoA collapsed." (citation omitted)).

water documents, the Afghan appellate court held that GIRoA's claims "were not proved." J.A. 2092; *see also* J.A. 249, 1784. GIRoA appealed to the Afghanistan Supreme Court. *Decision* at 5.

On December 19, 2017, while the Afghan lawsuit was pending before the Afghanistan Supreme Court, GIRoA provided the United States with a declaration ("the 2017 Declaration") executed by GIRoA's Minister of Defense. *Decision* at 5; J.A. 1216; *see also* J.A. 1214–19. The 2017 Declaration indicates that the Minister of Defense "authorize[d] Camp Dhalke and its expansion into FOB Shank ... as an Agreed Facility and Area for the use of U.S. Forces in accordance with the [Bilateral Security Agreement]." J.A. 1216. The 2017 Declaration was specifically "executed in accordance with Annex A of the [Bilateral Security Agreement]." *Id.* The 2017 Declaration further states that "GIRoA covenants that it has the legal authority over the [L]and necessary to effect this agreement and authorization." *Id.* It also states that "[a]ny and all claims made against the Camp Dhalke and FOB Shank land or regarding the ownership of this [L]and are the responsibility of GIRoA and shall be resolved in full by GIRoA." *Id.* On February 20, 2018, the Afghanistan Supreme Court issued a decision ("the 2018 Remand Decision") "repeal[ing]" the Afghan appellate court's 2015 decision and remanding the case. *Decision* at 7; *see* J.A. 1232–41.[4] In the 2018 Remand Decision, the Afghanistan Supreme Court determined that GIRoA "was not given the opportunity to prove [its] claims reflecting [the] fraudulent deed document" and that "th[e] case require[d] ... a thorough investigation." J.A. 1240. The Afghanistan Supreme Court referred the case to another Afghan court; the case later was transferred to the Special Appeals Court for Government Land Usurpation Cases ("Land Court"). *See* J.A. 1293, 1302, 1373.

On October 3, 2018, the GIRoA Ministry of Defense provided the United States with another declaration ("the 2018 Declaration") regarding ownership of the land on which FOB Shank and Camp Dhalke were located. *Decision* at 8; J.A. 1221. The 2018 Declaration stated:

> The Ministry of Defense (MoD) hereby declares, 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.

J.A. 1221.

On August 11, 2021, after a property investigation, the Land Court dismissed GIRoA's claim to the Land ("the 2021 Decision"). *Decision* at 8–9; J.A. 1305 ("unanimously dismiss[ing] the claim made by ... the [GIRoA] government representative"). The Land Court held that the claims made by GIRoA's attorney were "not verified" and ordered that GIRoA "shall not bother the [Lessors] and their attorneys from now on regarding the claimed property." J.A. 1305.

Shortly after the Land Court issued its 2021 Decision, the Taliban overthrew GIRoA. *See Decision* at 9 n.7. The fall of GIRoA raised questions about whether the Taliban would "implement judgments is-

4. The parties provided a different translation of the 2018 Remand Decision at J.A. 973–80. For purposes of this appeal, we see no meaningful difference between the provided translations. *Compare* J.A. 1240 (explaining the 2015 decision was "repealed"), *with* J.A. 979–80 (explaining the 2015 decision was "annulled"). Throughout this opinion, we cite to the translation provided at J.A. 1232–41.

sued by the courts of the previous administration," including the 2021 Decision. J.A. 2362. However, on February 15, 2022, the Afghanistan Supreme Court, under the new Taliban regime, issued an order—or "fatwa"[5] ("the 2022 Fatwa")—directing that the 2021 Decision "be implemented." J.A. 1596.

C.

We now turn to the procedural history before the Board. On April 13, 2018, the Lessors submitted to the U.S. Army Corps of Engineers a certified claim letter demanding approximately $28 million from the Corps for unpaid rent, interest, and deferred payment losses. *Decision* at 10; J.A. 38, 93, 112. On September 4, 2018, the Corps issued a contracting officer's final decision denying the claim. *Decision* at 10; J.A. 27–29. The Lessors appealed to the Board, J.A. 423, and then filed a five-count complaint. J.A. 428–47; *see also Decision* at 10.

On December 13, 2019, the U.S. government moved to dismiss on the ground that the Lessors' counsel had no authority to act on behalf of the Lessors. J.A. 537–48; *see also Decision* at 1. On July 21, 2021, the Board denied the U.S. government's first motion to dismiss based on that ground. *Decision* at 1; J.A. 1091–97.

On October 18, 2021, the U.S. government filed a second motion to dismiss and motion for judgment on the pleadings, arguing that the Lessors' claims were: (1) barred by the act of state doctrine; (2) unripe and not justiciable due to the ongoing judicial proceedings in the Afghanistan courts; and (3) inadequately pled. J.A. 1136–38; *see also* J.A. 1131–66. The parties submitted sur-replies, J.A. 1547–85, 2273–322, but the Board administrative judge did not hear oral argument on the government's motion. *See* J.A. 80–92.

On October 13, 2022, the Board issued its decision. *Decision* at 1–26. The Board converted the government's motion to dismiss for failure to state a claim to one for summary judgment "because the parties rel[ied] upon materials outside of the pleadings." *Id.* at 2. The Board then granted summary judgment in favor of the U.S. government on two grounds. *Id.*

First, the Board held that the Lessors "failed to raise a genuine issue of material fact suggesting that they owned the Land." *Id.* at 11. The Board "decline[d] to recognize" the 2021 Decision and 2022 Fatwa. *Id.* at 13; *see also id.* at 12–16. The Board treated the 2018 Remand Decision as a "final and conclusive judgment," *id.* at 17, entitled to recognition, and thus triggering issue preclusion. *Id.* at 16–19. The Board also found that "no reasonable factfinder" could rely on the Lessors' ownership documents because "the tax and water rights documents . . . were insufficient to cover the Land" and the "deed's handwriting differs from the handwriting on prior and subsequent deeds." *Id.* at 19.

Second, the Board held that "to provide [the Lessors] with the relief that they seek . . . would violate the act of state doctrine." *Id.* at 20. The Board reasoned that, in the 2017 and 2018 Declarations, GIRoA "ha[d] taken the official act within its territory of asserting its ownership of the Land," *id.* at 20, and that granting relief to the Lessors "would require [the Board] to declare invalid that GIRoA official act of asserting its ownership over the Land." *Id.* at 21.

The Lessors timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(10).

5. "A fatwa is a legal ruling or opinion given by a recognized authority on Islamic law." *Decision* at 10 n.8.

II. Standard of Review

[1, 2] "We review de novo the Board's conclusions of law, including grants of summary judgment, and the interpretation of a government contract." *Cooper/Ports Am., LLC v. Sec'y of Def.*, 959 F.3d 1373, 1377 (Fed. Cir. 2020) (internal quotation marks and citations omitted). "Summary judgment is appropriate when the record, when examined in a light most favorable to the non-movant, indicates that 'there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.' " *Ryste & Ricas, Inc. v. Harvey*, 477 F.3d 1337, 1340 (Fed. Cir. 2007) (quoting *Flexfab L.L.C. v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005)).

"[T]he decision of the [Board] on a question of fact is final and conclusive and may not be set aside unless the decision is—(A) fraudulent, arbitrary, or capricious; (B) so grossly erroneous as to necessarily imply bad faith; or (C) not supported by substantial evidence." 41 U.S.C. § 7107(b)(2)(A)–(C); *see also Boeing Co. v. Sec'y of Air Force*, 983 F.3d 1321, 1333 (Fed. Cir. 2020).

III. Discussion

Before this court, the Lessors argue that the Board erred in concluding that (1) the Lessors failed to raise a genuine issue of material fact regarding their ownership of the Land, *see* Appellants' Br. 19–20; *see also id.* at 23–46; and (2) the Lessors' contractual claims are barred by the act of state doctrine. *Id.* at 22; *see also id.* at 46–60. The U.S. government addresses the issues that the Lessors raise, Appellee's Br. 25–35, 38–43, but also argues that we should affirm the Board's grant of summary judgment because the Lessors cannot establish mutual intent to contract after 2009, *id.* at 15–19, and the Lessors' claims are espoused and extinguished, *id.* at 36; *see also id.* at 21–23, 35, 37–38. We address each argument in turn.

A.

The Lessors argue that the Board erred in granting summary judgment to the government because the Lessors raised genuine issues of material fact regarding ownership of the Land. *See* Appellants' Br. 23. First, the Lessors argue the U.S. government bore—and failed to carry—the burden of proving that the Lessors do not own the Land. *Id.* at 23–26. Second, the Lessors argue that the Board erred by not recognizing the 2021 Decision of the Land Court. *Id.* at 28–37. The Lessors argue that the 2021 Decision and 2022 Fatwa prove as a matter of law that the Lessors own the Land or, at minimum, raise genuine issues of material fact precluding granting summary judgment to the U.S. government on this issue. *Id.* at 26. Third, the Lessors argue that their deed, tax documents, and water-rights documents separately raise genuine issues of material fact and that the Board's refusal to credit these documents was improper. *Id.* at 38–45.

The U.S. government counters that the burden of proving land ownership should properly be on the Lessors as part of their burden to show a valid contract. Appellee's Br. 15–16. Regarding the genuine issues of material fact that the Lessors allege, the U.S. government primarily points back to the Board's findings. *See id.* at 38–43.

We agree with the Lessors that the Board erred in granting summary judgment to the government because the record before us, "when examined in a light most favorable to the non-movant," fails to show that "there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Ryste & Ricas*, 477 F.3d at 1340 (quoting *Flexfab*, 424 F.3d at 1259). We find the government's arguments to the contrary unpersuasive.

i.

[3, 4] We start with the burden of proof. We conclude that the Board did not err by placing the burden on the Lessors to show they owned the Land. As a practical matter, when "one party has superior access to the evidence needed to prove [a] fact[,] ... that party must bear the burdens of proof." 21B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5122 (2d ed. 2005). In this case, the Lessors are the purported landowners, and they reside in Afghanistan. As compared to the U.S. government, the Lessors have superior access to the evidence needed to prove their ownership of the Land, which is also located in Afghanistan. Accordingly, we decline to disturb the Board's placement of the burden of proof regarding ownership.

ii.

We next turn to the Lessors' contentions that the Board erred in not recognizing the 2021 Decision. This court has recognized that, "at least as of 2008, seven types of documents may serve as proof of land ownership" under GIRoA law, including "documents of a legal court." *Sharifi v. United States*, 987 F.3d 1063, 1068 (Fed. Cir. 2021). The Lessors seek to rely on the 2021 Decision to prove that they own the Land. *See, e.g.*, Appellants' Reply Br. 2. We do not decide whether the 2021 Decision conclusively proves ownership of the Land. However, we conclude that the Board erred in its non-recognition analysis and in resolving this issue at summary judgment.

[5] Ownership of the Land is a material fact question over which there is a genuine dispute. In the 2021 Decision, the Land Court found "the [L]and is privately-owned" by the individuals and residents of Abchakan Village and determined that the claims made by GIRoA's attorney were "not verified by the court." J.A. 1304–05. In resolving Land ownership at summary judgment, the Board based its decision in part on "exercis[ing] [its] discretionary power and declin[ing] to recognize [the 2021 Decision] under Restatement [(Fourth) of Foreign Relations Law of the United States ("Restatement")] § 484 [(2018)]." *Decision* at 13; *see also id.* at 12–14. But the Board erred in its analysis leading to its nonrecognition conclusion.

The Board relied on three of the nine discretionary grounds outlined in Restatement § 484, which states:

> To the extent provided by applicable law, a court in the United States need not recognize a judgment of a court of a foreign state if: (a) the party resisting recognition did not receive adequate notice of the proceeding in the foreign court in sufficient time to enable it to defend; ... (g) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; [or] (h) the specific proceeding in the foreign court leading to the judgment was not compatible with fundamental principles of fairness ....

The record here has not been developed sufficiently to support the Board's conclusion based on these grounds.[6]

First, the Board concluded GIRoA "did not receive notice of the proceedings in sufficient time to enable it to defend" its

6. The government failed to address these specific grounds on appeal. The government primarily argued that "[the Lessors] fail to persuasively explain how the 2018 Afghan Supreme Court decision [i.e., 2018 Remand Decision] could be reconciled with the subsequent Afghan court decisions [i.e., including the 2021 Decision]." Appellee's Br. 40. But for the reasons explained later in this opinion, the 2018 Remand Decision is not a final decision entitled to preclusive effect. *See infra* at 1311–12.

position before the Afghanistan court on remand following the 2018 Remand Decision and thus found that the Afghanistan court "failed to provide the GIRoA with notice and an opportunity to be heard." *Decision* at 13; *see also id.* at 9; Restatement § 484(a). But there is simply not enough evidence in the record before us to conclude as a matter of law that any notice or opportunity to be heard was lacking. The Board only cited a declaration from the government's expert, containing allegations made by a purported prosecutor for GIRoA, to support its lack of notice conclusion. *See Decision* at 9 (citing J.A. 1374 ¶ 17). When viewing the record in a light most favorable to the Lessors, we conclude that the Board prematurely decided a material factual question, adequacy of notice, that required further factual development.

Second, the Board failed to explain why the proceedings before the Land Court, which issued the 2021 Decision before the fall of GIRoA, were not "compatible with fundamental principles of fairness," Restatement § 484(h), beyond referencing these same "notice and opportunity to be heard" concerns. *Decision* at 13, *see also id.* at 12, 14. We are similarly unconvinced, without further development of the facts, that this ground applies or was appropriately resolved at summary judgment.

Third, the Board erred in concluding that the 2021 Decision "was rendered in circumstances that raise substantial doubts about the integrity of the rendering court with respect to the judgment," *Decision* at 13, because this ground of nonrecognition "requires a showing of corruption in the particular case that had an impact on the judgment rendered." Restatement § 484(g) cmt. i. The Board did not address the corruption requirement, and the government has not made such a showing of corruption. Accordingly, we conclude that the Board erred in its analysis of each of the Restatement § 484 grounds and thus erred by deciding at the summary judgment stage that the 2021 Decision was not entitled to recognition.

We do not decide whether the 2021 Decision conclusively proves ownership of the Land. Nor do we decide that the 2021 Decision was entitled to recognition as a foreign judgment. We conclude only that the Board erred in its analysis that led it to refuse to recognize the 2021 Decision and in resolving the Land ownership issue at the summary judgment stage.[7]

iii.

The Lessors identify three other types of documents that they allege raise genuine issues of material fact: a deed, water-rights documents, and tax documents. Appellants' Br. 38–39. The Board found that those documents do not raise genuine issues of material fact because (1) the 2018 Remand Decision was a final and conclusive judgment that created issue preclusion, *Decision* at 17; and (2) no reasonable factfinder could conclude that the documents establish that the Lessors owned the land, *id.* at 19. We conclude that the Board erred in both determinations.

[6] The 2018 Remand Decision is not "a final, conclusive, and enforceable judgment" entitled to preclusive effect. Restatement § 481 ("[A] final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States."); *see also* Restatement § 487 ("A foreign judgment entitled to recognition under [Restatement] § 481 is given the same preclusive

7. The Board also declined to recognize the 2022 Fatwa. *Decision* at 13. Because we find that the Board erred in granting summary judgment in light of the 2021 Decision, we do not need to separately address the 2022 Fatwa to decide this case.

effect by a court in the United States as the judgment of a sister State entitled to full faith and credit."). Issue preclusion only applies if the relevant issue was decided in a prior action that "has been finally adjudicated on the merits." *Jones v. United States*, 846 F.3d 1343, 1361 (Fed. Cir. 2017).

[7] The 2018 Remand Decision did not "finally adjudicate[ ] on the merits" the relevant issues. *Id.* In the 2018 Remand Decision, the Afghanistan Supreme Court remanded the case because it "require[d] further and a thorough investigation[;]" the lower court "had not considered" GIRoA's claim regarding the deed; and GIRoA had not been given an "opportunity to prove [its] claims" as to the allegedly fraudulent deed. J.A. 1240. These open issues show that the 2018 Remand Decision was not a final decision. There was no reason for the Board to consider the 2018 Remand Decision as "realistically . . . the final and conclusive recognizable decision on who owned the Land" due to the overthrow of GIRoA. *Decision* at 17 n.16. Moreover, the 2021 Decision, which was decided after the 2018 Remand Decision, found in favor of the other party. *See* J.A. 1304–05. While we do not expect to get another final decision from the Afghan court system due to the fall of GIRoA, neither the Board nor the government on appeal cites precedent requiring us to consider the 2018 Remand Decision final. At oral argument, the government's counsel conceded that "the 2018 [Remand] Decision is not final" and that issue preclusion does not apply. Oral Arg. at 27:37–27:58, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1523_07092024.mp3. In sum, the Board erred by giving the 2018 Remand Decision preclusive effect.

[8] The Board further erred by resolving material factual issues at the summary judgment stage relating to the deed, tax documents, and water rights documents provided by the Lessors. The 2021 Decision shows the Land Court received information indicating that the Lessors possess a deed to the Land. J.A. 1303 (2021 Decision referring to "legal deed no. 367, dated December 2, 1932[,] issued by Kulangar Court in Logar"). The Board found that "the Land deed's handwriting differs from the handwriting on prior and subsequent deeds, so the Land deed contains indicia of fraud." *Decision* at 19. In making this finding at summary judgment, the Board erred because determining whether the deed is fraudulent requires credibility determinations and weighing evidence, both of which are inappropriate during the consideration of a motion for summary judgment. *See, e.g.*, *Rorrer v. City of Stow*, 743 F.3d 1025, 1038 (6th Cir. 2014) ("Credibility judgments and weighing of the evidence are prohibited during the consideration of a motion for summary judgment; rather, the evidence should be viewed in the light most favorable to the non-moving party." (citation omitted)); *Nyari v. Napolitano*, 562 F.3d 916, 922 (8th Cir. 2009) ("It is well established that courts should neither weigh evidence nor make credibility determinations when ruling on a motion for summary judgment."); *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (explaining, in context of Fed. R. Civ. P. 56, that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial").[8] And even if the Board is correct that the "taxes and water rights evidenced in [the documents provid-

8. While the Board is not bound by the Federal Rules of Civil Procedure, Rule 7(c)(2) of the Armed Services Board of Contract Appeals states that ''the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance'' ''[i]n deciding motions for summary judgment.''

ed by the Lessors] were insufficient to cover the Land," *Decision* at 19, that also raises material factual issues—namely, what, if any, property rights the Lessors have that are relevant to the Land and what, if any, portion of the Land those rights cover.

When examining the record in a light most favorable to the non-movant, we conclude that the Board erred in determining that "the documents fail to raise a genuine issue of material fact suggesting that [the Lessors] owned the Land." *Id.* at 19. The evidence in this case, including but not limited to the 2021 Decision and the deed, would allow a reasonable factfinder to conclude that the Lessors owned the Land.

B.

The Lessors argue that the Board erred in granting summary judgment to the U.S. government under the act of state doctrine. Appellants' Br. 46. The Lessors argue that the Board's conclusion that granting relief to the Lessors would impermissibly invalidate the Declarations was wrong for four separate reasons, *id.* at 46–47: (1) the Declarations were not official sovereign acts, *id.* at 47–52; (2) granting the Lessors relief would not invalidate the Declarations, *id.* at 52–55; (3) the policies underlying the act of state doctrine weigh against applying the act of state doctrine here, *id.* at 55–58; and (4) even if the act of state doctrine applied here, it does not bar all the Lessors' claims, *id.* at 58–60.

The U.S. government contends that the act of state doctrine forecloses the Lessors' claims because "[t]he case unquestionably turns on the validity of the position taken by GIRoA in relations between it and the United States." Appellee's Br. 25. The U.S. government further argues that the Lessors cannot establish ownership of the land without the Board invalidating GIRoA's assertion that the land was public land. *Id.* at 28. In the U.S. government's view, GIRoA acted in its sovereign capacity when issuing the Declarations, and the Declarations formally added an area to the Bilateral Security Agreement's list of agreed facilities and areas. *Id.* at 30. The U.S. government also argues that none of the policies underlying the act of state doctrine weigh against applying the act of state doctrine in this case. *Id.* at 31.

[9, 10] "Under [the act of state] 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 . . . ." *Republic of Austria v. Altmann*, 541 U.S. 677, 700, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004); *see also* Restatement § 441. There is a factual predicate for the act of state doctrine to apply: the suit must "require[ ] the [c]ourt to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 405, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990) (quoting *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 62 L.Ed. 733 (1918)) (internal citation omitted).

In the Board's act of state doctrine analysis, *see Decision* at 19–25, the Board refers to various portions of the 2017 and 2018 Declarations and seems to imply the Declarations, in their entirety, are the requisite "official act[s] of a foreign sovereign." *W.S. Kirkpatrick*, 493 U.S. at 405, 110 S.Ct. 701. But the mere issuance of the Declarations is not in itself an act to which the act of state doctrine applies. The Board relies on three potential sovereign acts in the Declarations: (1) GIRoA's statements regarding land ownership; (2) the purported waiver [9] of GIRoA's citizens'

9. The Board referred to "GIRoA's official act of waiving its citizens' claims against the

claims against the United States related to the Land; and (3) the expansion of the Bilateral Security Agreement to include Camp Dhalke and FOB Shank as an agreed facility. *See Decision* at 21, 19–20, 22–25. We conclude that the Board erred by determining at the summary judgment stage that any of these potential acts triggers the act of state doctrine.

[11, 12] First, the Declarations' statements of land ownership were not official sovereign acts to which the act of state doctrine applies. The act of state doctrine "is typically applied to tangible acts, like the expropriation of property." *PNC Fin. Servs. Grp., Inc. v. Comm'r*, 503 F.3d 119, 126 (D.C. Cir. 2007); *see also McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1073 (D.C. Cir. 2012). Here, the Board stated that "GIRoA has taken the official act within its territory of asserting its ownership of the Land." *Decision* at 20; *see also id.* at 21. But the Declarations do not take or expropriate the Land as an official act. *See* J.A. 1216, 1221–22. Instead, in the Declarations, GIRoA appears to have recognized that ownership was an ongoing controversy, as evidenced by GIRoA's "covenant[s]" and "promise[s]" to "take full responsibility of any and all land cla[i]ms made regarding ownership over" the Land. J.A. 1221; *see also* J.A. 1216 ("GIRoA *covenants* that it has the legal authority over the land necessary to effect this agreement and authorization." (emphasis added)). Such recognition of a controversy is not an official sovereign act that would need to be declared invalid for the Board to grant the Lessors' requested relief. Accordingly, the act of state doctrine does not apply to GIRoA's statements of land ownership in the Declarations.

[13] Second, any waiver of the Lessors' claims by GIRoA via the Declarations is not the kind of sovereign act to which the act of state doctrine applies. *Decision* at 20–21. The act of state doctrine relates to recognizing the validity of a foreign sovereign's "official act" "performed within [the sovereign's] own territory." Restatement § 441. The Supreme Court has explained that "[i]n every case in which [the Court] ha[s] held the act of state doctrine applicable, 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*, 493 U.S. at 405, 110 S.Ct. 701. Here, GIRoA assumed responsibility for resolving in full "[a]ny and all claims made against the Camp Dhalke and FOB Shank land or regarding the ownership of this land." J.A. 1216; J.A. 1221–22. Neither the Board nor the government has identified any precedent applying the act of state doctrine in such a situation. The cases that the Board cites are distinguishable and instead relate to waiver provisions in treaties. *See Decision* at 21 (first citing *S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473, 478–79 (1964); and then citing *Pauly v. United States*, 152 Ct. Cl. 838, 844 (1961)). The parties have identified no such waiver provisions applicable to the facts before us.

Additionally, our sister circuit has explained that "[a]lthough the Supreme Court has not defined the contours of the 'official action' requirement of the act of

United States related to the Land.'' *Decision* at 21. Though the Board used the term ''waive[r],'' *id.,* the Board appeared to be referring to GIRoA's covenant to ''take full responsibility of any and all land cla[i]ms made regarding ownership,'' J.A. 1221, and related statements in the Declarations. *See Decision* at 21. We do not decide here whether such covenants constitute a waiver of GIRoA's citizens' claims against the United States related to the Land. We merely use the term waiver as a shorthand to refer to the Declarations' provisions identified by the Board.

state doctrine, the courts of appeals have understood the concept as referring to conduct that is by nature distinctly sovereign, i.e., conduct that cannot be undertaken by a private individual or entity." *McKesson*, 672 F.3d at 1073. GIRoA's assumption of responsibility in the Declarations is not a distinctly sovereign act—instead, it is the type of assumption of responsibility that individuals or entities can undertake in their private capacity. *See* J.A. 1216 ("Any and all claims made against the Camp Dhalke and FOB Shank land or regarding the ownership of this land are the responsibility of GIRoA and shall be resolved in full by GIRoA."); J.A. 1221–22 (similar). Accordingly, we conclude that any waiver of the Lessors' claims or assumption of responsibility by GIRoA via the Declarations is not an official act for purposes of the act of state doctrine.

[14] Third, we agree with the U.S. government that the Declarations' expansion of the Bilateral Security Agreement to include Camp Dahlke and FOB Shank as agreed facilities, J.A. 1216, is an official act of GIRoA. Restatement § 441; *see* J.A. 1221 ("acknowledg[ing]" and "validat[ing]" the 2017 Declaration). But that does not end our inquiry. To prevail, the U.S. government must show that granting the Lessors' relief in this case would require the Board to declare invalid the Declarations' expansion of the Bilateral Security Agreement. *See W.S. Kirkpatrick*, 493 U.S. at 405, 110 S.Ct. 701. That is not the situation here. The Board could determine that the U.S. government was required to pay rent for the period for which relief was requested without concluding any part of the Declarations is invalid. Enforcing the U.S. government's obligation to pay rent for use of the Land would simply trigger GIRoA's promise to "accept[ ] full responsibility for any and all land claims that may arise over the use of [FOB Shank and Camp Dhalke]," as envisioned in the 2018 Declaration. J.A. 1221; *see also* J.A. 1216. Accordingly, granting the Lessors' requested relief would not require invalidating the Bilateral Security Agreement, the Declarations, or any other sovereign act. Here too, we conclude that granting the Lessors' relief would not violate the act of state doctrine.

Our conclusion that the act of state doctrine is not implicated by the facts of this case is further supported by the general principles underlying the doctrine. *See W.S. Kirkpatrick*, 493 U.S. at 409, 110 S.Ct. 701 (indicating that in considering whether the doctrine should be invoked, the policies underlying the act of state doctrine may be considered). GIRoA, the government which perpetrated the purported act of state, is no longer in existence. Therefore, there is no risk of imperiling the relationship between the United States government and GIRoA, nor is there any concern about undue interference with GIRoA's acts. *See, e.g.*, Restatement § 441 cmt. a (explaining the act of state doctrine reflects "considerations of international comity and a concern about undue interference with another sovereign's acts"). Any action of a tribunal in this country simply cannot interfere with GIRoA's acts going forward.

We conclude that the act of state doctrine does not bar the Lessors' request for relief. Accordingly, the Board erred in granting the government summary judgment under the act of state doctrine.[10]

10. Because we conclude that the Board erred in finding that the act of state doctrine bars the Lessors' request for relief, we need not address the Lessors' fourth argument—that even if the act of state doctrine applied, it does not bar all the Lessors' claims. Appellants' Br. 58–60.

C.

The U.S. government raises two additional issues that it argues provide sufficient grounds for affirmance: (1) the purported lack of mutuality of intent to contract between the Lessors and the U.S. Army Corps of Engineers, Appellee's Br. 15–19, and (2) GIRoA's purported espousal and extinguishment of the Lessors' claims against the United States related to the Land. *Id.* at 35–38; *see also id.* at 21–23. The Board did not rely on either ground as a basis for its decision, however, and so *SEC v. Chenery Corp.* bars us from affirming on those grounds. 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947).

[15–17] "It is 'a simple but fundamental rule of administrative law' that reviewing courts 'must judge the propriety of [agency] action solely by the grounds invoked by the agency.' " *Calcutt v. FDIC*, 598 U.S. 623, 624, 143 S.Ct. 1317, 215 L.Ed.2d 557 (2023) (alteration in original) (quoting *Chenery*, 332 U.S. at 196, 67 S.Ct. 1760). "[A]n agency's discretionary order [may] be upheld," in other words, only "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). The Supreme Court has recognized an exception to *Chenery* in narrow circumstances "where '[t]here is not the slightest uncertainty as to the outcome' of the agency's proceedings on remand," *Calcutt*, 598 U.S. at 630, 143 S.Ct. 1317 (alteration in original) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 n.6, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) (plurality opinion)), such as "[w]here the agency 'was *required*' to take a particular action." *Id.* (quoting *Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 544–45, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008)).

[18, 19] The U.S. government argues that the Lessors cannot establish mutual intent to contract after 2009 and that should conclude the appeal. Appellee's Br. 15. But the Board did not invoke that ground as a basis for its decision. The Board's decision addressed mutuality of intent to contract only in the context of the land ownership dispute. *See Decision* at 11. The Board did not invoke the U.S. government's intent to contract, or anything about intent to contract post-2009, as the basis for any part of its decision. Accordingly, we cannot affirm the Board's decision on that ground unless a *Chenery* exception applies. *See Calcutt*, 598 U.S. at 630, 143 S.Ct. 1317. The U.S. government has not argued for the application of an exception, nor do we see one that is applicable. Because the Board was not required to make any particular decision about the U.S. government's post-2009 intent to contract and the facts presented in this case do not meet the high bar of showing "there is not the slightest uncertainty as to the outcome of the agency's proceedings on remand," we conclude that the government's alternative ground for affirmance is barred by *Chenery*. *Id.* (quoting *NLRB*, 394 U.S. at 767 n.6, 89 S.Ct. 1426) (cleaned up).

[20–22] We also cannot affirm the Board's judgment based on the government's newly raised espousal and extinguishment ground. Espousal occurs when one sovereign "assert[s] the private claims of its nationals against another sovereign." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984). "Once it has espoused a claim, the sovereign has wide-ranging discretion in disposing of [the espoused claim]," including "waiv[ing] it entirely"—in other words, extinguishing the claim. *Id.* Here, the government argues that in the 2017 and 2018 Declarations, "GIRoA espoused

the claims of [the Lessors] and extinguished them as against the United States" "[b]y 'accepting for resolution any such land claims filed against the United States.' " Appellee's Br. 37 (quoting J.A. 1221).

[23] But the U.S. government's argument fails because the Board relied on the act of state doctrine, not espousal or extinguishment, as a ground for its decision. *See Decision* at 19–25. The parties agree espousal and extinguishment is an "independent defense" from the act of state doctrine. Appellee's Br. 36; *see also* Appellants' Reply Br. 26. The U.S. government relies on the Board's analysis relating to the Declarations' purported waiver provision, which "accept[s] for resolution any such land claims filed against the United States Government," J.A. 1221—but that analysis was only made relating to the act of state doctrine. *See Decision* at 21. In fact, the Board did not mention espousal in its decision, nor do the cases cited by the Board in its waiver provision analysis refer to espousal. *Id.* (first citing *S.N.T.*, 166 Ct. Cl. at 478–79; then citing *Pauly*, 152 Ct. Cl. at 844). The government also does not argue where it has raised the issue of espousal to the Board. No *Chenery* exception applies, and we are barred from affirming the Board's decision based on this belatedly raised ground. It is for the Board, not this court, to decide in the first instance whether there is espousal and extinguishment in this case.

Accordingly, we decline to address the merits of the U.S. government's arguments based on the alleged alternative grounds for affirmance.

IV. Conclusion

We have considered the U.S. government's remaining arguments and find them unpersuasive. We vacate the Board's grant of summary judgment in the U.S. government's favor and remand to the Board for further proceedings consistent with this opinion.

VACATED AND REMANDED

Costs

Costs awarded to the Lessors.

IN RE: VETEMENTS GROUP AG, Appellant

2023-2050, 2023-2051

United States Court of Appeals, Federal Circuit.

Decided: May 21, 2025

Background: Trademark applicant appealed decision of the United States Patent and Trademark Office Trademark Trial and Appeal Board, which affirmed examining attorney's refusal to register proposed marks after applying foreign equivalents doctrine and concluding that proposed marks were generic and merely descriptive without acquired distinctiveness.

Holdings: The Court of Appeals, Wallach, Circuit Judge, held that:

(1) Board properly considered proposed marks under doctrine of foreign equivalents, and

(2) Board did not err in concluding that, as translated under doctrine of foreign equivalents, proposed marks were generic and unregistrable.

Affirmed.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

LESSORS OF ABCHAKAN VILLAGE, LOGAR PROVINCE, AFGHANISTAN,
Appellants

v.

SECRETARY OF DEFENSE,
Appellee

2023-1523

Appeal from the Armed Services Board of Contract Appeals in No. 61787, Administrative Judge J. Reid Prouty, Administrative Judge James R. Sweet, Administrative Judge Richard Shackleford.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*,[1] and MAZZANT, *Chief District Judge.*[2]

PER CURIAM.

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[1] Circuit Judge Newman did not participate.

[2] Honorable Amos Mazzant, Chief District Judge, United States District Court for the Eastern District of Texas, sitting by designation, participate only in the decision on the petition for panel rehearing.

O R D E R

The Secretary of Defense filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Lessors of Abchakan Village, Logar Province, Afghanistan. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

November 25, 2025
Date

Jarrett B. Perlow
Clerk of Court

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.*	)	

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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 (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 (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.

[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