10.A.1, (22)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY VON DARDEL, et al.,

Plaintiffs,

v.

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

Civil Action No. 84-0353 (BDP)

REPLY OF THE UNITED STATES OF AMERICA TO PLAINTIFFS' RESPONSE TO THE STATEMENT OF INTEREST OF THE UNITED STATES

STATEMENT

Plaintiffs' Opposition to the Motion of the Union of Soviet Socialist Republics for Relief From Judgment by Default and for Dismissal and Response to the Statement of Interest of the United States of America Dated June 29, 1989 (hereinafter "Plaintiffs' Response") raises only two new issues relating to the interpretation of the Foreign Sovereign Immunities Act ("FSIA") not previously addressed at length in our June 29, 1989 Statement of Interest.

First, plaintiffs contend that the United States failed to demonstrate by affidavit or other evidence how this case implicates its foreign policy interests. As discussed in Section I, infra, no such requirement exists. Indeed, one of Congress' primary objectives in enacting the FSIA was to transfer the responsibility of making immunity determinations from the Department of State to the courts.

Nevertheless, plaintiffs' position overlooks the lengthy and successful negotiations the United States government has conducted in an effort to persuade the Soviet Union to appear in this case. In this context the United States has self-evident foreign policy interests in permitting the Soviet Union to have its jurisdictional defenses decided by this Court. Although by no means required, to underscore these interests, we attach hereto the Declaration of Abraham D. Sofaer, the Legal Adviser of the Department of State, who details the nature and progress of these negotiations which culminated in the Soviet Union's appearance in this case, and the Declaration of Curtis W. Kamman, the Deputy Assistant Secretary of State for European and Canadian Affairs, who discusses the broader foreign policy implications of this suit.

Second, plaintiffs revive their argument that this Court has jurisdiction over this case pursuant to the non-commercial tort exception of the FSIA, 28 U.S.C. § 1605(a)(5). This Court has already implicitly rejected this basis of jurisdiction. Von Dardel v. USSR, 623 F. Supp. 246, 251 (D.D.C. 1985). Indeed, as discussed in Section II, infra, § 1605(a)(5) is inapplicable to this case. Consequently, plaintiffs' renewed attempt to obtain discovery of documents asserted to be relevant to this basis of jurisdiction should be rejected.

DISCUSSION

I. THE FOREIGN POLICY INTERESTS OF THE UNITED STATES SUPPORT PERMITTING THE SOVIET UNION TO PRESENT ITS JURISDICTIONAL DEFENSES.

Plaintiffs suggest that the United States has failed to demonstrate that it has any concrete foreign policy interests in this case, noting that it did not submit an affidavit or evidence outlining such interests. Plaintiffs' Response at 17. Of course, the United States' decision to furnish such an affidavit in Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987), does not bind it to provide similar documents in each FSIA case in which it participates. Nor do plaintiffs explain the significance of their argument even if it is accepted by the Court.

Although a discussion of United States foreign policy interests may provide useful background in a case such as this, Congress plainly wanted to break from the practice by which sovereign immunity determinations were made prior to the enactment of the FSIA in 1976:

> . . . in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by "suggestions of immunity" from the State Department. As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.

Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983) (footnote omitted). Congress enacted the FSIA in part to

free the State Department from these pressures and to transfer immunity determinations from the State Department to the courts, which would apply impartial legal principles. H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 7, reprinted in 1976 U.S. Code Cong. & Admin. News at 6606 (hereinafter "H. R. Rep. No. 94-1487"). Neither the text, purpose, nor legislative history of the FSIA suggest any requirement that the United States must present an affidavit or evidence detailing its foreign policy interests in those cases brought against foreign sovereigns in which it participates pursuant to 28 U.S.C. § 517.

The foreign policy interests of the United States in this case are not difficult to discern. As described in the Declarations of Legal Adviser Sofaer, and Deputy Assistant Secretary Kamman, the United States and the Soviet Union have regarded lawsuits against the USSR and its strict adherence to a principle of absolute sovereign immunity to be a sufficiently important issue in bilateral relations to warrant several meetings with the Soviets, both in Washington and Moscow, since 1985. Recognizing that the American legal system is too complex even for many Americans to comprehend, it required great care and patience by representatives of the Departments of State and Justice to explain to the Soviets principles of American legal procedure and the substance of American sovereign immunity law. Among other things, these representatives explained the somewhat counterintuitive notion that a foreign sovereign could appear to assert immunity without waiving it. Sofaer Decl. ¶¶ 5, 7-8.

These diplomatic efforts met with partial success when the Soviet Union agreed to appear in cases involving their commercial activities to which American law does not generally extend sovereign immunity. Sofaer Decl. ¶ 5; see Carl Marks & Co. v. USSR, 665 F. Supp. 323 (S.D.N.Y. 1987), aff'd, 841 F.2d 265 (2d Cir.), cert. denied, 108 S.Ct. 2874 (1988); Gregorian v. Izvestia, 658 F. Supp. 1224 (C.D. Cal. 1987), aff'd in part and rev'd in part, 871 F.2d 1515 (9th Cir. 1989). The Soviet Union refused to appear in this case because it believed that what it considered political rather than commercial matters should not be subject to foreign judicial process. Sofaer Decl. ¶¶ 5, 7-8. Ultimately, after additional rounds of consultations, U.S. and Soviet representatives negotiated a Memorandum of Understanding which undoubtedly played a part in bringing about the Soviet Union's appearance in this suit. Id. ¶¶ 9-10; Kamman Decl. ¶ 4C.

After years of negotiations with the Soviet Union, the United States has an obvious foreign policy interest in this Court permitting the Soviet Union to be heard on its jurisdictional defenses. This is the first case relating to political rather than commercial activities in which the Soviet Union has appeared in United States courts. Sofaer Decl. ¶ 11. This indicates the Soviet Union's willingness to regularize its legal activities in the United States, id, and to remove an irritant in our bilateral relations. Kamman Decl. ¶ 5. We believe that courts should be sensitive to this diplomatic background when, for example, rendering, discretionary rulings on

procedural issues raised in litigation involving the Soviet Union. We do not seek any favortism toward the Soviet Union, but rather a fair hearing on the merits of their arguments now that they have agreed to make those arguments before this Court.

Plaintiffs ask this Court to nullify the progress made and agreement reached in these delicate, lengthy and ultimately successful negotiations by exercising its discretion to find the Soviet Union's Rule 60(b)(4) motion untimely. The foreign policy interests of the United States would not be served if successful diplomatic efforts to persuade the Soviet Union to appear in this case resulted in an American court's determination that these negotiations lasted too long to permit the Soviet Union to present its jurisdictional defenses. See Kamman Decl. ¶ 6. The conduct of significant bilateral negotiations between the United States and a foreign sovereign should not be among those "exceptional circumstances", if any exist, which warrant a judicial determination that the sovereign's Rule 60(b)(4) motion is untimely. See Adams v. Vance, 570 F.2d 950, 954-55 (D.C. Cir. 1978) ("Courts must take into account that international negotiations have their own distinctive time frames.").

Apart from the foreign policy implications of their argument, plaintiffs' assertion that defendant's Rule 60(b)(4) motion is untimely is unsupported in the case law. Plaintiffs acknowledge that "federal courts do not ordinarily deny a Rule 60(b) motion for lack of timeliness," but contend that they may do so in "extreme circumstances." Plaintiffs' Response at 22.

The two cases cited in support of the proposition that this case presents such an "extreme circumstance" are readily distinguishable.[1]

Furthermore, plaintiffs' reliance on Practical Concepts to argue that Rule 60(b)(4) motions are untimely if filed after a plaintiff attempts to enforce a judgment, Plaintiffs' Response at 23-24, is misplaced.[2] In Practical Concepts, the Court expressly affirmed the district court's ruling that the sovereign defendant could "wait[] until after execution of the judgment was under way to raise its jurisdictional point . . ." Practical Concepts, 811 F.2d at 1548 (emphasis added). In so doing, the Court rejected plaintiff's argument, also advanced by plaintiffs here, that,

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[1] Action S.A. v. Marc Rich & Co., 83 Civ. 0512 (S.D.N.Y. July 14, 1989) (LEXIS, Genfed library, Courts file), which did not involve a sovereign defendant, turned on the Court's unsupported view that the defendant was obliged to assert his jurisdictional defenses by motion or in its answer. That rule is not applicable in FSIA cases. See Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1547 (D.C. Cir. 1987), citing Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982) ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."). In International Control Corp. v. Vesco, 73 Civ. 2518 (S.D.N.Y. Feb. 1, 1978) (LEXIS, Genfed library, Courts file), another case involving a private, rather than sovereign, defendant and involving allegedly insufficient service of process rather than subject matter jurisdiction, the Court noted both defendant's previous challenges to service and failure to raise it in an earlier Rule 60(b) motion. The Court, further, did not rely on these grounds alone to deny defendant's Rule 60(b) motion. Such circumstances are clearly not present in this case.

[2] Even if such a rule existed, it is not at all clear that it would apply to this case. First, plaintiffs have not attempted to enforce on the monetary judgment rendered in this case. Second, although plaintiffs have moved for civil contempt fines against the Soviet Union, their motion has not been decided much less granted and, therefore, is not ripe for enforcement.

because the sovereign defendant had deliberately bypassed numerous opportunities to challenge jurisdiction, its Rule 60(b) motion must be denied. Id. at 1546. Plaintiffs' argument should be similarly rejected.[3]

Finally, plaintiffs argue that granting defendant's Rule 60(b)(4) motion would prejudice them because it would prolong Mr. Wallenberg's imprisonment. Plaintiffs' Response at 25. This argument, based on an unproven factual assumption, is nothing more than a claim that laches bars the Soviet Union's Rule 60(b)(4) motion, an argument that has been rejected in this circuit. Austin v. Smith, 312 F.2d 337, 343 (D.C. Cir. 1962); Practical Concepts, 613 F. Supp. at 866.[4] Therefore, both foreign policy considerations and the unambiguous case law

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[3] First Fidelity Bank, N.A. v. Government of Antigua & Barbuda, No. 88-7863, slip op. (2d Cir., June 7, 1989) (LEXIS Genfed library, Courts file), also cited by plaintiffs, supports defendant's position. The Court in First Fidelity noted that "default judgments are disfavored, especially against foreign sovereigns. Courts go to great lengths to avoid default judgments against foreign sovereigns or to permit those judgments to be set aside." Id. at 21. Accordingly, it vacated a default judgment entered against the defendant after the plaintiff had succeeded in part in levying upon the defendant's bank accounts. The Court did observe that defendant had appeared in the case only after plaintiff began to execute on its judgment, but nevertheless vacated the default judgment, holding that defendant "should have an opportunity to defend this case on its merits." Id. at 22.

[4] Citing the House Report on the FSIA, plaintiffs also suggest that granting the Rule 60(b)(4) motion would contravene the intent of Congress that "sovereign immunity is an affirmative defense that must be specially pleaded in a timely manner." Plaintiffs' Response at 25. The portion of the House Report cited by plaintiffs supports the first assertion, but not the second. The House Report does not state that the affirmative defense must be pleaded within any particular time. See H. R. Rep. No. 94-1487.

support affording the Soviet Union the opportunity to present its jurisdictional defenses.

II. BECAUSE THE NON-COMMERCIAL TORT EXCEPTION TO IMMUNITY IS INAPPLICABLE, PLAINTIFFS ARE NOT ENTITLED TO DISCOVERY RELATING TO THIS JURISDICTIONAL CLAIM.

Plaintiffs argue that the Soviet Union committed non-commercial torts within the meaning of 28 U.S.C. § 1605(a)(5) and is therefore not entitled to sovereign immunity. Plaintiffs' Response at 59-64. This Court has implicitly rejected this argument by describing plaintiffs' other jurisdictional arguments as "far more compelling" and by not discussing the § 1605(a)(5) argument further. Von Dardel, 623 F. Supp. at 251. Nevertheless, plaintiffs renew the argument here and seek to take discovery of essentially all documents in defendant's possession which have anything to do with Mr. Wallenberg in the hope that any such existing records will support this jurisdictional claim.

Section 1605(a)(5) creates an exception to sovereign immunity for cases brought against foreign states for "personal injury or death, or damage to or loss of property, occurring in the United States . . ." (emphasis added). Citing Argentine Republic v. Amerada Hess, 109 S.Ct. 683 (1989), plaintiffs correctly observe that § 1605(a)(5) requires the injury to have occurred in the United States. Plaintiffs' Response at 60-61. Because the tort and injury occurred in the same place at the same time outside the United States in Amerada Hess, the Court did not have occasion to discuss whether the tort itself must

also occur in the United States. The legislative history, however, clearly indicates that it does:

> Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state . . . ; the tortious act or omission must occur within the jurisdiction of the United States . . .

H. R. Rep. No. 94-1487 at 20-21. See Frolova v. USSR, 761 F.2d 370, 379 (7th Cir. 1985) (both the tort and the injury must occur within the United States); Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524 (D.C. Cir. 1984) (same), cert. denied, 470 U.S. 1051 (1985); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842-43 (D.C. Cir.) (same), cert. denied, 469 U.S. 881 (1984); English v. Thorne, 676 F. Supp. 761, 764 (S.D. Miss. 1987) (same); Kline v. Republic of El Salvador, 603 F. Supp. 1313, 1315-16 (D.D.C. 1985) (same). See also Perez v. The Bahamas, 652 F.2d 186, 189 (D.C. Cir.) (tort suit against the Bahamas dismissed because tort did not occur in the United States), cert. denied, 454 U.S. 865 (1981).

Neither the tortious activity nor the injuries alleged in plaintiffs' Complaint occurred within the United States. The gravamen of plaintiffs' Complaint challenges the "unlawful seizure and detention and possible wrongful death" of Mr. Wallenberg. Complaint, ¶ 1. Plaintiffs do claim that the Soviet Union has issued false statements about Mr. Wallenberg and has

refused to provide information about him, thereby deceiving persons in the United States, Complaint, ¶ 16, but these allegations, even if true, are insufficient to afford this Court jurisdiction under § 1605(a)(5).

First, 28 U.S.C. § 1605(a)(5)(B) provides that the non-commercial tort exception to immunity does not apply to claims arising out of misrepresentation and deceit. The detention of Mr. Wallenberg and the alleged misrepresentations regarding the circumstances of his imprisonment are both temporally and conceptually distinct tortious acts. Under § 1605(a)(5)(B), Congress provided the Soviet Union with immunity from claims of misrepresentation or deceit, no matter how egregious, even if such acts occurred in the United States.

Second, even if the clear distinction between the detention and later misrepresentations are blurred and are considered a "tortious whole," § 1605(a)(5) does not apply. It is the law of this circuit that § 1605(a)(5) only applies when "the tort in whole . . . occur[s] in the United States." Asociacion de Reclamantes, 735 F.2d at 1525 (quoting In re Sedco, Inc., 543 F. Supp. 561, 567 (S.D. Tex. 1982)). As the court explained:

> The primary purpose of the "tortious act or omission" exception of § 1605(a)(5) was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business. We decline to convert this into a broad exception for all alleged torts that have some relationship to the United States.

Id. at 1523 (citations omitted).[5] Neither all, nor even the "essential locus," id. at 1523, of the tortious conduct challenged by plaintiff occurred in the United States.[6]

Even if plaintiffs' factual allegations are true, they have failed to allege that both the alleged torts as a whole and the subsequent injuries occurred within the United States. Therefore, the non-commercial tort exception to sovereign immunity set forth in § 1605(a)(5) does not apply to this case.

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[5] Olsen by Sheldon v. Government of Mexico, 729 F.2d 641, 645-46 (9th Cir.), cert. denied, 469 U.S. 917 (1984), is distinguishable. In Olsen, unlike this case, plaintiffs alleged "conduct constituting a single tort," id. at 646 -- the negligent piloting of an airplane -- which occurred both in the United States and Mexico. Because sufficient, although not all, of the tortious conduct occurred in the United States, the Court found § 1605(a)(5) to apply. The Court observed that if every aspect of the tortious behavior had to occur within the United States for § 1605(a)(5) to apply, then foreign sovereigns would escape liability by alleging that some of the alleged conduct occurred outside the United States. Id. Here, plaintiffs alleged separate torts - false imprisonment and possibly wrongful death and misrepresentation. To accept plaintiffs' view that these torts are part of a single whole implicates the inverse of the policy concern identified in Olsen. If only some conduct within such a single tort need occur in the United States for § 1605(a)(5) to apply, then plaintiffs need only allege conceptually and temporally distinct torts, most of which occur abroad, as a single tort to fall within § 1605(a)(5). Congress clearly did not contemplate such a result.

[6] Neither plaintiffs, who are Swedish citizens, nor Mr. Wallenberg are alleged to have suffered any injuries within the United States. Paragraphs 31 and 32 of the Complaint allege that plaintiff von Dardel and other friends and relatives of Mr. Wallenberg, some of whom live in the United States, have been separated from Mr. Wallenberg, have been denied information about him and have therefore suffered emotional distress. Even if true, no such resident of the United States is a plaintiff in this action insofar as we aware. Plaintiffs have no standing to assert the claims and injuries of these third parties. Warth v. Seldin, 422 U.S. 490, 499, 509 (1975); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972).

As a result, this Court should reject plaintiffs' renewed effort to take discovery on this jurisdictional issue. Plaintiffs' Response at 26-28.[7]

Intrusive discovery requests, such as that propounded by plaintiffs here, are conceptually inconsistent with the notion of sovereign immunity, and are profoundly obstructive of the capacity of the United States to convince foreign sovereigns to submit to the jurisdiction of U.S. courts. To require a sovereign defendant to respond to such requests pending a resolution of sovereign immunity issues serves only to discourage foreign states from participating in domestic litigation. Sofaer Decl. ¶ 13. This tends to deprive plaintiffs with meritorious claims of recoveries they would obtain from more willing participation of foreign sovereigns. Special care must therefore be taken in monitoring discovery requests served on foreign states. Although foreign states should not be exempted from discovery obligations, they should not be compelled to respond to discovery unless and until the court determines that a valid

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[7] Plaintiff apparently served a "Request for Production of Documents on Jurisdictional Issues" on the defendant on or about February 2, 1984. This request goes far beyond any attempt to uncover facts relating to any tortious conduct occurring in the United States. Rather, taken as a whole, plaintiffs seek virtually every conceivable document possessed by the Soviet Union relating to Mr. Wallenberg. To permit plaintiffs to proceed with this discovery while reassessing the jurisdictional basis for this lawsuit would be to award prematurely plaintiffs' Relief No. C of their Complaint -- an order requiring defendant to furnish plaintiffs all information in its possession concerning Raoul Wallenberg.

legal claim has been pleaded against them and that the court has jurisdiction over the state. See Sofaer Decl. ¶ 13.

Here, no amount of discovery can avoid the reality that little or no portion of the tortious conduct challenged by plaintiff occurred in the United States and that plaintiffs have suffered no injury in the United States. No legal theory or set of facts conceivably uncovered in discovery can support plaintiffs' claim of jurisdiction under § 1605(a)(5). Therefore, plaintiffs are not entitled to take discovery relating to this jurisdictional issue. See Grove Valve & Regulator Co. v. Iranian Oil Services, Ltd., 87 F.R.D. 93, 96 & n.8 (S.D.N.Y. 1980); Lantz International Corp. v. Industria Termotecnica Compana, 358 F. Supp. 510, 516 (E.D. Pa. 1973). Not only is such discovery in this case unnecessary, but requiring the Soviet Union to respond to it could significantly complicate relations between the Soviet Union and the United States and undermine the purposes of the FSIA. See Sofaer Decl. ¶ 13. Plaintiffs' renewed request for discovery should be denied.

CONCLUSION

For the reasons set forth in our June 29, 1989 Statement of Interest and the foregoing, this Court should set aside the default judgment entered against the Soviet Union and dismiss this case for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply of the United States of America to Plaintiffs' Response to the Statement of Interest of the United States was, this 31st day of June, 1989, served by first class mail, postage prepaid, on:

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JEFFREY S. GUTMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY VON DARDEL, Plaintiff, v. UNION OF SOVIET SOCIALIST REPUBLICS, Defendant.	)	Civil Action No. 84-0353

DECLARATION OF ABRAHAM D. SOFAER

Declaration of Abraham D. Sofaer

I, Abraham D. Sofaer, hereby declare pursuant to 28 U.S.C. section 1746 as follows:

1. I am the Legal Adviser of the Department of State. I have served in this capacity since June 10, 1985. I submit this declaration to advise the court of communications between the United States and the Soviet Union regarding the Von Dardel case. I understand that Deputy Assistant Secretary for European and Canadian Affairs Curtis W. Kamman is also submitting a declaration (hereinafter "Kamman Declaration") in these proceedings in which he addresses the foreign policy implications of these lawsuits. My declaration is based on my personal knowledge and recollections and on information provided to me in my official capacity.

2. My responsibilities as Legal Adviser include the formulation and implementation of United States Government policy with respect to the sovereign immunity of states. It is the policy of the United States to encourage foreign governments to present their views concerning litigation against them in United States courts directly to those courts, in accordance with United States law. Considerable barriers

still exist to implementing this policy. Many governments continue to adhere to the absolute theory of sovereign immunity, which until recent years was the established position in international practice. These states believe that they have no obligation to appear in the courts of another state, even to invoke that immunity, and they extend the same, absolute immunity to states from the actions of their own courts. Many foreign governments simply do not understand the United States legal system. Many are intimidated by the expense and complexity of litigation in United States courts. Suits against such foreign governments in United States courts -- and default judgments that result from their failure to appear -- have repeatedly become major issues in bilateral relations. As a result, I am often involved, along with my staff, in consultations with other governments in efforts to explain to them the operation of our judicial system and of the United States Foreign Sovereign Immunities Act ("FSIA"). My purpose in all these instances is to urge these foreign governments to appear in cases brought against them in United States courts, to raise their defenses, including defenses of immunity, and to trust our courts to be fair, and to abide by the judgments that result.

3. The Soviet Union has long held and asserted the principle that it and its agencies and instrumentalities are entitled under international law to absolute immunity from the

jurisdiction of foreign courts and cannot properly be compelled to appear in foreign courts. Soviet domestic law and practice regarding actions against foreign states in Soviet courts also follow this principle. Soviet law grants absolute immunity to all foreign states and their instrumentalities, although the applicable statute provides for reciprocal denial of immunity if another state fails to accord similar treatment to the Soviet Union. In the context of this litigation, the Soviet view has been repeated frequently by Soviet officials to Department representatives, and has been stated in Soviet diplomatic notes. The Soviet Note of April 19, 1984 (Kamman Declaration, Attachment 2), returning the notice and summons in this case, stated "the fact that in accordance with the principle of sovereign equality of states, consolidated in the UN Charter, the Soviet state and its organs enjoy immunity from jurisdiction of foreign courts." The Soviet note of March 6, 1986 (Kamman Declaration, Attachment 4), protesting the entry of the default judgment in this case, stressed that "[t]he American authorities should realize that this and other decisions of the U.S. courts against the U.S.S.R. are inadmissible in relations between states," and that "in accordance with the universally recognized principle of the sovereign equality of states, confirmed by the UN Charter, the Soviet state and its organs enjoy immunity from the jurisdiction of foreign courts and therefore cannot be brought

to court as a defendant without its clearly expressed consent." These statements, as well as other Soviet statements contained in diplomatic notes regarding these cases, reflect the Soviet Union's view that its claimed entitlement to absolute immunity relieves it of any obligation to appear in foreign courts even to invoke that immunity.

4. Department of State officials have met with Soviet representatives both in Washington and in Moscow on numerous occasions to explain United States requirements regarding litigation and to urge the Soviet Union to seek advice of private counsel concerning participation in or other means of resolving these and other lawsuits against it. Specifically, following the default judgment in October 1985, Department representatives, including members of my staff from the Office of the Legal Adviser, informed the Soviet government that a default judgment had been entered in this case. On May 23, 1986, Department representatives informed Soviet Embassy representatives that default judgments had been entered in several cases against the Soviet Union and its instrumentalities in U.S. courts, including this one. In particular, a default judgment was entered on July 31, 1985 in the case of Gregorian v. Izvestia, et. al, in the Central District of California; a default judgment was entered on March 31, 1986 in the case of Carl Marks v. Union of Soviet Socialist Republics, in the Southern District of New York; and a default

judgment was entered in this case on October 15, 1985. The Department representatives also explained requirements and procedures under United States law concerning attachment of property in execution of judgments, as well as those by which defendants may contest default judgments and attachment actions, and encouraged the Soviets to seek private legal advice concerning Soviet participation in, or resolution of, these cases within the United States legal system. These judgments were entered at a time of extreme sensitivity (and opportunity) in U.S. - Soviet relations.

5. On March 3-4, 1987, I headed a delegation of State and Justice Department officials that met in Moscow with a high-level Soviet delegation, with representatives from numerous agencies of the Soviet Government, to discuss questions of sovereign immunity. We discussed issues of principle, as well as specific cases against the Soviet Government and its agencies or instrumentalities in United States courts, including this case. During these discussions, we explained United States law concerning foreign sovereign immunity. We advised the Soviet Union that it could appear in United States courts to assert its immunity without either conceding its principled adherence to the absolute theory of sovereign immunity or waiving its claim to such immunity. We urged the Soviet Government to retain counsel and to appear in several cases against it in which it had not appeared,

including this case. We indicated that cases in which default judgments have been entered against foreign governments raise issues of the implementation of the FSIA that, wholly apart from the interests of the foreign government, are important to the United States Government. Such issues include the desirability that the court have all the facts and legal arguments before making its decisions. We also explained to the Soviet Union that the United States Government has filed statements of interest in appropriate cases brought under the FSIA in which a foreign state has moved to have a default judgment against it set aside. We advised the Soviets that we would be prepared to set forth our views concerning the FSIA in appropriate cases against the Soviet Union if the Soviet Union moved to set aside a default judgment against it. We also emphasized, however, the need for the Soviet Union to adopt a generally applicable policy of appearing in all suits in United States courts, even if only to assert immunity. Following these discussions, the Soviet Union agreed to appear to assert its claim to immunity in the Carl Marks and Gregorian cases. At that time, however, the Soviets made it clear that they would not appear in this case, as they viewed its allegations as political and governmental matters not subject to court jurisdiction. Finally, in continuation of our efforts to resolve this matter, we urged the Soviet Union to provide a full and satisfactory accounting of the fate of Mr.

Wallenberg.

6. This policy initiative to convince the Soviet Union to appear and litigate its jurisdictional and other claims in U.S. courts was openly avowed. On April 23, 1987, I addressed the Section on International Law and Practice of the American Bar Association in Washington, D.C. about the State Department's efforts to support effective implementation of the FSIA by educating foreign states about the law and by urging them to appear in our courts. In particular, I discussed the Department's efforts to encourage the Soviet Union to appear in the Gregorian and Carl Marks cases, noting the importance of the Soviet Union's decision to appear in both cases, and indicating our hope that these appearances would lead to a general practice in which the Soviets always appear. I pointed out the interest of the United States Government in resolving disputes between United States citizens and foreign governments within the framework of the United States legal system. I also discussed the fact that the success of our efforts to persuade foreign states to resolve their disputes within the framework of our legal system is undercut when foreign governments are faced with lawsuits that are not properly brought under the FSIA, including cases such as this one, which question the propriety of actions by the foreign government in its own territory and in its sovereign, rather than private, capacity.

7. On September 21-22, 1987, I headed a delegation of State and Justice Department officials that met in Washington, D.C. with a high-level Soviet delegation to continue the discussions held in Moscow in March on questions of sovereign immunity. In the course of these discussions, we reviewed specific cases against the Soviet Government and its agencies or instrumentalities in United States courts, including this case. We again advised the Soviet Union that it could appear in United States courts to assert its immunity without either conceding its principled adherence to the absolute theory of sovereign immunity or waiving its claim to such immunity, and we specifically urged the Soviet Government to retain counsel and to appear in this case. We also advised the Soviets that United States Government would be prepared to follow our practice of filing statements of interest in appropriate cases against foreign governments if the Soviet Union moved to set aside a default judgment against it. Again, as on each occasion that we have discussed this case with Soviet Union, we noted the United States' abhorrence of the Soviet Union's unjust treatment of Mr. Wallenberg, and urged them to account for his fate. The Soviets repeated their view that this was a very special, political case, unlike the other cases in which the Soviet Union had recently appeared, all of which involved commercial considerations of some kind. The Soviets repeated

and emphasized the views stated in their March 6, 1986 diplomatic note (Kamman Declaration, Attachment 4), which provided that the Soviet side did not recognize the District Court decision as legal because it violated the obligation to respect the sovereign immunity of the Soviet Union.

8. On July 18-19, 1988, I again headed a delegation of State and Justice Department officials that met in Moscow with a high-level Soviet delegation to continue to discuss foreign sovereign immunity. At this time, I repeated my advice that the Soviet Union seek counsel and appear in this case, and that such an appearance would neither concede its principled adherence to the absolute theory of sovereign immunity nor waive its claim to such immunity.

9. On November 18, 1988, I headed a delegation of State and Justice Department officials that met in Washington, D.C. with a high-level Soviet delegation to continue the discussions. At this meeting, the Head of the International Law Department at the Soviet Ministry of Foreign Affairs, Yuri Rybakov, and I signed a Memorandum of Understanding to record discussions and understandings on the subject of promoting mutual understanding in the legal sphere, including sovereign immunity (Kamman Declaration, Attachment 5). The Memorandum reviewed the three rounds of consultations. It noted that the United States and

Soviet delegations followed different theories of sovereign immunity and, in particular, that the Soviet Union adhered to the absolute immunity of foreign states from suit. The Memorandum also acknowledged that suits in the courts of one state against a foreign state may create difficulties and tensions, and agreed that better understanding of applicable procedures may serve to minimize potential problems stemming from suits against a foreign state. The two delegations agreed that appearances in court to assert sovereign immunity are not regarded as waivers of immunity and noted that the states would provide appropriate positions, consistent with their usual practice, to their courts on the application of their laws on sovereign immunity. The Memorandum closed by confirming the Parties' intention to continue periodic bilateral consultations on foreign sovereign immunity and legal proceedings in one state against another state. Once again, at this time, I expressed my view that it would be consistent with the measures set forth in this Memorandum of Understanding for the Soviet Union to appear through private counsel in this case, in order to assert the defense of foreign sovereign immunity.

10. Following the signing of this Memorandum of Understanding, the Department of State continued to discuss this litigation with the Soviets. In particular, Departmental personnel, including members of my staff from the Office of the Legal

Adviser, informed Soviet Embassy representatives in December 1988, and March 1989, of the plaintiffs' filing of additional pleadings in this case, and continued to urge the Soviet Union to seek advice of private counsel concerning participation in the lawsuit.

11. The Soviet Union has now engaged counsel and has appeared to assert appropriate defenses to set aside the default judgment in this case. This action represents the completion of the U.S. diplomatic objective of convincing the Soviet Union to litigate its immunity claims in U.S. courts in all cases. In accordance with our belief that this major shift in Soviet behavior and policy warrants the vacating of default judgments entered prior to our effort's commencement, the United States has filed a Statement of Interest providing its views on the jurisdictional issues presented by this case. The Plaintiffs' Statement in Opposition to the Soviet Union's Motion states that the U.S. Statement of Interest "neglects to mention any specific, concrete foreign policy concerns involving this particular case." To the contrary, this particular case involves very substantial and specific foreign policy concerns. To my knowledge, the Soviet appearance in this case is the second time that the Soviet Union has appeared in a United States court in a proceeding brought solely against the Soviet Government, and not against one of its agencies or

instrumentalities. More importantly, to my knowledge, this is the first time that the Soviet Union has appeared in a proceeding that relates solely to alleged governmental acts, unrelated in any way to a commercial undertaking or commercial considerations. The Soviet Union's appearance in this case indicates its intent to regularize its activities in the United States, and to participate in cases against it in United States courts. Such steps could lead to general policies that would greatly increase the likelihood that the Soviet Union, as well as persons who sue it, obtain decisions on the merits that are likely to resolve difficult disputes.

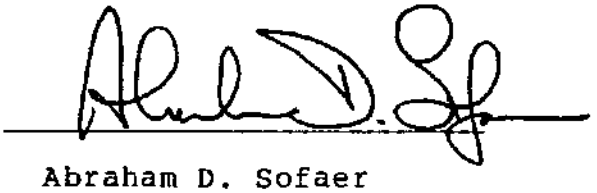
12. As the accompanying Kamman Declaration indicates, this case has become a significant issue in bilateral United States-Soviet relations. The United States Government has expended considerable effort to urge the Soviet Government to appear in this case and raise its defenses, including the contention that it is absolutely immune, before the court instead of through diplomatic channels. In light of the Soviet view of international law and Soviet domestic law, the Soviet Union's decisions to appear in these cases is a very important development in the process of adapting to United States procedures, including the FSIA. Against this background, I believe that United States interests would be served, as well as the interests of justice, if counsel for the Soviet

Government were permitted to make its arguments to the court.

13. The Plaintiffs' Statement in Opposition to the Soviet Union's motion also asserts that the plaintiffs are entitled to take discovery on jurisdictional issues at this time. However, the Soviet Union has raised several meritorious legal defenses which should dispose of this case in its entirety, rendering any discovery moot. If a foreign state is denied a determination that it is entitled to immunity until after it is first made to suffer the intrusion of discovery of facts not necessary to the determination of sovereign immunity, the immunity doctrine is gravely undermined. The liberal discovery afforded by the Federal Rules of Civil Procedure is often regarded by foreign governments as highly intrusive and as inconsistent with the concept of sovereign immunity. Where, as we believe to be the case here, the judgment involved is void for lack of jurisdiction on the face of the complaint, permitting discovery would be inconsistent with the sovereign immunity extended to the Soviet Union by U.S. and international law and could significantly complicate the relations between the Soviet Union and the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 28, 1989



Abraham D. Sofaer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY VON DARDEL, Plaintiff, v. UNION OF SOVIET SOCIALIST REPUBLICS, Defendant.	)	Civil Action No. 84-0353

DECLARATION OF CURTIS W. KAMMAN

Declaration of Curtis W. Kamman

I, Curtis W. Kamman, hereby declare pursuant to 28 U.S.C. §1746 as follows:

1. I am the Deputy Assistant Secretary of State for European and Canadian Affairs responsible for Eastern Europe, Yugoslavia and the Union of Soviet Socialist Republics. I have served in this capacity since June 5, 1989. Before that time, I served in several positions of responsibility for matters involving United States relations with the Soviet Union, including assignments as Deputy Chief of Mission, Political Counselor and Political Officer in the United States Embassy in Moscow.

2. I submit this declaration to advise the court of the views of the United States with respect to the foreign policy implications of this law suit. My declaration is based on my personal knowledge and recollections and on information provided to me in my official capacity. It is my understanding that the Department of State Legal Adviser Abraham D. Sofaer will also submit a declaration in these proceedings that describes communications that the United States Government has had with the Soviet Government regarding this case

(hereinafter, "Sofaer Declaration").

3. Maintaining a stable environment conducive to working with the Soviet Union across the range of our five-part agenda of regional matters, arms control, human rights and transnational and bilateral issues is a matter of the highest priority in United States foreign policy. The importance that the United States attributes to relations with the Soviet Union is evidenced by frequent meetings of senior United States and Soviet officials, including, most recently, the visit of Secretary of State Baker to Moscow, May 10 to 11, 1989. Accordingly, the United States Government has sought, to the extent possible, to regularize United States-Soviet bilateral relations so that individual issues can be addressed on their merits.

4. In an attempt to prevent litigation against the Soviet Union in U.S. courts from causing needless disruption to United States relations with the Soviet Union, the Department of State has had a number of diplomatic communications with that Government. The diplomatic notes exchanged between the United States Government and the Soviet Government are attached and briefly summarized below. Additional contacts between officials of the two governments are summarized in the Sofaer Declaration. These contacts, during which the United States and the Soviet Union set forth their disparate views on

sovereign immunity, have included the following:

A. In early 1984 plaintiffs requested routine assistance from the Department of State in transmitting the summons and complaint to the United States Embassy in Moscow for service on the Soviet Union pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601, et seq. ("FSIA"). In keeping with normal practice, the United States Embassy transmittal was accompanied by a diplomatic note of April 2, 1984 to the Soviet Ministry of Foreign Affairs, which stated that under United States law, neither the Embassy nor the Department of State was in a position to comment on the present suit and that any jurisdictional or other defenses, including claims of sovereign immunity, must be addressed to the court by the foreign state (Attachment 1). The note also referred to the possibility that a default judgment could be entered against a defendant who does not respond to a complaint and noted that for the purpose of asserting jurisdictional and other defenses it was advisable to consult a private attorney in the United States. On April 19, 1984, the Soviet Government rejected service by means of a diplomatic note, and returned the documents transmitted with the United States Embassy note (Attachment 2). The Soviet note also set forth, for the first time with regard to this case, the Soviet position claiming entitlement of the Soviet State

and its organs to immunity from the jurisdiction of foreign courts.

B. After the court granted the plaintiffs' motion for default judgment on October 15, 1985, and entered an amended judgment on November 7, 1985, the Department of State, at plaintiffs' request under the FSIA, transmitted the default judgment and amended judgment to the Soviet Ministry of Foreign Affairs by diplomatic note of January 22, 1986 (Attachment 3). That note again restated United States requirements regarding litigation. In its note of March 6, 1986, the Soviet Ministry of Foreign Affairs rejected service of the default and amended judgments (Attachment 4). The note again stated the Soviet Government's view that the Soviet State and its organs enjoy immunity from the jurisdiction of foreign courts and cannot be brought to court without clearly expressed consent. The note also stated that "the decision made by the American court concerns questions referring to purely internal competence of the Soviet organs of State power." The note demanded that United States authorities "take appropriate measures in guaranteeing the jurisdictional immunity of the Soviet state," and warned that "the American side will bear the full responsibility for the consequences of failing to take such measures." The note also stated that "any possible measures taken to implement such decisions, including encroachment on

the state property of the USSR, would have the most serious consequences for relations between our countries and would undermine the possibility of normal development of our bilateral relations in different spheres."

C. Department of State officials, including attorneys from the Department's Office of the Legal Adviser, have also met with Soviet representatives both in Washington and in Moscow on a number of occasions to explain United States's requirements regarding litigation and to urge the Soviet Union to seek advice of private counsel concerning participation in this lawsuit. These meetings are described in the accompanying Sofaer Declaration. In addition, last November Legal Adviser Sofaer and Yuri Rybakov, Head of the International Law Department at the Soviet Ministry of Foreign Affairs, signed a Memorandum of Understanding recording discussions and understandings on the subject of promoting mutual understanding in the legal sphere, including sovereign immunity (Attachment 5). The Soviet decision to retain counsel to appear and to raise its defenses in this case is, I believe, in large part the result of these discussions and this Memorandum of Understanding.

5. This case has become an issue in bilateral United States-Soviet relations. In view of the Soviet concern

over this case, including the default judgment entered herein and the plaintiff's motion to hold the Soviet Union in contempt, the way in which this matter is handled could have repercussions for other important United States interests with respect to the Soviet Union. The Soviets indicated in a protest of March 6, 1986 (Attachment 4) that any effort to enforce the court's judgment would have most grave consequences and "undermine the possibility of normal development of our bilateral relations in different spheres." Given their strongly held position concerning sovereign immunity, I believe that the Soviets' willingness to appear and to participate in these proceedings is an important step to remove an irritant in our bilateral relations. United States foreign policy interests vis-a-vis the Soviet Union weigh in favor of facilitating these Soviet efforts.

6. The Department of State believes that the views of the Soviet Union with respect to basic issues of international law are entitled, under the principles of comity and equality among sovereign states, to receive a fair hearing by all branches of the United States Government. It has been the Department's intention through the pendency of these proceedings to persuade the Soviet Union that the appropriate procedural means under both United States and international law for presenting these views to the United States Government is not through diplomatic

channels but through representations to the United States court itself. Although I cannot predict what precise actions the Soviet Union will take with respect to the disposition of these proceedings, in my judgment permitting the Soviet Union to have its day in court would clearly serve the foreign policy interests of the United States. Conversely, denying the Soviet Union an opportunity to present its views in court, particularly given our diplomatic efforts to encourage its participation, can be expected to affect adversely our bilateral relations with that country, and therefore to affect adversely foreign policy interests of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 28 July, 1989

Curtis W. Kamman

Attachments:

1. U.S. Embassy Note No. 431 of April 2, 1984.
2. Soviet Ministry of Foreign Affairs Note No. KU-775 of April 19, 1984.
3. U.S. Embassy Note No. 30 of January 22, 1986.
4. Soviet Ministry of Foreign Affairs Note No. KU-460 of March 6, 1986.
5. Memorandum of Understanding of November 18, 1988.

EMBASSY OF THE
UNITED STATES OF AMERICA

No. 431

The Embassy of the United States has the honor to refer the Foreign Ministry to the lawsuit entitled Guy Van Dardel and Sven Hagstromer v. Union of Soviet Socialist Republics, in which the Government of the U.S.S.R. is a defendant. The case is pending in the United States District Court for the District of Columbia docket number 84-0353. The Embassy herewith transmits a summons and complaint in both English and Russian. This note constitutes service of these documents upon the Government of the U.S.S.R. as contemplated in Title 28, United States Code, Section 1608(a)(4).

Under applicable United States law a defendant in a lawsuit must file an answer to the complaint or some other responsive pleading within 60 days from the date of service of the complaint (i.e. the date of this note) or face the possibility of having judgment entered against it without the opportunity of presenting evidence or arguments in its behalf. Accordingly, the Embassy requests that the enclosed summons, and complaint be forwarded to the appropriate authority of the Government of the U.S.S.R. with a view toward taking whatever steps are necessary to avoid a default judgment.

Please note that under United States law and procedure, neither the Embassy nor the Department of State is in the position to comment on the present suit. Under the laws of the United States, any jurisdictional or other defense including claims of sovereign immunity must be addressed to the court before which the matter is pending, for which reason it is advisable to consult an attorney in the United States.

In addition to the summons and complaint, the Embassy is enclosing a "notice of suit" prepared by the plaintiff, which summarizes the nature of the action which has been filed against the government.

Embassy of the United States of America,

Moscow, April 2, 1984.

I George Glass, a consular officer at the Embassy of the United States at Moscow, certify that this is a true copy of Embassy note number 431 dated April 2, 1984, and delivered to the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics on April 2, 1984.

George Glass
Vice Consul of the United States of America

Attachment 1

KU-775

The Ministry of Foreign Affairs of the Union of Soviet Socialist Republics refers to the Embassy's note No. 431 of April 2, 1984 and returns hereby the documents of the US District Court for the District of Columbia in which the Soviet Union is named as a defendant.

The Ministry again directs the attention of the American side to the fact that in accordance with the principle of sovereign equality of states, consolidated in the UN Charter, the Soviet state and its organs enjoy immunity from jurisdiction of foreign courts.

Moscow, April 19, 1984.

TO THE EMBASSY OF THE UNITED STATES OF AMERICA, Moscow

Attachment 2

1/22/86

No.30

The Embassy of the United States of America refers the Ministry of Foreign Affairs to the lawsuit entitled Guy von Dardel and Sven Hagstromer v. Union of Soviet Socialist Republics in which the Government of the USSR is a defendant. The United States District Court for the District of Columbia has rendered a decision in the referenced case, and entered a judgment against the Union of Soviet Socialist Republics. The Embassy herewith transmits a Notice of Default Judgment and Amended Judgment. This note constitutes service of these documents upon the Government of the USSR as contemplated in Title 28, United States Code, Section 1608(a)(4) and 1608(e).

The Ministry's attention is invited to the provisions of Section 1610 of Title 28, United States Code, regarding attachment of assets following judgment for the plaintiff. Section 1610(c) states in the pertinent part that "no attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter."

Attachment 3

The Ministry is further advised that under United States law and procedure, neither the Embassy nor the Department of State is in a position to comment on the Court's decision in this matter. Under United States law, the question of whether a procedure is available to open or vacate the default judgment rendered against the Union of Soviet Socialist Republics or otherwise to defend against enforcement of judgment is a matter which must be addressed to the appropriate Court. For this reason, it is advisable to consult an attorney in the United States.

Accordingly, the Embassy requests that the enclosed Notice of Default Judgment and Amended Judgment be forwarded to the appropriate authority of the Government of the Union of Soviet Socialist Republics with a view towards taking whatever steps are necessary to protect its interests in this case.

The Embassy of the United States of America

Moscow, January 22, 1986

I, Eugene Zajac, a consular officer at the Embassy of the United States at Moscow, certify that this is a true copy of the Embassy note number 30 dated January 22, 1986, and delivered to the Ministry of Foreign Affairs on January 22, 1986.

Eugene C. Zajac
Consul General

INFORMAL TRANSLATION

KU-460

The Ministry of Foreign Affairs of the Union of Soviet Socialist Republics, referring to the Embassy's note No. 30 of January 22, 1986, declares that the Soviet side does not recognize as legal the decision of the District Court of the District of Columbia made against the USSR in the so-called "Wallenberg case". In accordance with the universally recognized principle of the sovereign equality of states, confirmed by the UN Charter, the Soviet state and its organs enjoy immunity from the jurisdiction of foreign courts and therefore cannot be brought to court as a defendant without its clearly expressed consent. As is known, the Soviet state has given no consent to be brought to an American court as a defendant in this case.

At the same time, the attention of the Embassy is drawn to the fact that the decision made by the American court concerns questions referring to purely internal competence of the Soviet organs of the State power.

In its time, in response to the corresponding requests of the Department of State, the Soviet side has already given exhaustive explanations with regard to the fate of Swedish citizen R. Wallenberg and considers the matter closed.

However, American official authorities, capitalizing on the name of Wallenberg, continue making statements and taking actions clearly aimed at inciting anti-Soviet sentiment. It is quite obvious that the American court, in rendering its decision, was not guided at all by legal rules, but other motives.

The American authorities should realize that this and other decisions of the US courts against the USSR are inadmissible in relations between states. Any possible measures taken to implement such decisions, including encroachment on the state property of the USSR, would have most serious consequences for relations between our countries and would undermine the possibility of normal development of bilateral relations in different spheres.

The Ministry of Foreign Affairs of the USSR firmly insists that the American side take appropriate measures in guaranteeing the jurisdictional immunity of the Soviet state and warns that otherwise the American side will bear the full responsibility for the consequences of failing to take such measures.

The documents of the District Court of the District of Columbia in the case of Wallenberg are being returned.

Moscow, March 6, 1986

Enclosures:
34 pages

TO THE EMBASSY OF THE UNITED
STATES OF AMERICA, Moscow

Attachment 4

MEMORANDUM OF UNDERSTANDING

The undersigned, Abraham D. Sofaer, Legal Adviser of the United States Department of State, and Yuri M. Rybakov, Head of the International Law Department of the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics, have prepared this Memorandum to record discussions and understandings between their respective delegations on the subject of promoting mutual understanding in the legal sphere, including sovereign immunity.

1. Delegations representing the Government of the United States of America and the Government of the Union of Soviet Socialist Republics have held three rounds of consultations, in March 1987, September 1987, and July 1988, concerning legal proceedings brought in the courts of one state against another sovereign state or its agencies or instrumentalities, including separate juridical persons.

2. The two Delegations noted that their Governments follow different theories of foreign sovereign immunity. The United States follows the "restrictive theory," under which foreign states and their agencies and instrumentalities may be sued concerning their commercial and certain other activities. The Soviet Union follows the "absolute theory" of sovereign immunity, under which foreign states are absolutely immune from suit.

3. Each Delegation acknowledged that it does not seek by this Memorandum to change the immunity principles adhered to by the other side or to alter its own domestic law with respect to those principles.

4. At the same time, the two Delegations acknowledged that suits in the courts of one state against a foreign state or an agency or instrumentality thereof may create difficulties and tensions beyond those associated with the subject matter of the suit. This is particularly so when the two states' theories and practices concerning sovereign immunity differ.

5. The two Delegations expressed the mutual conviction that better understanding of applicable procedures, including legal protections that may be afforded, may serve to minimize potential problems stemming from suits against a foreign state or agency or instrumentality thereof, consistent with the interests of both countries.

6. Each Delegation noted that its respective law generally recognizes as separate juridical personalities commercial organizations which are duly established under the law of other states as independent juridical persons. Organizations thus recognized are granted protections at least to the same extent granted to the separate juridical persons of the host state under their respective laws, and treated no less favorably than those of other states.

7. The Delegations agreed that, under their respective laws, appearances in court to assert sovereign immunity are not regarded as waivers of sovereign immunity. The Delegations also noted that the states will provide appropriate positions, consistent with their usual practice, to their respective courts on the application of their respective laws relating to the sovereign immunity of states, their components, and entities.

8. Each Delegation undertook from time to time and as it considers useful to explain to the other significant new developments or changes in law or practice.

9. Each Delegation confirmed the intention of its Government to continue, as appropriate, periodic bilateral consultations regarding foreign sovereign immunity and legal proceedings in one state against another state.

IN WITNESS WHEREOF the undersigned have signed this Memorandum.

DONE at Washington , in duplicate this 18th day of November, 1988, in the English and Russian languages, each text being equally authentic.

Abraham D. Sofaer
Legal Adviser
Department of State
United States of America

Yuri M. Rybakov
Head, International Law
Department
Ministry of Foreign
Affairs, Union of Soviet
Socialist Republics