No. 99
Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV,

Plaintiff,

v.

WILLIAM FRENCH SMITH,

Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND BILL OF COMPLAINT

MARTIN POPPER
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Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Now comes the plaintiff and respectfully moves this Court for leave to file the annexed bill of complaint and supporting brief against William French Smith.

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Counsel for Plaintiff

Dated: October 25, 1984

STATEMENT IN SUPPORT OF MOTION

Plaintiff, Penyu Baychev Kostadinov, Assistant Commercial Counselor of the Bulgarian Embassy to the United States, was arrested on September 23, 1983 and indicted on September 26, 1983 in the United States District Court for the Southern District of New York on one count of conspiracy to commit and to attempt to commit espionage and one count of attempted espionage. 18 U.S.C. §794(a) and (c). He has been held without bail. The indictment was dismissed on January 17, 1984 by the United States District Court for the Southern District of New York on the finding that the plaintiff is immune from the criminal jurisdiction of the United States by the terms of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, 500 U.N.T.S. 95. On May 10, 1984 the United States Court of Appeals for the Second Circuit issued a judgment reversing the judgment of the United States District Court. On October 10, 1984, this Court denied plaintiff's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (No. 84-35).

The People's Republic of Bulgaria has directed plaintiff, its agent and employee, to place before this Court its claim that the intention of the Framers of the Constitution of the United States of America was that representatives of Foreign Sovereigns in the United States be accorded the privilege of a hearing in the highest court when subjected to action attacking their person, freedom or dignity. Constitution of the United States, Article III, Section 2, Clause 2. For this reason, and the reasons developed in the brief

submitted herewith, plaintiff invokes the original jurisdiction of this Court.

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BILL OF COMPLAINT

Plaintiff, Penyu Baychev Kostadinov, complaining of defendant, says:

I.

This is an action by plaintiff under the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, 500 U.N.T.S. 95, and 22 United States Code Section 254d, against William French Smith. This Court has jurisdiction pursuant to the Constitution of the United States, Article III, Section 2, Clause 2.

II.

Plaintiff, Penyu Baychev Kostadinov, is Assistant Commercial Counselor of, and a member of the administrative and technical staff of, the mission to the United States of the People's Republic of Bulgaria.

III.

Defendant, William French Smith is and has been at all relevant times Attorney General of the United States.

IV.

On or about September 23, 1983, agents and employees of defendant, acting under his direction and control, arrested plaintiff and took him into custody where he remains to this date, all in the City and State of New York.

V.

From on or about September 23, 1984, and continuing to this date, agents and employees of defendant, acting under his direction and control, have sought to bring plaintiff to trial in the United States District Court for the Southern District of New York.

VI.

By virtue of the above conduct, defendant has transgressed the inviolability of plaintiff's person, subjected him to arrest and detention, and attacked his person, freedom and dignity, and threatens and intends to continue such conduct, all in violation of the Vienna Convention, 23 U.S.T. 3227, TIAS 7502, 500 U.N.T.S. 95, Articles 29, 31 and 37.

WHEREFORE plaintiff demands and prays that a Writ of Prohibition or Mandamus issue in his favor against defendant William French Smith prohibiting the defendant from taking any action directed towards subjecting plaintiff to trial in the United States District Court for the Southern

District of New York and subjecting plaintiff to continued detention, and for such other and further relief as the Court may deem just and equitable.

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Counsel for Plaintiff

Dated: October 25, 1984

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Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV,

Plaintiff,

v.

WILLIAM FRENCH SMITH,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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Preliminary Statement

The factual record on which the claim is based is best summarized in the opinion of the United States District Court for the Southern District of New York dismissing the indictment against plaintiff and finding that plaintiff is a member of the Bulgarian mission to the United States, having been notified to, and accepted by, the Department of State. This finding by the district court supports the plaintiff's claim, at the direction of his government, to the status of "public minister." The district court opinion is reprinted as Appendix A. The opinion of the United States Court of Appeals for the Second Circuit, reversing the dismissal of the indictment, is reprinted as Appendix B. This motion does not directly address the desirability of *appellate* review argued in the petition denied on October 9, 1984. Here, two questions are presented:

I. Was the intent of the Framers of the Constitution in Article III, Section 2 (original jurisdiction of the Supreme Court) to give to the limited class, to which the plaintiff belongs, i.e. the representatives of Foreign Sovereigns, the privilege of a determination, in the first instance, in this Court, of a claim for redress of grievances?

II. Was the intent of the Framers of the Constitution in Article III, Section 2, to provide that no suit be brought *against* a "public minister" except in the Supreme Court. *Ames* v. *Kansas,* 111 U.S. 449 (1884).

The merits of plaintiff's claim to immunity from the criminal jurisdiction of the United States are as set out and recognized by the United States District Court for the Southern District of New York, subsequently erroneously reversed. Relying on the "well-settled view that denial of certiorari imparts no implication or inference con-

cerning the Court's view of the merits", *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363, 366, n.1 (1973), plaintiff makes a claim of constitutional dimension on this Court's attention not previously addressed.

ARGUMENT

The case presents the first recorded instance where a Foreign Sovereign, through plaintiff its employee and agent, asserts that: an official of the Foreign Sovereign is a "public minister"; is entitled to immunity from the criminal jurisdiction of the United States under Treaty (The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, 500 U.N.T.S. 95) and international law; and is wrongly being denied immunity by officers of the United States. The weight and seriousness of the claim is established both by the fact that it is advanced on behalf of a Sovereign with whom the United States has diplomatic relations, and by the acceptance of the substance of the claim by the district court in which the indictment had been brought.

The constitutional grant of original jurisdiction in the Supreme Court in "all cases affecting Ambassadors, [and] other public Ministers", United States Constitution, Article III, Section 2, recognized that respect for a Foreign Sovereign required that the highest court of the nation decide certain questions of overriding importance to the Sovereign. Thus, Hamilton explained in *The Federalist* the reason the original jurisdiction had been extended to cases affecting "public ministers":

> Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preserva-

> tion of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted to the highest judicatory of the nation."

"The Federalist" No. 81, at 416 (Beloff, ed. 1948).

The grant of original jurisdiction as to cases brought *against* "public ministers" was intended by the Framers of the Constitution to be exclusive as well. The First Judiciary Act so provided. This Court has found the relevant provisions of the First Judiciary Act to be a matter of constitutional construction:

> It thus appears that the first congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the constitution by the states, and with the objections urged against it, did not understand that the original jurisdiction vested in the supreme court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers, and consuls, and those in which a state was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a state to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister, or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.

> Acting on this construction of the constitution, congress took care to provide that no suit should be brought *against* an ambassador or other public minister except in the supreme court, but that he might sue in any court he chose that was open to him.

Ames v. *Kansas,* 111 U.S. 449, 464 (1884) quoted in part in *South Carolina* v. *Regan,* 104 S.Ct. 1107, 1124 (1984) (Justice O'Connor, concurring).

Consistency with this Court's prior opinions suggests granting leave to file. It was the "evident purpose" of the Framers to "keep open the highest court of the nation" for an aggrieved "diplomatic or commercial representative of a foreign government." Plaintiff, Assistant Commercial Counselor of the Bulgarian Embassy to the United States, jailed for over a year without bail or trial, is unquestionably an aggrieved "diplomatic or commercial representative of a foreign government." The claim on the original jurisdiction of this Court was believed by the Framers to be a privilege "due . . . the rank and dignity of those for whom the provision was made." Plaintiff, at the instance of his government, claims the privilege (or "favor") the Framers intended to bestow upon the class to which he belongs. The underlying reason for the privileged access to this Court is as valid today as in 1789:

> Perhaps more importantly, the Framers also thought that the original jurisdiction was a necessary substitute for the powers of war and diplomacy that these sovereigns previously had relied upon. See Georgia v. Pennsylvania, 324 U.S. 439, 450, 65 S.Ct. 716, 722, 89 L.Ed. 1051 (1945); United States v. Texas, 143 U.S. 621, 641, 12 S.Ct. 488, 492, 36 L.Ed. 285 (1892). "The Supreme Court [was] given higher standing than any known tribunal, both by the *nature* of its rights and

> the *categories* subject to its jurisdiction . . . ," A. de-Toqueville, Democracy in America, p. 149 (J.P. Mayer ed. 1969) (emphasis in original), precisely to keep sovereign nations and States from using force "to rebuff the exaggerated pretensions of the Union . . ." Id., at 150.

South Carolina v. *Regan, supra,* 104 S.Ct., at 1124.

Further, the division between those matters within the exclusive and those within the concurrent original jurisdiction in the Judiciary Act of 1789 was a matter of constitutional construction by those most certain to know the Framers intent, *Ames* v. *Kansas, supra,* 111 U.S., at 464. Therefore, the 95th Congress was incompetent, in 1978, to confer concurrent jurisdiction on the lower federal courts in cases against public ministers. Insofar as a section of Public Law 95-383, amending 28 U.S.C. §1251, purportedly gives jurisdiction in suits against public ministers to the district courts in violation of the Framers intention and will, such grant is a nullity. See *Marbury* v. *Madison,* 1 Cranch 137 (1803). The defendant, in the actions complained of here, is not only subjecting the plaintiff to imprisonment and threat of trial in violation of Treaty and international law, but is proceeding in a court without jurisdiction.*

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* The relief sought in this Court is that which, at the dawn of our constitutional history, was found available in the original jurisdiction. *Marbury* v. *Madison,* 1 Cranch 137 (1803). The explicit statutory grant of authority to issue mandamus to "persons holding office under the authority of the United States" found in the First Judiciary Act of September 24, 1789, c.20, 1 Stat. 73, 80-81, was subsequently limited to actions "where a State, or an ambassador, or other public minister . . . is a party." Rev. Stat. §688; Act of March 3, 1911, c.231, 36 Stat. 1087, 1156, and has now been merged in the All Writs Act, 28 U.S.C. §1651. See, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§4005, 4043. The original jurisdiction can be exercised, however, without any authorizing act of Congress. This Court has said that it is itself "authorized to prescribe its mode and form of proceedings, so as to accomplish the ends for which the jurisdiction was given." *Florida* v. *Georgia,* 17 Howard 478, 491 (1855).

Plaintiff's claim to the status of "public minister" is substantial; his Government avers it and has required him to make the claim herein.* The findings of the United States District Court support the claim. Three Justices of this Court joined in a concurring opinion expressing the view that the Framers had *mandated* that review in the Supreme Court be available in such circumstances:

> [T]he Framers . . . generally left Congress the power of determining what cases, if any, should be chanelled to the federal courts. The one textual exception to that rule concerned the original jurisdiction, where the Framers apparently mandated that Supreme Court review be available. "The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or diplomatic or commercial representative of a foreign government." *Ames* v. *Kansas,* 111 U.S. 449, 464, 4 S.Ct. 437, 444, 28 L.Ed. 482 (1883).

South Carolina v. *Regan, supra,* 104 S.Ct., at 1124.

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* "The [original jurisdiction] provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege, not of the official but of the sovereign or government which he represents, accorded from high considerations of public policy. . . ." *Ex parte Gruber,* 269 U.S. 302 (1925).

CONCLUSION

Invoking the "high privileges of those for whose protection the constitutional provision was intended", *Ames* v. *Kansas, supra,* 111 U.S. at 469, plaintiff, at the direction of the Sovereign he represents, prays leave to file the annexed complaint and to obtain review in this Court of his substantial claim to immunity under Treaty and international law.

Respectfully submitted,

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Counsel for Plaintiff

Dated: October 25, 1984

APPENDIX

CORRECTED TRANSCRIPT

APPENDIX A

Opinion and Order of U.S. District Court

SOUTHERN DISTRICT OF NEW YORK

(S) 83 Cr. 616 (VLB)

UNITED STATES OF AMERICA

v.

PENYU BAYCHEV KOSTADINOV,

Defendant.

January 17, 1984
11:00 a.m.

Before:

HON. VINCENT L. BRODERICK,
District Judge

APPEARANCES

RUDOLPH W. GIULIANI,
United States Attorney for the Southern District of New York,

RUTH GLUSHIEN WEDGWOOD,
Assistant United States Attorney

RICHARD SCRUGGS,
Criminal Division, Department of Justice

JOHN MAGE,
ELLEN P. CHAPNICK,
Attorneys for defendant

The Clerk: United States versus Penyu Kostadinov.

The Court: This is the defendant Mr. Kostadinov's motion to dismiss the complaint on the basis of 22 U.S.C. 254(d), which provides as follows:

"Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations under Section 254(b) or 254(c) of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual or as otherwise permitted by law or applicable rules of procedure."

In considering this motion, I will be dealing with the nature and the status of the Office of the Commercial Counselor of Bulgaria in New York and the status of Mr. Kostadinov as assistant commercial counselor in that office. It is necessary to consider historically the circumstances under which that office was established to determine its nature and status.

Briefly stated, Mr. Kostadinov's claim is that the Office of the Commercial Counselor in New York is part of the Bulgarian Embassy; that he, Mr. Kostadinov, was a member of the technical and administrative staff of that office and a member of the Bulgarian Mission who has been sent by Bulgaria and accepted by the United States. Hence, he claims that he is immune from prosecution.

The government's position is primarily that the office is not a part of the Bulgarian Embassy or Mission and that it is United States policy that no one working in a trade office in New York of a foreign country has diplomatic immunity except for the senior commercial or financial officer.

The government concedes that the office itself is inviolable under the provisions of the Vienna Convention since the commercial counselor or the senior financial officer, in this case the commercial counselor, has diplomatic

immunity, but it claims that Mr. Kostadinov, as assistant commercial counselor, did not have immunity.

Alternatively, the government argues that if I do find that the commercial office in New York is a part of the Bulgarian Embassy, that it is an office of one; that the commercial counselor is that one and that everyone else working there is simply an employee of Bulgaria and is not entitled to any privileges and immunities.

I note preliminarily that the governing law with respect to immunity is the Vienna Convention on Diplomatic Relations of April 18, 1961. This was ratified by the United States and it entered into force with respect to the United States on December 13, 1972. It has also been ratified by Bulgaria and is in force with respect to Bulgaria.

Prior to the enactment and the ratification and the effectiveness with respect to the United States of the Vienna Convention, the suggestion by the government, the State Department, that Mr. Kostadinov does not have immunity might have been sufficient to conclude the court. Today that treaty is involved and the court cannot be so concluded. The determination of the existence or not of diplomatic immunity with respect to Mr. Kostadinov is a matter of treaty interpretation and application of that interpretation to the facts that have been developed in this case. The Vienna Convention, in short, is a treaty which is the law of the land.

I do note that in 1978 the provisions of Title 22 pertaining to immunity that had been in effect since the early days of the republic were repealed and new provisions embodied in Sections 254(a), (b), (c) and (d) were enacted. Those provisions pertain to the applicability of the Vienna Convention.

I will focus first on the cicrumstances under which the Commercial Office of Bulgaria in New York was opened. Diplomatic relations between the United States and Bulgaria, which had been broken off for some time, were resumed in 1959 and there were negotiations between the

two countries in the years 1961 through 1963 with respect to various claims of United States nationals and other financial matters.

The documentation which has been made available to me indicates that in the course of those negotiations, Bulgaria was very interested in achieving most favored nation status vis-a-vis the United States and that it was also interested in opening a trade office in New York. The negotiations culminated in an agreement and the execution of various documents related to that agreeemnt on July 2, 1963.

I am very sure that the documentation that has been provided is by no means complete. Many years have passed since 1963 and we have had the experience in the course of this case to learn that the documentation has been hard to come by. I do intend to review this documentation that has been made available, however, including the documention in the course of negotiations which led up to the agreements of July 2, 1963, because in my judgment those negotiations provide a necessary framework.

On February 9, 1963, the minister of the United States in Bulgaria reported to the Department of State concerning a conversation which she had with the Prime Minister of Bulgaria and the Foreign Minister.

I should state that the United States had a legation in Sofia and the Bulgarian government had a legation in Washington during the period 1959-1963. It was some years later, in 1966, that each of those missions was raised to the status of embassy.

The report from Minister Anderson to the Department of State covered various matters, including the question of the financial claims of United States nationals. She stated that she asked the prime minister with respect to those claims whether Bulgaria was ready to put forward a new proposal. The Prime Minister replied that he was not informed on all the details, but as far as he knew, an agreement had almost been reached between the two

governments. He mentioned that there was an amount that was doubled by the United States before the agreement was to be concluded and asked whether in light of this there was any guarantee that if an agreement was reached, the United States would not again increase the amount of its claims. Minister Anderson replied to them that if an agreement were reached which was approved by the State Department, the agreement would be implemented and carried out by the United States Government.

There was further discussion with respect to the claims and other matters and then the prime minister said that in his view all of the questions could be solved very easily, but that the real question is "What will follow the settlement of these problems"

Minister Anderson reported that she replied that she "had several conversations in Washington with, among others, President Kennedy, the Secretary of State and other officials in the Department of State and that we envisage several practical steps which could be taken after the settlement of the outstanding problems, such as:

"A. The establishment of a Bulgarian Trade Office in New York.

"B. Raising the status of our missions to embassies here and in Washington.

"C. A cultural exchange program."

On April 27, 1963 a telegram was sent from the State Department to the American legation in Sofia. The telegram discussed various details with respect to the proposed agreements and procedures for exchanging details of agreements. It stated "Copies Rumanian agreement, exchanges of notes and pertinent legislation air pouched April 25.

"Copy of release on trade with Rumania including indication of U.S. agreement to opening of Rumanian trade office in New York also being pouched. While not an integral part of the Rumanian agreement, this constituted an associated feature of the general settlement. As Bul-

garians know, we would be prepared to issue a corresponding statement for Bulgaria."

On May 16, 1963, there was a memorandum prepared of a conversation as the State Department with respect to a courtesy call by the Bulgarian Minister. According to the memorandum, the Bulgarian Minister asked whether the United States was going to send a delegation to Sofia to negotiate a written financial claims agreement.

Mr. Andrews, who is indicated as being EE, which indicates, I believe, Eastern Europe, stated that work was not finished on a draft claims agreement and that they were not yet ready to send a delegation. The memorandum goes on to say that the minister asked about the prospects for Bulgaria to obtain most favored nation treatment for its exports to the United States and states that Mr. Tyler, the assistant secretary for Europe, said that there would not be much prospect of that, adding that "the volume of trade between the United States and Bulgaria was very small and that we would like to see it increase."

"Mr. Davis remarked that it was our hope, after the conclusion of a claims settlement which would open the way for Bulgaria to establish a trade office in New York and after issuance of a statement expressing our desire to facilitate increased trade, that some expansion of trade could take place even without MFN status for Bulgaria. It would be false to hold out a promise of any change with regard to MFN in the near future."

There was further discussion with respect to trade and tariffs: "The minister wondered how trade could be developed under these circumstances. Mr. Davis said that although he was not familiar with Bulgarian goods or their marketability in the U.S., we favored an increase in trade within the existing legal structure. Bulgarian trade experts would have to explore the U.S. market and conclude sales contracts. The establishment of a trade office in New York and the issuance of a trade statement would

have the effect of improving the atmosphere which some expansion of trade could be achieved."

There is then a memorandum of a conference dated June 1, 1963 at the White House between the President and others and Minister Popov from Bulgaria. In the course of this conference, according to the memorandum, "The minister said they were encouraged by the recent agreement in principle to complete a financial claims settlement and hoped that with the establishment of a trade office in New York some progress could be made in developing U.S.-Bulgarian trade."

Then there is a memorandum to the Secretary of State dated June 14, 1963 reqesting authorization to sign with Bulgaria an intergovernment agreement for the settlement of claims of American nationals against Bulgaria. The memorandum discusses the prior history of the problems with Bulgaria and of the negotiations for the settlement of the claims, discusses the substance of a proposed draft agreement for settlement of property and war damage claims, discusses accompanying notes which it is proposed be exchanged with the Bulgarian government, including a note with respect to the resumption of delivery of U.S. treasury checks to individuals in Bulgaria and a note relating to Bulgaria's obligation to pay outstanding U.S. dollar bonded indebtedneess.

It goes on to discuss a draft statement with respect to trade: "Attached to this memorandum is a draft statement expressing our favorable attitude toward the development of peaceful trade with Bulgaria. While this statement is not to be an integral part of the agreement, it has served as one of the bargaining levers used in the negotiations. We propose to issue this statement in the form of a press release. This has been cleared by the Department of Commerce.

"Recommendation: It is recommended that you authorize Minister Eugenie M. Anderson to sign the proposed agreement and accompanying notes either in their present

form or, if the Bulgarian government will not agree to our precise formulations, an agreement and notes which are similar in all respects. If there is any question of material departure from these texts, it will be referred for consideration by EUR and L without referral to you."

It is my understanding that EUR stands for the Assistant Secretary of State for Europe and L stands for legal counsel.

This memorandum was approved on June 16 by U. Alexis Johnson, who I believe was the Under Secretary of State.

On June 19 a telegram was sent by Stefan, who I believe was a member of the negotiating team then in Bulgaria, to the Secrtary of State. It stated that agreement had been reached on all articles in the United States draft text except two and that the Bulgarian delegation had requested the deletion of certain words. It went on to say that "Bulgarians agreed to eliminate words 'to improve also their economic relations' from preamble on basis that trade statement would be made."

On June 20 a telegram went from Stefan in Sofia to the Secretary of State which stated that agreement had been reached on the claims agreement proper and went on to say that, "USDEL presented draft statement on trade. BULDEL expressed desire for inclusion of MFN reference although reacting otherwise favorably to certain extent."

The telegram concluded with the recommendation that: "If they accept our draft note on Circular 655 and our trade statement, we accept their last proposal for bond notes. Appreciate advice re any objection before meeting June 24."

The telegram from the State Department to the delegation in Sofia on June 21 referred to the trade statement in the following way: "Assume from ref tel you intended adhere our language trade statement and Circular 655 letter. We consider Bulgarian language 2 ref tel unacceptable."

A telegram from Stefan to the State Department on June 27 stated that the claims negotiation had been concluded and an agreement reached on all remaining issues in a June 26 meeting. "Bulgarians accepted: (1) our revised language for paragraph 2, sentence 2 of trade statement," namely: 'the resumption of diplomatic relations facilitated the conduct of trade between the two countries;' (2), our drafts for notes on final value of assets and; (3), bond notes with key fourth paragraph taken from U.S.-Rumanian exchange."

The telegram went on to say that: "The two delegations tentatively agreed on July 2 for signing agreement, for the U.S. press release and July 3 for Bulgarian press release."

On July 2 there was a telegram from Minister Anderson to the Secretary of State stating that she had signed the claims agreement and accompanying documents at the Bulgarian Foreign Ministry and that Deputy Foreign Minister Popov had signed the agreement and documents for the Bulgarian government. The telegram went on to say: "Bulgarian television and press covered ceremony. Minister Popov mentioned to me his satisfaction over U.S. press release."

On July 2 a message went from the American legation in Bulgaria to the Minister of Foreign Affairs, which read as follows: "The Legation of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Peoples Republic of Bulgaria and has the honor to refer to the Agreeemnt signed today between the Governments of the United States of America and the People's Republic of Bulgaria relating to financial questions and to enclose a statement concerning trade relations between the United States of America and the Peoples Republic of Bulgaria, which the Government of the United States of America is issuing today in the United States."

The statement itself reads as follows: "The conclusion of an agreement on financial claims and related issues between the United States of America and the Peoples

Republic of Bulgaria removes a significant obstacle to the establishment of more normal relations between the two countries. Conditions for the expansion of peaceful trade have therefore been improved by the signing of this agreement.

"In 1959, after a nine-year hiatus, the United States and Bulgaria agreed to resume diplomatic relations. The resumption of diplomatic relations facilitated the conduct of trade between the two countries. It is the view of both Governments that the expansion of peaceful trade would be mutually beneficial and would serve to develop increasing ties between the people of the United States and the Bulgarian people. The United States of America is prepared to authorize the Legation of the Peoples Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between our two countries. Both Governments will be prepared to facilitate the travel of commercial representatives and officials interested in increasing trade. As conditions permit, both Governments will consider further measures which will contribute to the development of expanded trade relations.

"Through such efforts, the Governments of the United States of America and the Peoples Republic of Bulgaria welcome the possibility of creating favorable conditions for the expansion of peaceful trade and the development of more normal trade relations should also serve as a means of increasing fruitful contacts between the peoples of the two countries."

On July 5, Minister Anderson sent to the Department of State an Airgram with the subject, "Claims Negotiations with Bulgaria." The text stated that there was transmitted therewith: "the following documents regarding the claims Agreement signed with Bulgaria on July 2, 1963." I am summarizing these documents. One, an original copy of the claims agreement; two, conformed copies of notes to the Bulgarian government concerning

Bulgarian dollar obligations, Treasury Circular 655 and assets; three, original notes with respect to Bulgarian dollar bond obligations, Treasury Circular 655 and assets; four, conformed copy of the Legation note to the Ministry of Foreign Affairs of the People's Republic of Bulgaria with respect to the U.S. press release on U.S.-Bulgarian trade relations.

An internal State Department publication reporting on the U.S.-Bulgaria claims agreement included the following on the matter of trade: "Statement on Development of Trade. While not an integral part of the agreement, we released on the same day, a statement expressing our favorable attitude toward the development of peaceful trade with Bulgaria. This statement, which served as one of our bargaining levers during the negotiations, notes that the conclusion of the agreement on financial claims removes a significant obstacle to the establishment of more normal relations between the two countries and that conditions for the expansion of peaceful trade have therefore been improved. We announced that we are prepared to authorize the Bulgarian Legation to establish in New York a commercial office which would have the purpose of promoting trade between the two countries. As conditions permit, both governments will consider further measures which will contribute to the development of expanded trade relations."

At that stage, following the completion of the negotiations in Bulgaria with respect to the claims agreement, the Bulgarian Legation was authorized to open a trade office in New York when it wanted to do so.

There were further conversations with respect to this, both in Washington and in Bulgaria. Thus, on October 23, 1963, Minister Anderson had a conference with the Minister of Foreign Trade of Bulgaria. At that conference she asked whether Bulgaria was now ready to open the trade office in New York and said that she thought it would be helpful to discuss and possibly negotiate the

questions. Minister Budinov said that so far as the New York office was concerned the problem was solved; that he had met in New York with Bulgaria's trade representative who had already found an appropriate office.

I find that the entire context of the negotiations and the relationship of the discussion of the trade office in the context of the claims settlement agreement indicates that the agreement on the part of the United States to permit the Bulgarian Legation to open a trade office in New York was an essential part of the total agreement and that it constituted a binding agreement under international law, and that Bulgaria was, therefore, expressly authorized by the United States to have its Legation open a commercial office in New York.

It has been and it continues to be the position of the government that that trade office when it was opened was not part of the Bulgarian Legation, later the Bulgarian Embassy.

In the course of this motion, an affidavit has been submitted by Richard Gookin, the Associate Chief of Protocol of the Department of State, who has stated, based on his discussions with Department of State personnel and on a review of the official files of the Department of State, "The Office of the Commercial Counselor of the People's Republic of Bulgaria, located at 121 East 62nd Street, New York, New York has never been granted status by the Department of State as part of the Embassy of the People's Republic of Bulgaria, nor is it considered by the Department of State to be part of the Embassy."

The development of documentation in the course of this motion suggests strongly that a great deal of the documentation was not available to Mr. Gookin when he made that affidavit.

I find, for reasons which I will spell out, that the Commercial Counselor's office was established as part of the Bulgarian Legation and that it has continued to the present time to be a part of the Bulgarian Embassy.

I refer first to the authorization reported at the time of the claims settlement agreement. It was reported then that the United States is prepared to authorize the Legation of the People's Republic of Bulgaria to establish in New York a commercial office. The name has been used in correspondence with and by the State Department; thus in a letter dated April 25, 1973 from the Office of Protocol to the Bulgarian Embassy, there is a clear inference that the State Department considered the New York office to be a part of the Embassy:

"As you know, it is the policy of the Department of State to accept for inclusion in the Department's 'diplomatic list' only the officer-in-charge of an Embassy, Commercial or Financial Office in New York. . . . In view of the foregoing, I regret that it will not be possible to authorize the issuance of DPL license plates for automobiles of other personnel of the Commercial Office of the Commercial Office of the Bulgarian Embassy in New York."

There is a State Department memorandum dated March 27, 1968 which gives an indication of how the New York office, not only of the Bulgarian Embassy but of other embassies, was perceived by the State Department. The memorandum is entitled: "Conditions under which East European Embassies are Permitted to Maintain Commercial Offices in New York City."

The memorandum notes the State Department policy that employees of commercial offices do not have immunity. It states, however, that: "The premises of the commercial office, being considered a part of the Embassy, are inviolable."

The memorandum also suggests that "persons applying for visas outside the United States to enter the United States for assignment to the commercial office of an Embassy should indicate that they will be staff members of the Embassy assigned to the commercial office."

The memorandum provides: "The commercial office may not be utilized as a general diplomatic or consular facility,

but only for purposes consonant with the status of the office as part of the Embassy and with the status of the officer-in-charge as reflected in his diplomatic title."

Now, the government has made two arguments with respect to this memorandum. The first argument is that it was never communicated to the Bulgarian Embassy, and apparently it never was communicated to the Bulgarian Embassy. The second argument is that this was a proposed modus operandi that was sent around for comments and that it is not a binding document.

The government also suggested that there are various people out there who might be able to give information to the court if the court was interested in having the information. These are people to whom this memorandum was directed who apparently did not comment, at least to the extent that the comment is a matter of written record.

There are other indications, however, in the files of the State Department itself that this memorandum had substantially more importance than the government suggests. There is a memorandum of March 27, 1973 from apparently the United States Mission at the United Nations to the State Department which refers directly to the 1968 memorandum.

That 1968 memorandum was by its terms from the EUR/EE, which I believe is the Eastern Europe Desk, to S/CPR, which I believe is the Office of Protocol.

"In accord with EUR/EE's memorandum to S/CPR of March 27, 1968, we have authorized the maximum three DPL plates for the use of the Commercial Counselor of Bulgaria in N.Y., one for the use of his wife and one in the name of the office."

That 1968 memorandum dealt, among other things, with license plates and presumably had continued validity and vitality in 1973.

In 1969 Bulgarian officials in the United States protested about certain incidents in New York and Washington against Bulgarian officials. This prompted the Secretary of State to send a telegram on July 14, 1969 to the United

States Embassy in Sofia outlining his response to the incidents. In that telegram he made reference to the diplomatic status of the commercial office, and he added that, "U.S. accepts obligation to provide normal protection to diplomatic missions and their representatives located in this country."

He concluded the telegram: "You can assure Bulgarians that police continuing efforts to apprehend perpetrators of acts against property of Bulgarian government and personnel. New York police will be reminded of diplomatic status of Bulgarian and other East European diplomatic commercial offices located there."

In the Blue List, which is the diplomatic list published by the Department of State, the New York commercial office is listed under the listing for the Bulgarian Embassy.

The record before me indicates that the Bulgarian representatives in this country have maintained consistently that the premises of the New York office are inviolable since the office is, in their contemplation, a part of the Bulgarian Embassy in Washington.

At a meeting on July 1, 1969 with the American Ambassador to Bulgaria in Sofia they discussed this matter, and it is memorialized in a State Department memorandum of conversation:

"Mr. Ivanov recounted in detail the facts as known to the Ministry regarding the breaking and entering of the office of the Bulgarian Trade Mission in New York. He said the Bulgarian Government was most concerned over the gross violation of the inviolability of the Bulgarian Trade Mission office as 'an office of the Bulgarian Embassy.' He said that on June 28 the Commercial Counselor (Ishpekov) found the office turned upside down with a note left by the cleaning woman that she had so found it on June 27 and had called the New York City Police. Ishpekov reported that desks and safes had been broken open and files scattered around. He reported also that upon their arrival (after the cleaning woman's call) the police entered the premises of the Bulgarian Trade Mission with-

out seeking permission from Mr. Ishpekov or other Bulgarian diplomatic representative—this despite the fact that there is a sign outside the office reading 'Embassy of the Peoples Republic of Bulgaria Commercial Office.'"

I should also add to this that when Mr. Kostadinov was originally named by Bulgaria to be Assistant Commercial Counselor, the application was in terms of being an Assistant Commercial Counselor of the Bulgarian Embassy.

In find that both the Department of State and the Republic of Bulgaria have regarded the commercial office in New York, consistently with the understanding that was reached in connection with the claims settlements on July 2, 1963, to be a part of the Embassy of the Republic of Bulgaria.

We will take a five minute recess.

(Recess)

The New York Commercial Office was established at a time when the Vienna Convention was not in effect. I do not have before me the question of Mr. Kostadinov's status as an assistant commercial counselor in the New York office at any time prior to the time that the Vienna Convention came into effect.

It is probable that this court would have been concluded by the suggestion that Mr. Kostadinov had no immunity if that suggestion had been made prior to the time that the Vienna Convention was enacted. There is certainly no question on the record before me but that it has been the consistent position of the Department of State, from 1963 to the present time, that no employees in the commercial office, other than the Commercial Counselor himself, have diplomatic status.

I also note, however, that none of the discussions with respect to diplomatic status took place prior to the time, to wit, July 2, 1963, that the authorization for the opening of that commercial office as a part of the Bulgarian legation was announced.

It will be appropriate at this time, therefore, for me to consider the Vienna Convention, because I shall be later considering the impact of that convention on the facts before me. So I will briefly summarize what I regard as the provisions of the Vienna Convention which are germane to decision in this case.

Article 1 defines "members of the mission" as the "head of the mission and the members of the staff of the mission."

I have used the term define. Perhaps identify is a better word. There is very little in the way of definition.

Article 1(f) provides that: " 'the members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission."

Article 1(i) says in substance that the "premises of the mission" are the buildings used for the purpose of the mission.

Article 7 pertains to the appointment of members of the staff of the mission. It states that, "Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. . . ."

Articles 5 and 8 referred to in Article 7 have no relevance to this case.

Article 9 provides: "1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the head of the mission or any member of of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State."

Article 11, also referred to in Article 7, provides that: "1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the

size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving state and to the needs of the particular mission. 2. The receiving state may equally, within similar bounds and on a nondiscriminatory basis, refuse to accept officials of a particular category."

Article 10 provides in relevant part: "1. The Minister for Foreign Affairs of the receiving state shall be notified of: (a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission." It ends: "2. Where possible, prior notification of arrival and final departure shall also be given."

Article 12 provides that: "The sending State may not without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established."

Article 22 provides in relevant part, "The premises of the mission shall be inviolable."

Article 24 makes that applicable to the archives and documents of the mission.

Article 37, paragraph 2, provides, in relevant part, that "Members of the administrative and technical staff of the mission . . . shall enjoy the privileges and immunities specified in Articles 29 to 35," with certain exceptions.

Article 29 provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."

Article 31 provides in relevant part "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."

Those provisions that the person of a diplomatic agent shall be inviolable in Article 29 and that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state in Article 31 are made applicable to a member of the administrative and technical staff of the mission by reason of Article 37.

Article 32 provides, "1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State. 2. Waiver must always be express."

Article 39 provides in paragraph 1 that: "Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed."

Article 47 provides, "1. In the application of the provisions of the present Convention, the receiving state shall not discriminate as between states. 2. However, discrimination shall not be regarded as taking place: (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State; (b) where by custom or agreement States extend to each other more favorable treatment than is required by the provisions of the present Convention."

The government has argued that even if, as I have found, the New York Commercial Counselor's office is part of the Bulgarian Embassy, it must be viewed as a mission of one. That is, only the head of the office, the chief commercial counselor, may be considered a member of the mission and thus entitled to the privileges and immunities provided in the Vienna Convention. It is the government's position that the United States has the right to restrict the New York office in this fashion, relying principally on Article 11 of the Vienna Convention.

Article 11 provides that: "In the absence of specific agreement as to size, the size of the mission, the receiving State may require that the size of the mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission." It also provides that "The receiving State may equally,

within similar bounds and on a nondiscriminatory basis, refuse to accept officials of a particular category."

The government's position is that it has exercised its prerogative under Article 11 to limit the size of the New York office by, (1) issuing circulars in 1974 and 1977 which require that staff members of a mission reside in Washington, D.C. and, (2) by informing Bulgarian officials in Washington and in Sofia that only the head of the New York office was entitled to diplomatic immunity and that the subordinate staff members were not so entitled.

In 1974 and again in 1977 the State Department sent circular notes to all chiefs of mission in Washington, including that of Bulgaria. The 1977 note restated, among other things, the State Department's 1974 pronouncement that the staff of a diplomatic mission must reside in the Washington, D.C. area.

"In order that the policy of accreditation may be uniformly a matter of record for all missions, the criteria is set forth in detail as follows: Each diplomatic officer must (1) possess a valid diplomatic passport, if diplomatic passports are issued by his government, or, in the alternative, this mission should by diplomatic note explain its absence in particular cases if the government does issue diplomatic passports; (2) possess a recognized diplomatic title; (3) be a holder of an A-1 nonimmigrant visa; (4) with the exception of the designated senior financial economic and commercial positions in New York City, reside in the Washington, D.C. area; and devote official activities to diplomatic duties on an essentially full-time basis."

That note concludes, "The Chiefs of Mission are also reminded that the following criteria apply respecting acceptance of individuals as members of the nondiplomatic staffs entitled to certain privileges, exemptions and immunities. They must (1) possess A-2 or A-3 visas; (2) be performing full-time duties with the diplomatic mission, and (3) reside in the Washington, D.C. area."

The evidence before me indicates that the materials contained in the 1974 note and the 1977 note did not come as

any surprise to either Bulgarian officials or officials of any other embassy. The testimony before me in the course of this hearing indicates very clearly that as early as 1963, the Bulgarian Minister in Washington was notified of these restrictions and there have been apparently consistent restrictions imposed by the State Department since at least that time.

As recently as 1981 there were specific exchanges on this subject between the Department of State and the Bulgarian authorities. A Department of State telegram to the American Embassy in Sofia dated January 31, 1981 discusses the status of the staff of the Bulgarian office in New York. The relevant portion of that telegram reads: "1. In the course of sorting out the documentation of Mirolyub Vutov assigned to the Bulgarian Trade Office in New York, the Department had occasion to review with the Bulgarian Embassy the existing procedures regarding trade office personnel. Those procedures are set out below for the information and guidance of the Embassy."

"2. The head of the trade office will be entitled to diplomatic status and will be assigned formally as Commercial Counselor at the Bulgarian Embassy in Washington. He will be issued an A-1 visa, notified to the department's Office of Protocol, and will receive full diplomatic accreditation and full diplomatic privileges and immunities.

"3. Other personnel assigned to the trade office, who are employees of the Bulgarian Ministry of Foreign Affairs or Ministry of Foreign Trade, will be issued A-2 visas. They will be notified to the Office of Protocol, but will not be accerdited or issued diplomatic identity or tax cards. They will have no diplomatic privileges or immunities."

A meeting in Washington on April 10, 1981 involved conversations with respect to this matter with Bulgarian officials, and those conversations are memorialized in a State Department memorandum: "Shamwell said that Bulgarian officials assigned to the United States receive "A" visas, but that the Visa itself did not confer diplomatic

status or immunity. As a matter of policy, diplomatic missions were required to be located in the District of Columbia, he said, to prevent a proliferation of offices and persons with diplomatic status around the country. Shamwell said a number of countries, including Bulgaria, had been permitted to have one officer from the Embassy with diplomatic status resident in New York on an exceptional basis because of that city's commercial significance. None of the other personnel assigned to New York by Bulgaria or by other countries with similar offices were accredited as diplomatic staff or accorded privileges and immunities under the Vienna Convention. He said they fell in the category of 'miscellaneous foreign government officials' and were entitled only to relief from paying U.S. federal income taxes.

Dragov stated that the Bulgarian officials assigned to New York operated under the direction of the Bulgarian Ambassador. Under the relevant U.S. laws, diplomatic agents were entitled to full immunity and members of the technical and administrative staff were entitled to full criminal immunity as well as civil immunity for acts undertaken in the conduct of their official duties. Shamwell pointed out that these immunities applied only to accredited members of the Embassy staff and that the Bulgarian personnel in New York, other than Toromonov," and I interject here that Toromonov at that time was the Commercial Counselor, "were neither diplomatic agents nor technical and administrative staff or service staff. He said that persons who were accredited received official identity documents from the department and were included in the department's blue or white lists of diplomatic personnel. An on-the-spot examination of copies of those lists verified that Toromonov was the only Bulgarian official in New York so listed. Toromonov acknowledged that the situation was as described by Shamwell, but Dragov said that we would have to discuss the matter with his Ambassador before commenting further."

The record shows that State Department officials had at least four additional meetings from late April through June 1981 with Bulgarian officials on the subject of privleges and immunities, and that the department's policy toward the New York office was expressed at these meetings.

A telegram of June 6, 1981 from the Secretary of State to the United States Embassy in Sofia indicates how firmly entrenched this policy was:

"The explanation of the U.S. position on personnel ceilings provided by chargé (paragraph 4 of REFTEL) was exactly on track. In response to the question raised by Pchelintsev, the embassy should inform the MFA"—the Ministry of Foreign Affairs—"that we do not wish to play numbers games with the staffs of our embassies in Sofia and Washington. We will continue to accredit as members of the Bulgarian Embassy in Washington only those persons resident in Washington and the Embassy Commercial Counselor who is resident in New York. We will take into general account the total number of Bulgarian government officials assigned to the United States and Washington and in other cities in considering the appropriateness of the level of staffing. We do not intend, however, to include nondiplomatic personnel in New York in any listing of persons accredited to the U.S."

The issue that is drawn, therefore, is whether the Department of State, which acts for the President, may withhold privileges and immunities from staff personnel working in the Office of the Commercial Counselor of the Bulgarian Embassy in New York under the Vienna Convention.

Under Article 11 of the Vienna Convention, a receiving state, in this case the United States, has discretion over the size of the mission, over the numbers of persons at the mission. There is nothing in the Vienna Convention, however, that gives the receiving state control over the question of privileges and immunities. The Vienna Convention in this particular departs from history. It makes it very clear that a receiving state may limit size.

It gives no authority to a receiving state to withhold privileges.

It would seem to me in fact, given the structure of the Vienna Convention, that if the receiving state could limit privileges and immunities, logic would go out of the provisions of the Vienna Convention itself. The very structure of the convention is to spell out the consequences of status. If a person is a technical or administrative member of a mission, he is under the Vienna Convention entitled to certain privileges and immunities, and one of those privileges is immunity from criminal prosecution.

The action tatken by the Department of State goes directly to privileges and immunities. Mr. Kostadinov applied for a visa on the basis that he was going to be an assistant commercial counselor of the Bulgarian Embassy, replacing another person who had held that same position of assistant commercial counselor in New York. He was permitted to come into this country. He was notified to the State Department. He was permitted to work in the commercial counselor's office in New York, and I have found already that that office was a part of the Bulgarian Embassy.

This record indicates that the Department of State has made no effort to limit the numbers of persons working in the Office of the Commercial Counselor in New York. I am sure that that does not mean that no such efforts have been made, but certainly there are no such efforts which are part of the record before me, and the Department of State has been notified not only with respect to Mr. Kostadinov, but with respect to everyone else who is working in that office. It has always had the option to declare him not acceptable, and if he were declared not acceptable, Bulgaria would be required under the Vienna Convention to recall or to terminate his functions. The Department of State has not done that and presumably as a matter of practice has never done that in the past because it has relied on what it regarded as its power prior to the application of the Vienna Convention to with-

hold diplomatic privilege. Now after the application of the Vienna Convention it believes it has the same power to withhold diplomatic privilege.

We have here a commercial office, part of the Bulgarian Embassy, which was in place and operating and had a staff as of the time the Vienna Convention became effective. Presumably in that period before the Vienna Convention became effective it was entirely appropriate for the State Department, with respect to the Bulgarian office in New York or any similar office, to withhold diplomatic privileges and immunities. Its authority to do it once the Vienna Convention was adopted must be found in the Vienna Convention or in 22 U.S.C. 254, which is intented effectively to implement the Vienna Convention.

The consistency of the State Department policy with respect to employees of officers of missions, such as the Commercial Counselor's Office of the Bulgarian Embassy, has been established beyond peradventure. It has been a longstanding policy, and so far as everything before me is concerned, it has been applied uniformly. It has been articulated and I have reviewed a great deal of this articulation in circular notes and in conferences with Bulgarian officials.

But that policy, no matter how consistently articulated or how long it had been held, must be evaluated in light of the international commitments which bind the United States. It cannot operate to contradict the language of the Vienna Convention, which is a multilateral treaty to which the United States has pledged its support. That convention sets forth very clearly the privileges and immunities to which a technical or administrative employee of an embassy is entitled.

Having adhered to the Vienna Convention and consented to the provisions of the Vienna Convention, the United States is bound to respect the privileges and immunities which that Convention provides, and those privileges apply in equal force with respect to the Bulgarian Embassy in

Washington and to the Office of the Commercial Counselor in New York, which is a branch of that embassy.

Because of Article 12 of the convention, the United States need never have been concerned about immunity with respect to any foreign trade office in New York. That section provides that, "The sending state may not, without the prior express consent of the receiving state, establish offices forming part of the mission in localities other than those in which the mission itself is established." But the United States did consent to the establishment of the office in New York as a part of the Bulgarian legation, now the Bulgarian Embassy.

Having given that consent, the United States, by signing the Vienna Convention and adhering to it, committed itself to providing the staff of the embassy in the New York office with the privileges that are spelled out in the Convention.

If when the Convention had been signed the United States had wanted a residency requirement for staff members of a mission, it presumably could have either sought the insertion of such a provision in the Convention or it could have taken a reservation or an exception on that matter. So far as any evidence before me is concerned, it did not.

If, therefore, Mr. Kostadinov is functioning as Assistant Commercial Counselor of the Bulgarian Embassy in New York and he has been properly noticed to the United States, he is entitled to the immunities which are set forth in the Vienna Convention. Specifically, under Articles 37 and 31 he is entitled to immunity from criminal jurisdiction.

I now address the question of whether he has properly become a staff member of the Bulgarian Mission. Again I turn to the Vienna Convention.

Article 7 provides that subject to various other provisions, "the sending state may freely appoint the members of the staff of the mission." One of those subject Articles is Article 9, which provides that the receiving state may

notify the sending state that any member of the staff of a mission is not acceptable.

Article 10 requires that a receiving state be notified of the appointment of members of the mission. This duty of notification may very well be a new duty imposed by the Vienna Convention and on such notification the receiving state, here the United States, could declare that the member appointed by the sending state was unacceptable.

Now, the receiving state can act either before or after the staff member has arrived. Article 9 provides that the receiving state may at any time, and without having to explain its decision, notify the sending state that any member of the staff of the mission is not acceptable. So what the Vienna Convention spells out its notification by the sending state and refusal by the receiving state.

Mr. Kostadinov relies on notice to the United States Embassy in Sofia that he was appointed an employee in the commercial service of the Embassy of the Peoples Republic of Bulgaria, that was on May 5, 1979, and a visa was issued on May 23, 1979, and he assumed his duties in New York on July 3, 1979.

Between then and now several visas have been issued with respect to Mr. Kostadinov. On his application for those visas, his position has been described as assistant to the commercial counselor or as assistant commercial counselor in New York City. In a form DA 394, which was filed on behalf of Mr. Kostadinov on November 19, 1980, he was described as assistant commercial counselor of the Bulgarian Embassy's commercial counselor's office and a New York address was given. It is my recollection that there were two succeeding registrations filed on DA 394.

The Vienna Convention does not provide any form of notification or of accreditation and it is certainly abundantly clear from the record before me that the Department of State knew precisely where Mr. Kostadinov would be working and in what capacity.

The United States delegation to the Vienna Convention considered the question of formality or lack of formality with respect to notification procedure:

"All that should be necessary in the case of a member of the staff of the mission is his notification by the sending state to the two receiving states (where there are two receiving states) and their express or tacit acceptance of him. A person can be 'accredited' in many ways. A note from the head of mission regarding a newly arrived member of his staff should be quite sufficient to assure the receiving state that he does in fact speak for his government. Unless the receiving state objects to the appointment, he will thereby have been 'accredited' in the dictionary meaning of the term."

The evidence presented before me shows that Mr. Kostadinov complied with notification requirements, nor did the United States specifically object in the ways prescribed in the convention. It never declared him unacceptable. It never declared him *persona non grata,* although that would not be applicable because apparently that applies only to persons with diplomatic rather than nondiplomatic status. It never expressed any objection to Mr. Kostadinov or to him serving in the position of assistant commercial counselor.

It argues that its policy, set forth in the notes I have already discussed, and the fact that he never appeared on a white list that is published by the State Department was notice to the Bulgarian Embassy, and to Mr. Kostadinov, that he was not accepted as part of the embassy staff.

The problem about that argument is that it was notice of no such thing. It was notice that while Mr. Kostadinov was being accepted and was not being rejected as an employee of the commercial counselor's office, that he would not be accorded diplomatic privileges and immunities. At this stage, the State Department was arrogating to itself on a continuing basis powers that it undoubtedly had prior

to the adherence to the Vienna Convention, but which it has no longer.

Mr. Kostadinov's title of Assistant Commercial Counselor makes him a member of the administrative and technical staff of the Bulgarian Embassy within the meaning of the Vienna Convention and the Diplomatic Relations Act, 22 U.S.C. 254(a), which adopts the descriptions of the Vienna Convention.

Article 1 of the Vienna Convention refines members of the administrative and technical staff as members of the mission.

The Vienna Convention provided only three categories for members of a mission: Diplomatic members, technical and administrative members and service members. The approach of the Department of State is to provide a fourth category not authorized by the Vienna Convention, and not authorized by 22 U.S.C. 254, that is, members of the technical and administrative staff who are not entitled to privileges and immunities.

I find, therefore, that Mr. Kostadinov is a member of the technical and administrative staff of the Bulgarian Embassy in his capacity as assistant commercial counselor.

I find further that the Department of State was properly notified of his designation.

I find further that the Department of State, having been notified and having accepted Mr. Kostadinov in the sense that he was assigned to the New York office after notice to the Department of State and without objection by the Department of State, the Department of State had no authority and no power under the Vienna Convention to deny him the privileges which the Vienna Convention accords him.

I find that he was not rejected by the Department of State. He was therefore accepted by the Department of State.

In arriving at this decision, I have given consideration to the provisions of 22 U.S.C. 254(c). It provides: "The

President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the members of the mission, their families and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention."

I note first that Article 47 of the Vienna Convention authorizes more favorable treatment, but not less favorable treatment.

I note further that any action taken under 254(c) by the President must be on the basis of reciprocity. There is no evidence in this case that the attempt to deny privileges and immunities to Mr. Kostadinov was on the basis of reciprocity. Indeed, it was a general policy which was made applicable to all. I find, therefore, that Section 254(c) has no application.

I find that under the Vienna Convention, Mr. Kostadinov is immune from the criminal jurisdiction of the United States and I grant the motion.

Appendix A—Opinion and Order of U.S. District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

83 Crim. 616 (VLB)

UNITED STATES OF AMERICA,

—against—

PENYU BAYCHEV KOSTADINOV, a/k/a "Penyo B. Kostadinov", a/k/a "Penu B. Kostadinov",

Defendant.

ORDER

VINCENT L. BRODERICK, U.S.D.J.

Defendant moved to dismiss the indictment pursuant to 22 U.S.C. §254d and Rule 12, Fed.R.Crim.P.

For reasons set forth on the record, the motion is granted.

This order will not become effective until appeal has been had.

So ORDERED.

/s/ VINCENT L. BRODERICK,
U.S.D.J.

Dated: New York, New York
January 17, 1984

Copies Mailed to Counsel of Record

APPENDIX B

Opinion of U.S. Court of Appeals

FOR THE SECOND CIRCUIT

No. 1133—August Term 1983

Argued: April 11, 1984 Decided: May 10, 1984

Docket Nos. 84-1042, 84-1092

UNITED STATES OF AMERICA,

Appellant,

—against—

PENYU BAYCHEV KOSTADINOV,

Defendant-Appellee.

B e f o r e :

TIMBERS and PRATT, *Circuit Judges*,
and METZNER, *District Judge*.*

* Hon. Charles M. Metzner, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix B—Opinion of U.S. Court of Appeals

Appeal from an order dismissing an indictment by the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge*, on the ground that the defendant is immune from criminal prosecution by virtue of diplomatic immunity.

Order reversed and the indictment reinstated.

APPEARANCES:

RUTH GLUSHIEN WEDGWOOD, Assistant United States Attorney for the Southern District of New York, New York (Rudolph W. Giuliani, United States Attorney, Paul Shechtman, Assistant United States Attorney, New York, New York, of counsel), *for Appellant*.

MARTIN POPPER, New York, New York (John Mage, Wolf Popper Ross Wolf & Jones, New York, New York, of counsel), *for Defendant-Appellee*.

METZNER, *District Judge*:

The United States appeals from an order of the United States District Court for the Southern District of New York, Vincent L. Broderick, Judge, dismissing an espionage indictment against the appellee on the ground that the defendant is fully immune from the criminal jurisdiction of the United States by virtue of diplomatic immunity. Vienna Convention on Diplomatic Relations,

23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, and 22 U.S.C. § 254d (1982) (Convention). For the reasons stated below, we reverse.

I. *The facts leading to this appeal*

Appellee, Penyu Baychev Kostadinov, is an employee of the Bulgarian Ministry of Foreign Trade, and serves as an assistant commercial counselor in that country's New York trade office. With the permission of the United States, the Bulgarian Legation (later Embassy) in Washington opened the New York office in 1963 for the purpose of promoting trade between the two countries. Bulgaria designated a commercial counselor to head up this office, and he was specifically granted diplomatic immunity by the United States Government. This government recognizes the premises housing the New York office as part of the premises of the Bulgarian Embassy in Washington.

The record reflects that on September 23, 1983, Kostadinov met with another individual in a restaurant in Manhattan. There he purchased from that individual a secret document entitled "Report on Inspection of Nevada Operations Office," which concerned various security procedures for American nuclear weapons. At that meeting Kostadinov paid the individual $300, arranged to meet the person again to make further payment, and gave the person a list of thirty additional classified documents which Kostadinov wanted to acquire. Unbeknown to Kostadinov, the individual had been providing information to the Federal Bureau of Investigation, whose agents recorded the meeting on audio and videotape. FBI agents arrested Kostadinov as he left the meeting. He subsequently was indicted on one count of attempted espionage, 18 U.S.C. § 794(a) (1982),

and one count of conspiracy to commit espionage, 18 U.S.C. § 794(c) (1982).

Kostadinov moved before Judge Broderick to dismiss the indictment, claiming that he had diplomatic immunity from criminal prosecution under the provisions of the Convention. Judge Broderick granted Kostadinov's motion, finding that since the New York trade office at which Kostadinov worked was a part of the Bulgarian Embassy, the title "assistant commercial counselor" makes him a member of the staff of the "embassy"[1] as defined by the Convention, entitling him to immunity.[2]

II. *The Vienna Convention*

A. *Provisions and history*

The sole issue on this appeal is whether, under the provisions of the Convention, approved by the Senate in 1965 and ultimately ratified by this country in 1972, as well as 22 U.S.C. § 254d, Kostadinov was a member of the Bulgarian mission immune from criminal prosecution in this country. It appears that prior to the Convention there would be no question as to the power of the United States to deny diplomatic immunity to Kostadinov. Section 254d provides that an indictment against an individual protected by the Convention shall be dismissed.

Under the Convention, diplomatic privileges and immunities are determined with reference to a country's "mission" abroad, but nowhere does the Convention

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1 The court below used the word "embassy," which is the term generally used. However, the Convention refers only to "mission" which will be used in this opinion.

2 Kostadinov relies on an opinion by Judge Lasker who previously adopted similar reasoning, in a civil setting. *Vulcan Iron Works v. Polish American Machinery Corp.*, 472 F. Supp. (S.D.N.Y.), *rev'd on other grounds on reconsideration,* 479 F. Supp. 1060 (S.D.N.Y. 1979).

expressly define the term "mission." Article 1 does define the "members of the mission" as "the head of the mission and the members of the staff of the mission," which includes "the diplomatic staff . . . the administrative and technical staff and . . . the service staff of the mission . . . ." The "administrative and technical staff," in turn, is defined as "the members of the staff of the mission employed in the administrative and technical service of the mission . . . ." It is to this group that Kostadinov claims to belong, and indeed, Article 3 lists one of the functions of a diplomatic mission as "developing" the "economic" relations between the sending and receiving states.[3]

Article 7 provides, in pertinent part, that subject to Articles 9 and 11, "the sending State may freely appoint the members of the staff of the mission." Article 9 states that:

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[3] In its 1958 discussion of draft Article 3 (later adopted in virtually identical form as final Article 3), the International Law Commission recognized that nations often sent abroad commercial representatives whose entitlement to diplomatic immunities varied from country to country. The rapporteur had proposed a commentary stating in part that "[a]n overlapping of functions may easily occur in the course of co-operation between the trade delegations and the diplomatic mission, which will make it difficult to determine whether the trade delegation or its members have been notified as belonging rightly to the mission." The draft commentary also observed that the subject of trade representatives was not suitable for treatment "by general provisions," but was more appropriately covered by "commercial treaties." *Summary Records of the International Law Commission,* [1958] 1 Y.B. Int'l L. Comm'n 110.

After heated debate over the proper status of trade representatives, reflecting the fact that various nations treated them differently, *Summary Records* at 110-11, 235, the Commission adopted a simple commentary. It wrote that "[w]ith regard to trade missions, it should be noted that the question of commercial representation as such—i.e., apart from the commercial attaches of a diplomatic mission—is not dealt with in the draft because it is usually governed by bilateral agreement." *Report of the International Law Commission to the General Assembly,* [1958] 2 Y.B. Int'l L. Comm'n 90.

"1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

Article 11 provides that:

"1. In the absence of the specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category."

The above provisions are better understood after examining the groundwork performed by the International Law Commission (Commission) and the discussions by the delegates to the Vienna Conference which prepared the Convention.

In 1954 the Commission, an agency of the United Nations, initiated work on the subject, and appointed a "special rapporteur" to prepare a set of draft articles, with a commentary. In 1957 the Commission adopted a provisional set of articles, with an official commentary, and submitted its work to the Secretary-General of the United Nations, with a request that he transmit them to constituent governments for their observations. The General Assembly's Sixth Committee also reviewed the draft.

In 1958, after having received various comments in response to its 1957 draft, the Commission adopted draft articles and the rapporteur's commentary, and forwarded its work to the General Assembly with a recommendation that U.N. member states conclude an international convention based upon the draft. *See generally Report of the Interntional Law Commission to the General Assembly*, [1958] 2 Y.B. Int'l L. Comm'n 89 (*Report*), and sources cited therein.

In 1959 the General Assembly requested the Secretary-General to convene a conference in Vienna by the spring of 1961, in order to prepare a convention on diplomatic intercourse and immunities. The Assembly specifically referred to the Vienna Conference the Commission's 1958 report, comprising both the draft articles and the rapporteur's commentary, "as the basis for its consideration of the question of diplomatic intercourse and immunities." G.A. Res. 1450(XIV), 7 December 1959.

The Vienna Conference met and produced the Vienna Convention on Diplomatic Relations.

The background material illuminates what we believe to have been a misconception by the district court of the meaning of the term "mission" in the Convention. The court placed emphasis on the physical aspect of a "mis-

sion." Under the Convention, a "mission" consists of a group of people sent by one state to another; it does not refer to the premises which they occupy in the receiving state. This is made clear by the rapporteur's commentary to Article 6 of the Commission's draft, which was later adopted as Article 7 of the Convention. In his commentary to that draft article the rapporteur wrote:

> "While it is the sending State which appoints *the persons who comprise the mission*, the choice of these persons . . . may considerably affect relations between the States, and it is clearly in the interests of both States that the mission should not contain members whom the receiving State finds unacceptable."

Report at 91 (emphasis added). In a similar fashion, the commentary to draft Article 10 (final 11) observes that one of the "questions connected with the mission's composition which may cause difficulty" is "that of the choice of *the persons comprising the mission*." Report at 92 (emphasis added).

In the general commentary to the draft articles, the rapporteur stated that diplomatic privileges and immunities may be divided into three groups: "(a) Those relating to the premises of the mission and its archives; (b) Those relating to the work of the mission; (c) Personal privileges and immunities." *Report* at 94-95. In this case we are concerned with (c).

Draft Article 19 (final 21) speaks of the receiving state's obligation to assist the sending state to acquire the "premises necessary for its mission," and the rapporteur's commentary again draws the distinction between the mission and the physical premises which it uses, speaking of potential problems rendering it difficult "for a mission to

acquire the premises necessary to it." *Report* at 95. Draft Article 20 (final 22) delineates the immunity which attaches to the premises of a mission, which are expressly defined by the rapporteur as including "the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented"; the premises are used "as the headquarters of the mission." *Report* at 95. Draft Article 43 (final 45) observes that while a *mission* may be recalled, the receiving state must "protect the premises of the mission," or the sending state "may entrust the custody of the premises of the mission" to a third state.

One objection might be raised to the interpretation differentiating between mission and premises, based upon the final text of Article 12. The original draft required the sending state to obtain the permission of the receiving state before establishing "offices in towns other than those in which the mission itself is established." The final text required permission to establish "offices forming part of the mission in localities other than those in which the mission itself is established." At first blush this article appears to be an isolated reference to physical structures as comprising a "mission," despite the many clear statements to the contrary elsewhere in the Convention and the commentary.

Here again, the rapporteur's commentary clarifies the intent of the article which was "included to forestall the awkward situation which would result for the receiving Government if *mission premises* were established in towns other than that which is the seat of the Government." Report at 92 (emphasis added). The original draft of this article clearly adopted the consistently accepted view that a "mission" is composed of people, and premises are where missions are housed.

The change in language between the draft and the final text was not intended to alter the purpose set forth by the rapporteur. The records of the Vienna Conference demonstrate that the additional words were inserted to make it clear that such offices were to be physically inviolable to the same extent as the mission's primary premises. However, this does not confer diplomatic immunity on those who work there.

In addition, the delegates rejected the use of the all-inclusive term "premises" in this section in order to make it clear that no consent was required for the establishment, for example, of summer residences or homes outside the boundaries of the capital.[4]

In its report to the Secretary of State, the United States delegation to the Vienna Conference observed that Article 12 reflected "[p]resent international practice."[5] The United States declared in 1939 that "the only foreign diplomatic officers . . . permitted to reside and maintain offices in New York City will be the ranking commercial or financial officer,"[6] and it has continuously followed that policy.

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4 *See Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna,* 2 March-14 April 1961 (Geneva 1962) 108-12 (remarks of the delegates of the United Kingdom and Turkey; remarks of the delegate of Cuba, observing that a diplomatic mission might establish offices *not* forming part of the mission).

The records of the International Law Commission's consideration and adoption of the draft article and commentary reflect similar concerns. *Summary Records, supra* note 2, at 113-14, 239-40.

5 *United States Delegation to the United Nations Conference on Diplomatic Intercourse and Immunities, Report to the Secretary of State,* Dep't of State Pub. No. 7289 (1962). A position paper of the United States delegation to the Vienna Conference noted the American policy of declining to accredit subordinate trade office employees not resident in Washington, and did not indicate that the Convention would alter that practice. 7 Whiteman, *Digest of International Law* 9 (1970).

6 *Letter from George T. Summerlin, Chief of Protocol of the State Department, to the Belgian Ambassador to the United States* (November 4, 1939).

Finally, the Senate subcommittee considering the Convention was informed by the State Department that the Convention would apply to the "diplomats in Washington, and those in New York at the United Nations and also those attached to the OAS and to the NATO headquarters who have diplomatic status [all of whom] number about 3,000 in this country, roughly,"[7] The subcommittee was further informed that the Convention would not apply to trade office personnel.[8]

B. *The location of one's office in mission premises does not necessarily carry with it diplomatic status.*

Kostadinov argues that he is a "member of the staff of the mission" under the Convention, for he works in the New York trade office, which is housed in mission premises. Since mission premises and the mission itself are independent concepts, however, it does not follow that his working in mission premises requires the conclusion that Kostadinov is a member of the mission.

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7 *Vienna Convention on Diplomatic Relations: Hearing Before the Subcommittee of the Senate Committee on Foreign Relations,* 89th Cong., 1st Sess. 22 (1965) (statement of Leonard C. Meeker, State Department Chief Legal Adviser). At the same time the subcommittee was informed that the text of Article 11, permitting a receiving state to limit the size and categories of staff in sending states' missions, would not change current United States practice. *Id.* at table (list of Convention provisions and their effects, if any, on United States law).

8 *Id.* at 74. With this understanding, in his report to the Senate recommending approval of the Convention, Senator Church wrote:

> "Since there are a great many more foreign official representatives in the United States than those attached to permanent diplomatic missions accredited to the Government of the United States, the committee received assurances that the Vienna convention applied only to the latter group. Members of trade missions and other negotiating groups . . . are not within the scope of this convention. It is strictly limited to the permanent diplomatic missions maintained by foreign governments at the seat of other foreign governments."

Ex. Rep. No. 6, 89th Cong., 1st Sess. 10 (1965).

The members of the Commission and the delegates to the Vienna Conference recognized that under existing international law persons sent by a foreign nation to perform consular duties may maintain offices upon mission premises, but not be members of the mission itself.[9] The delegates demonstrated their clear aversion to conferring diplomatic status upon purely consular officials even when those officials maintained offices on mission premises. The delegates from Brazil, for example, observed that consular sections on mission premises operated as consulates, not as parts of the missions, and that consular personnel often remain behind when their nation's diplomatic missions are recalled. *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna*, 2 March-14 April 1961 (Geneva 1962) 82 (*Conference*). In a statement echoed by several other nations' delegates, the Yugoslavian delegate added that while most countries would tolerate the performance of some consular functions on the premises of diplomatic missions, the entire subject of consular relations was outside the scope of that conference on diplomatic immunities. *Conference* at 82-83 (*e.g.*, remarks of delegates of Viet-Nam and Argentina). Ultimately, a separate convention was prepared to regulate consular relations, the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

The Commision specifically discussed another instance inwhich a person employed and working on mission

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9 *See also Restatement of the Foreign Relations Law of the United States* Title B (tent. Draft No. 4, 1983), intro. note at 23n (observing that foreign officials may be sent abroad for various purposes, "and may have offices at a diplomatic mission . . . but the status of such persons, and their privileges and immunities, must be determined in each case in the light of the agreement between the two states, and is not determined by their title or designation.").

premises nonetheless would not be entitled to be considered a "member of the staff of the mission," and, of course, would not enjoy diplomatic privileges and immunities. Article 9 provides that a receiving state may declare "at any time" that any member of the staff of a mission is not acceptable, in which case the sending state shall "recall the person concerned or terminate his functions with the mission." Should the sending state refuse or fail within a reasonable period to do so, "the receiving State may refuse to recognize the person concerned as a member of the mission."

In the commentary to the draft of this article, the rapporteur observed that should the sending state fail to fulfill its obligations concerning an unacceptable member, the receiving state "may take action of its own accord. It may declare that the functions of the person concerned are terminated, that he is no longer recognized as a member of the mission, and that he has ceased to enjoy diplomatic privileges." *Report* at 91. The delegates at Vienna shared this understanding of the article. *See, e.g., Conference* at 102 (remarks of the delegates of India, Iraq and the U.S.S.R.).[10] Thus, if the sending state refuses to act on the receiving state's objections within a reasonable time, the person concerned loses any diplomatic privileges and immunities which he may once have had, and this is so regardless of whether he continues to be employed by the mission and is provided office space on its premises. Nothing in the convention requires that the receiving state must either expel the person concerned or accept him as a member of the mission.

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10 *See, e.g.*, the 1958 *Summary Records, supra* note 3, at 237-38; and the 1957 Commission proceedings, *Summary Records of the International Law Commission*, [1957] 1 Y.B. Int'l L. Comm'n 201-02, 225.

The mere fact that Kostadinov's office is located in a building in New York which is considered part of the Bulgarian Embassy does not, without more, establish that he is one of the persons who comprise the Bulgarian mission to the United States. Accordingly, we now examine whether pursuant to the terms of the Convention, Kostadinov in particular enjoys diplomatic immunity.

C. *Is Kostadinov a member of the mission*?

During the course of the discussions in Vienna, the Indonesian delegate remarked that it was not the Conference's intent to afford diplomatic status to all persons holding diplomatic passports in cases where the receiving state did not approve. *Conference* at 56. The State Department has consistently refused to recognize "assistant commercial counselors" as having diplomatic immunity and has so notified Bulgaria.

The United States recognizes that New York City is the proper place for offices engaged in expanding trade between foreign countries and the United States. Diplomatic missions to the United States are confined to Washington, D.C. The only exception to the requirement that members of the diplomatic mission reside and work in Washington is that the commercial counselor may also head up the New York trade office and reside in New York. Of course, the counselor may employ other persons from his country to assist in conducting the work of the office, but it does not follow that such persons are members of the diplomatic mission.

In the negotiations between Bulgaria and the United States in 1963 regarding settlement of financial claims, the subject of improving trade between the countries was discussed. The settlement of the claims was contained in a

written agreement. Bulgaria requested insertion of language in the agreement regarding trade between the countries, but the United States insisted on keeping the issues separate. The subject of trade relationships was merely contained in a press release issued by the United States which stated:

> "The United States is prepared to authorize the Legation of the People's Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between our two countries. Both Governments will be prepared to facilitate the travel of commercial representatives and officials interested in increasing trade."[11]

Shortly after the issuance of this press release, the director of the State Department's Office for East European Affairs informed the Bulgarian Minister in Washington that only the Bulgarian Commercial Counselor in Washington, who would also head the New York office, would be entitled to diplomatic immunity. He further stated that immunity would not be provided for anyone else employed at the New York trade office. This message was repeated on March 11, 1964, to the First Secretary of the Bulgarian Legation in Washington.[12]

This policy takes on added meaning in this case when we consider the discussions with regard to commercial representation by the Commission. It is perfectly clear that commercial representation is not covered by the Convention.[13] Kostadinov asserts that the press release

11 Department of State, *For the Press*, No. 355 (July 2, 1963).

12 Department of State, Memorandum of Conversation among Messrs. Vedeler, White and Molerov, March 11, 1964.

13 *See supra* note 3.

constitutes a "Bi-Lateral Agreement" which makes him a commercial attache with diplomatic immunity. Certainly a press release is not a bi-lateral agreement.

The State Department again reminded Bulgaria of its policy regarding New York trade missions on April 25, 1973, in denying the request by the Bulgarian Embassy in Washington for diplomatic license plates for newly arrived trade representatives in New York.[14]

Thrice in the next five years, in 1974,[15] 1977[16] and 1978,[17] the State Department sent circular notes to the chief diplomatic officer of each Washington embassy restating the longstanding United States policy that all mission personnel entitled to diplomatic privileges and immunities, with the exception of the senior financial, economic and commercial officers in New York, must reside in the Washington area.

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14 The letter read as follows:

> "As you know, it is the policy of the Department of State to accept for inclusion in the Department's 'Diplomatic List' only the officer-in-charge of an Embassy Commercial or Financial Office in New York. It is the general practice under such circumstances, since only that officer enjoys privileges and immunities, to issue only three sets of DPL license plates; one for the official vehicle, one for the automobile of the diplomatic officer and one for that of his wife.
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> In view of the foregoing, I regret that it will not be possible to authorize the issuance of DPL license plates for automobiles of other personnel of the office of the Commercial Office of the Bulgarian Embassy in New York."

Letter from State Department Assistant Chief of Protocol to Second Secretary of Bulgarian Embassy, April 25, 1973.

15 *Reprinted in* Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1974* at 157-58.

16 *Reprinted in* Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1978* at 536-37.

17 *Id.* at 532-36.

In May, 1979, Bulgaria notified the United States that it was sending Kostadinov "in the commercial service of the Embassy of the Peoples' Republic of Bulgaria in Washington" to replace Stefan Kossev. Kossev was an assistant commercial counselor in New York City. At that time Bulgaria knew that Kostadinov would not be accepted by the United States as a member of the mission. Although the United States did not formally notify Bulgaria that Kostadinov was "not acceptable," the whole course of conduct prior to his arrival and thereafter made it abundantly clear that the United States did not consider any person sent by any country with such assignment acceptable as a member of a mission.

This government issued an A-2 visa to Kostadinov. Such a visa does not necessarily confer diplomatic immunity. *See* 8 U.S.C. § 1101(a)(15)(A)(i), (ii) (1982); 22 C.F.R. § 41.12 (1983). This exchange of documents did not constitute a withdrawal by the United States of its understood policy regarding officers of a trade mission in New York. They did not constitute an acceptance of Kostadinov as a member of the Bulgarian diplomatic mission entitled to immunity.

Subsequent to his arrival, Kostadinov never received a diplomatic identity card and his name never appeared on the blue or white lists prepared by this government which indicate that a person has diplomatic immunity. He worked in the trade office in New York City.

In January 1981 the State Department restated its position to the Bulgarian Embassy in connection with Mirolyub Vulov, who had been assigned to the Bulgarian trade office in New York.[18] In April 1981, in another context, the Bulgarian Commercial Counselor was again

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[18] *See Cable from State Department to United States Embassy in Sofia*, January 31, 1981.

advised of the position of the United States.[19] On May 29, 1981, an official of the Bulgarian Ministry of Foreign Affairs met with representatives of the United States Embassy in Sofia and specifically referred to the fact that the United States did not accord its subordinate New York trade officers diplomatic privileges and immunities.[20]

As noted above, in the absence of a specific agreement as to the size of the mission, Article 11 permits the receiving state to "require that the size of a mission be kept within limits considered by it to be reasonable and normal" with regard to conditions in the receiving state and the needs of the mission concerned.[21] That article also

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19 The Bulgarians were told that:

> "Bulgarian officials assigned to the United States Receive A visas, but that the visa itself did not confer diplomatic status or immunity. As a matter of policy, diplomatic missions were required to be located in the District of Columbia . . . to prevent a proliferation of offices and persons with diplomatic status around the country. [The State Department officer] said a number of countries, including Bulgaria, had been permitted to have one officer from the Embassy with diplomatic status resident in New York on an exceptional basis because of that city's commercial significance. None of the other personnel assigned to New York by Bulgaria or by other countries with similar offices were accredited as diplomatic staff or accorded privileges and immunities under the Vienna Convention. [The officer] said they fell in the category of 'miscellaneous foreign government officials' who were entitled only to relief from paying U.S. federal income taxes."

Cable from State Department to United States Embassy in Sofia, April 15, 1981.

20 *See Cable from United States Embassy in Sofia to State Department,* May 29, 1981.

21 The Commission's draft had set up an objective standard of "reasonable and normal" for a mission's size. The delegates at Vienna rejected that standard, and granted the receiving state the right to limit the size of missions to the number *it* considered reasonable and normal. *Conference* 106-08 (committee records), 13-4 (plenary session adopting the article). *See* Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 98-99 (1962).

permits the receiving state, on a nondiscriminatory basis, to "refuse to accept officials of a particular category."

The United States did precisely what Article 11 permits. It limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely, assistant commerical counselors based in New York. Furthermore, it did so on a nondiscriminatory basis.

III. *Conclusion*

This court concludes that Kostadinov is not a member of the Bulgarian mission entitled to immunity from criminal prosecution. The order dismissing the indictment is reversed and the indictment reinstated.

An appeal was subsequently filed by the government from an order of Judge Broderick granting Kostadinov habeas corpus relief. That order was stayed pending appeal and the appeal was consolidated with the appeal on the merits. However, the matter was never briefed nor argued on the appeal from the dismissal of the indictment. This second appeal is dismissed as moot.