

1985

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Recommended Citation

Robert M. Jarvis, *The Honorary Consul in Modern International Practice: Why Article 68 of the Final Act of the United Nations Conference on Consular Relations Should Be Amended to Provide a Uniform Regime for the Sending and Receiving of Honorary Consuls*, 23 Duq. L. Rev. 905 (1985).
Available at: <https://dsc.duq.edu/dlr/vol23/iss4/5>

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The Honorary Consul in Modern International Practice: Why Article 68 of the Final Act of the United Nations Conference on Consular Relations Should be Amended to Provide a Uniform Regime for the Sending and Receiving of Honorary Consuls

Robert M. Jarvis*

I. INTRODUCTION

States throughout the world have long sought to promote trade with other nations. One way in which states have attempted to foster such commerce is by the development and maintenance of a consular service, the function of which is to facilitate business relations with the receiving country.

Larger states have found the advantages to be gained from the posting of consular officers throughout the world so great that they now have vast professional consular corps.¹ Smaller states, less wealthy states, and newly independent states, while recognizing the advantages to be gained from such services, have often found themselves unable to afford the cost of a far flung consular corps.²

As an alternative, such states have turned to the practice of appointing part-time consular officers known as honorary consuls.³ Honorary consuls are normally appointed in those ports and cities in which representation is thought important, but which cannot

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1. The United States, for example, is currently represented by 72 Consulates General, 34 Consulates, 3 Branch Offices and 30 Consular Agencies located throughout the world. Office of the Federal Register, *THE UNITED STATES GOVERNMENT MANUAL* 1984/85 389 (1984). A complete listing of all of the United States consulates is contained in Joint Committee on Printing, *1983-1984 CONGRESSIONAL DIRECTORY* 98TH CONGRESS 875-82 (1983).

2. See *infra* text accompanying notes 119-28.

3. Honorary consuls have also been called *consules electi*, *consuls marchands*, non-career consuls, and unsalaried consuls. L. LEE, *CONSULAR LAW AND PRACTICE* 14 (1961).

justify the expense of a full-time consular officer.

Honorary consuls are usually, though not always, citizens of the state in which the appointing state wishes to be represented.⁴ Such a person does not receive remuneration from the state that appoints him,⁵ although he sometimes receives an allowance with which to conduct his office. Unlike a professional consular official, an honorary consul enjoys only limited immunity.⁶ An honorary consul may engage in full-time employment for his personal profit.⁷ The position of honorary consul carries with it a certain increased social status⁸ and a number of perquisites,⁹ although the right to such perquisites differs from location to location.¹⁰

4. In some instances, however, they are nationals of a third state; that is, they are not a national of either the appointing or receiving state. In 1907, for example, the German ambassador in Washington, D.C. requested that the American consular agent in Tripoli, Syria, be permitted to also hold the Office of German Vice Consul. The request was refused, but the United States did offer to instruct its agent to use his good offices on behalf of German subjects. The matter is recounted in IV G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 663-64 (1942).

5. It is usually thought that the lack of remuneration is the chief test for deciding whether or not a consul is honorary. *But see infra* note 52.

6. The extent of the immunities enjoyed by an honorary consul is discussed in detail in *United States v. Marcano Garcia*, 456 F. Supp. 1358 (D.P.R. 1978), *aff'd*, 622 F.2d 12 (1st Cir. 1980). In that case the defendants were charged with the wilful and unlawful seizure and confinement of the Honorary Consul of Chile while he was traveling in San Juan, Puerto Rico. The court held, *inter alia*, that an honorary consul is an "internationally protected person" under United States law.

7. The right of honorary consuls to engage in other occupations has caused sharp criticism of the institution of honorary consuls. The matter is more fully discussed *infra* Part V.B of this article.

8. The subject of the social prestige enjoyed by holders of the title honorary consul is discussed *infra* Part V.C of this article. For a case involving, *inter alia*, a loss of prestige due to an incorrect report that the plaintiff had been suspended from his post of honorary consul, see *DeCarvalho v. da Silva*, 414 A.2d 806 (R.I. 1980).

9. The most common perquisites are the right to place the coat of arms of the appointing state on one's house, entitlement to special license plates for one's car, and the flying of the national flag of the appointing state. See *Oregon v. Killeen*, 39 Or. App. 369, 592 P.2d 268 (1979).

In a recent situation, however, American honorary consuls serving in Oregon were unsuccessful in obtaining legislation which would grant them free license plates. See OR. REV. STAT. § 481.080 (1983), *as amended* by S.B. 91 (Oregon Legis. Assembly, Mar. 6, 1981). The legislature rejected the notion that such a "diplomatic courtesy would help improve relations between the United States and the nations [which the honorary consuls] represented." UPI Regional News, Feb. 27, 1981 (available June 1, 1985, on NEXIS, Wire File). Contributing to the rejection of the proposed legislation was concern over the prospect of policemen erroneously assuming that honorary consuls possessed diplomatic immunity from traffic tickets. Added to this was revelation of the existence of 10,000 outstanding tickets against professional consuls in a single Oregon county. *Id.*

10. The United States, for example, has recently commented on the perquisites to which an honorary consul residing in the United States is entitled. In response to an inquiry from the Lebanese Embassy, the State Department replied on December 14, 1979 that:

States vary with regard to the sending and receiving of honorary consuls. Some have prohibited their citizens from accepting appointment as an honorary consul from another country,¹¹ while others have made it their practice to neither receive nor send honorary consuls.¹² Still others accept honorary consuls, though they themselves do not send them.¹³ Some states both receive and send honorary consuls.¹⁴ Finally, the consular services of a number of states are made up almost entirely of honorary consuls.¹⁵

This international practice has been codified in Article 68 of the Final Act of the United Nations Conference on Consular Relations, which was adopted in 1963.¹⁶ Article 68 views the office of honorary

The Department of State does not issue a special or official American passport to a United States citizen appointed by a foreign government as an honorary consul. The entitlement of honorary consuls to special tags for their automobiles is governed by the laws and regulations of the particular state in which the consular post is located. The laws and regulations of the several states of the Union vary in this respect, and each state in which the Embassy may be interested should be consulted to ascertain the local practice.

The Vienna Convention on Consular Relations, to which the United States is a party, permits an honorary consul who is head of a consular post to fly the national flag of the sending State "on his means of transport when used on official business", subject to the laws, regulations and usages of the receiving State. It is the position of the United States Government that honorary consuls in the exercise of this right should scrupulously limit it to occasions when the automobile is being used solely on official business in the sending State, bearing in mind that in most instances such consuls are also engaged in private commercial or professional activity.

Finally, the Vienna Convention referred to also permits an honorary consul who is serving a foreign government as head of a consular post to fly the national flag of the sending State on his residence, again subject to the prevailing regulations and usages of the receiving State. The United States Government has no objection to an honorary consul exercising its right, provided that the consul's residence is a single family dwelling.

Dept. of State File Nos. P79 0179-0355 and P79 0179-0357, *reprinted in* M. NASH, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1979 675 (1983). For a case where the defendant was prosecuted for impersonating an honorary consul, see *Cortez v. United States*, 328 F.2d 51 (5th Cir. 1964).

11. The government of Hungary enacted specific legislation more than 30 years ago which prohibits any Hungarian citizen from accepting appointment as an honorary consul. See *infra* Part IV.A 1 of this article.

12. The Soviet Union, for example, has insisted that every consular treaty it has signed since the end of World War II include a specific provision prohibiting the sending or receiving of honorary consuls. See *infra* Part IV.A 1 of this article.

13. The United States, Australia and New Zealand will accept but not send honorary consuls. LEE, *supra* note 3, at 17.

14. Ireland, Pakistan and South Africa all receive and send honorary consuls, but rely for the most part on career consuls. *Id.* at 304.

15. As noted *infra* Part IV.A 3 of this article, some countries report that 80% or more of their consuls are honorary. See also LEE, *supra* note 3, at 304.

16. U.N. Doc. A/CONF.25/13, April 23, 1963. The text of the Act is printed at 57 AM J. INT'L L. 993 (1963). The Conference entered into force on March 19, 1967. The United

consul as an optional one, and provides that "[e]ach State is free to decide whether it will appoint or receive honorary consular officers."¹⁷ No penalties attach if a state refuses to accept an honorary consul, although such a refusal may mean that the tendering state will lack representation in the refusing state.¹⁸

The most often cited reasons why states refuse to accept honorary consuls are: (1) a belief that the allegiance of their nationals should not be shared with other countries;¹⁹ (2) a feeling that businessmen who serve as honorary consuls receive an unfair advantage over other businessmen in the community by having access to classified information from the state which appointed them;²⁰ and (3) the perception that persons holding the rank of honorary consul often know little, if anything, about the state they represent, and are therefore not in a position to fulfill the office as ably as a professional consular officer.²¹ This last problem has become more acute as the practice of selling honorary consularships has increased.²²

As problems with the honorary consul system have gained widespread visibility, and as professional consular services have become the standard practice of many larger states, a growing number of countries have begun to refuse to admit honorary consuls.²³ Such a development is unfortunate in light of the hardships which result to smaller countries. This trend is likely to continue unless steps are taken to reform the process by which honorary consuls are

States agreed to be bound by it on December 24, 1969. Currently more than ninety states are signatories to the treaty. See U.S. DEPT. OF STATE, TREATIES IN FORCE 214 (1984).

17. Article 68 is entitled: "Optional character of the institution of honorary consular officers."

18. Article 2 of the Conference's Final Act states that "[t]he establishment of consular relations between states takes place by mutual consent."

19. See *infra* Part V.A of this article for a discussion of the problem of dual allegiances.

20. The charge that honorary consuls enjoy an unfair advantage over local businessmen is discussed *infra* Part V.B of the article.

21. The question of whether honorary consuls adequately discharge their offices is discussed in Part V.C of this article.

22. *Id.*

23. The exclusion of honorary consuls has been achieved by providing, in the bilateral consular treaties between nations, that only nationals may be consular officers. For a recent example of such a provision, see the Sino-American Consular Convention concluded in 1980. Article 4(2) of that Convention states that "Consular officers shall be nationals of the sending State only, and shall not be permanent residents of the receiving State." Consular Convention Between the United States of America and the People's Republic of China, Sept. 17, 1980, art. 4(2), T.I.A.S. No. 10209.

named.²⁴

In light of the foregoing, a new regime should be developed in order to address the perceived flaws in the present system. Such a regime should be standardized so as to increase the likelihood that an honorary consul who is tendered will be accepted. In addition, a uniform system would be easier to administer than the current, haphazard reliance on individual state practice.

The purposes of this article are to: (1) examine the current system for appointing and receiving honorary consuls; (2) discuss the weaknesses in the present system; and (3) present a proposal for a uniform regime for the regulation of honorary consuls under the auspices of the United Nations.²⁵ Although the problems of the current system have been apparent for some time,²⁶ scant attention has been paid to honorary consuls by legal commentators. What study has been devoted to the subject has focused on the question of what immunities attach to honorary consuls.²⁷ Because of the relative vastness of the literature on honorary consul immunities, that topic will only be touched incidentally in this work.

II. THE DEVELOPMENT OF THE CONSUL AND HONORARY CONSUL SYSTEMS

A. *Development of the Consul System*²⁸

The appointment of an honorary consul is an alternative to the

24. As explained *infra* Part VI of this article, there has been over time a notable movement by many states to refuse honorary consuls, even though their earlier practice was otherwise.

25. What is envisioned, as explained *infra* Part VI of this article, is that Article 68 of the Final Act of the United Nations Conference on Consular Relations will be substantially rewritten along the lines of the proposal set out in Part VI.

26. Problems with the practice of sending honorary consuls have been written about since at least the 18th century. See *infra* note 48.

27. Consular immunities are considered in: Lee, *Some New Features in the Consular Institution*, 44 GEO. L.J. 406 (1956); Lee, *Toward A Uniform Customs Exception for Consular Officers*, 7 INT. & COMP. L.Q. 762 (1958); Note, *Consular Immunity: In Law and in Fact*, 47 IOWA L. REV. 668 (1962). For other interesting aspects of the consular office, see Note, *Consular Discretion in the Immigrant Visa-Issuing Process*, 16 SAN DIEGO L. REV. 87 (1978). Recently, honorary consuls in the United States have been sought out by opponents of the South African government. Following demonstrations which have often bordered on violence, Americans citizens serving as honorary consuls of South Africa have been forced to resign. Barker & Marriott, *Braving Cold, Marchers Hold Protest Parade; Hundreds March in Opposition to Administration's Policies*, Washington Post, Jan. 22, 1985, at A21; Magnuson, *Fresh Anger Over Apartheid; Bishop Tutu and Conservative Congressmen Join the Protest*, Time, Dec. 17, 1984, at 46; Werner, *Protests Spreading in U.S. Against South Africa Policy*, N.Y. Times, Dec. 5, 1984, at A18.

28. The basis for this section of the article is B. SEN, A DIPLOMAT'S HANDBOOK OF IN-

appointment of a career consul. Such appointments are usually made because the post cannot justify, either in terms of expenses or duties, a full-time consular official. In order to gain some perspective of what an honorary consul is, it is useful to trace the history and practice of consuls.

The development of consuls appears to stem from the expansion of international commerce and trade which occurred following the collapse of the Western Roman Empire in 476 A.D. As the strictures of what had been the empire began to fall away, traders and merchants started to push back the known frontiers of the Roman world. This push soon quickened into a major movement, spurred on by the enthusiastic reception which the Roman merchants received in the new markets.²⁹

As merchants began to travel far distances from their homelands, it became impractical for them to continue visiting distant lands for a few months at a time. Many merchants therefore gave up their households and started trading on a full-time basis in foreign cities. As the number of these foreign traders grew significant, whole communities began to form which consisted solely of foreign merchants. Within these communities further divisions occurred, so that each nation's merchants often had their own district.³⁰

These "cities-within-cities" never became assimilated into the larger community of the host town. Instead, they organized their own school, churches and warehouses and retained their own languages, religions and customs. In large part, the failure to assimilate was due to the widely recognized feudal principle of personality,³¹ which granted communities significant measures of autonomy and self-rule. It is also likely that the barriers of language and religion played a part in isolating the foreign merchant communities.

Self-rule was so complete that foreign districts were also frequently allowed to set and enforce their own laws. These laws were patterned on the laws of the district's homeland rather than the

INTERNATIONAL LAW AND PRACTICE 201-04 (1965). Sen's views are in accord with the earlier views of the United States government as expressed in a letter dated July 14, 1855 exchanged between Attorney General Cushing and Secretary of State Marcy. The letter is reprinted in E. STOWELL, CONSULAR CASES AND OPINIONS 541-47 (1909).

29. SEN, *supra* note 28, at 201.

30. Attorney General Cushing's letter, *supra* note 28, refers to these districts as "municipal colonies." STOWELL, *supra* note 28, at 545.

31. Attorney General Cushing explained the personality principle's effect by stating that because of it "[i]t was customary for distinct nationalities, co-existing under the same general political head, and even in the same city, to maintain each a distinct municipal government." STOWELL, *supra* note 28, at 545.

laws of the host country, even when the two sets of laws differed greatly. In the nineteenth and early twentieth centuries, of course, these differences were highlighted in numerous unfortunate incidents which put an end to the right of self-rule.³²

Law within the foreign merchant communities was administered by judges selected from among the merchants. The judges, known as special magistrates, had no legal training and were essentially equivalent to modern day commercial arbitrators.³³ The right to have and appoint special magistrates appears to have been accepted by host governments with little dissent. Records of special magistrates appear in Chinese history in the eighth century and in Indian history by the ninth century.³⁴ The system spread to the eastern half of the Roman Empire following the Arab conquest of that part of the empire.³⁵

The system of special magistrates enjoyed its most prominent early recognition in Italy. The Italian Republics frequently exchanged consuls among themselves and with Spain.³⁶ By the middle of the eleventh century Venice was routinely sending magistrates to Constantinople to try Venetians involved in civil and criminal cases.³⁷ By the middle of the thirteenth century, the city of Genoa had obtained permission from King Ferdinand III of Castille to have consuls at Seville settle disputes between Genoese residents and local citizens.³⁸

In the twelfth century special magistrates began to acquire the

32. These incidents were caused by the practice of granting to foreign consuls extraterritorial rights in respect to civil or criminal actions concerning their citizens. Although such extraterritoriality was recognized in Serbia, Bulgaria, Iran, Egypt and a number of other states well into the 20th century, it was notable in American relations with China and Japan, where abuses of the right reached often extraordinary levels. A detailed discussion of the practice of extraterritorial jurisdiction appears in 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 278-351 (1968).

33. Attorney General Cushing described the role and position of consuls in this period in the following manner:

Such municipal colonies, organized by the Latin Christians, and specially by those of the Italian Republics, in the Levant, were administered, each by its consuls, that is, its proper municipal magistrates, of the well-known municipal denomination. Their commercial relation to the business of their countrymen was a mere incident of their general municipal authority. Such also, at the outset, was the nature of their political relation to other co-existing nationalities around them in the same country, and to that country's own supreme political or military powers.

STOWELL, *supra* note 28, at 545.

34. SEN, *supra* note 28, at 202.

35. *Id.* Attorney General Cushing is in agreement. STOWELL, *supra* note 28, at 545.

36. SEN, *supra* note 28, at 202.

37. *Id.*

38. *Id.*

title consul, and reports of the presence of consuls begin to appear regularly from the twelfth century on in the accounts of the trading cities bordering the North and Baltic Seas and the Mediterranean.³⁹ By the close of the fifteenth century English consuls were present in Sweden, Norway and Denmark.⁴⁰ At the same time, Genoa, Venice and France had concluded consular treaties with Turkey providing their consuls with extensive civil and criminal jurisdiction in that country.⁴¹

As noted above, prior to the sixteenth century consuls were chosen by and from the merchants of a foreign nation located in the state where representation was sought. This changed in the sixteenth century as states began to appoint consuls as official representatives of the state, thereby fusing their commercial duties with diplomatic functions.⁴² Shortly thereafter, states began to maintain permanent diplomatic missions and the office of consul went into a long eclipse.⁴³

The advent of commercial shipping which was reliable, thus linking the world together in a way that had not previously been known, revived the need for consuls in the eighteenth century.⁴⁴ By the early part of the nineteenth century consuls were once again in vogue. Britain established a consular service in 1825⁴⁵ following the earlier leads of France, the Netherlands and the United States.⁴⁶ Today consular services are maintained, either apart from or combined with the Foreign Service, by many countries.⁴⁷

B. *Development of the Honorary Consul System*

In marked contrast to the development of the consul system, little has been written regarding the origin of appointing honorary consuls. Vattel, however, insisted in his 1758 work *The Law of Nations*, that honorary consuls should not be appointed.⁴⁸ Thus it

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 202-03.

43. *Id.* at 203.

44. *Id.* at 203. Indeed, the duties of many consuls became and remains today the protection and assistance of mariners. The American practice regarding consuls and mariners is described in detail in M. NORRIS, *THE LAW OF SEAMEN* §§ 28-70 (3rd ed. 1970 & Supp. 1984).

45. SEN, *supra* note 28, at 203.

46. *Id.*

47. *Id.* at 204.

48. E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 124 (Vol. III of the 1916 translation by C. Fenwick), *cited in* LEE, *supra* note 3, at 18. For an early case relying on the work, see *Clarke v. Cretico*, 1 Taunton 106, 127 Eng. Rep. 772 (1808).

would seem safe to say that honorary consuls were known, at the latest, by the beginning of the 1700's.

Other historical sources, while refraining from attaching a date to the beginning of the honorary consul system, lay the development of the system at the door of the Scandinavian countries. They utilized the office to watch over their extensive shipping fleets.⁴⁹ Whatever else may be said, the practice of appointing honorary consuls had begun to generate lawsuits and attract harsh critics by the 1880's.⁵⁰

The features which distinguish an honorary consul from a professional or "regular" consular officer are now thought to be the following:⁵¹

a) *Remuneration*: Career consuls receive fixed salaries, whereas honorary consuls do not;⁵²

b) *Contract of Services*: Career consuls are bound by a contract of service to the sending state, while an honorary consul is under only a moral duty to carry out his office;⁵³

c) *Training*: Professional consuls usually gain their posts by examination, while honorary consuls are normally selected on the basis of their stature in the community;⁵⁴

49. SEN, *supra* note 28, at 218, while discussing the benefits of the honorary consul system, noted that the advantages were enjoyed chiefly "by small nations with world wide commercial maritime interests."

50. One of the leading critics during the latter part of the 19th century was Robert Phillimore of England, who argued for the abolition of the honorary consul in II COMMENTARIES UPON INTERNATIONAL LAW 282 (3d ed. 1882). It is indeed interesting that Phillimore should have been a critic of the honorary consul system, which was being used to watch over maritime interests by many countries. See *supra* note 49. Phillimore served as the Admiralty Judge of England from 1867 to 1883, following a career which was deeply involved in maritime law. His father, Dr. Joseph Phillimore, had been the Admiralty Advocate of England. For a discussion of the career of Sir Robert Phillimore, see F. WISWALL, THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800 96-97 (1970).

51. These features are drawn from LEE, *supra* note 3, at 14-16. He, in turn, drew them from discussions held during the eighth session of the International Law Commission held in 1956, when a draft convention on consular relations was being debated. The work of the International Law Commission is discussed *infra* this article beginning with the text which accompanies note 80.

52. Remuneration, however, is not a guaranteed method for classifying consuls into honorary and career categories. Under the Finnish consular law, consuls are classified as career or honorary on the basis of whether they are locally recruited. Thus, the Finnish service has career consuls who are unpaid. LEE, *supra* note 3, at 14.

53. Here too, the practice of states vary, with some countries such as the United Kingdom and the Netherlands regarding the honorary consul in the temporary service of the sending state. *Id.* No instances have been reported, however, of a sending state, acting upon such a view, imposing upon the honorary consul the duties imposed by the sending state upon its own nationals.

54. *Id.* The fact that honorary consuls are selected because of the reputation they en-

d) *Nationality*: A career consul is of the same nationality as the state which appoints him.⁵⁵ An honorary consul usually has the nationality of the receiving state,⁵⁶ although in some instances he may be a national of a third state;⁵⁷

e) *Exercise of other profession*: Professional consuls are prohibited from holding other positions.⁵⁸ Honorary consuls always hold other positions;⁵⁹

f) *Extent of immunities*: Professional consular officers enjoy wide ranging immunities.⁶⁰ Honorary consuls enjoy only very limited immunities;⁶¹

g) *Scope of functions*: Professional consuls carry out a variety of functions, especially if their home state has not appointed a diplomatic officer in the same region.⁶² Most honorary consuls are permitted only limited functions;⁶³

joy, regardless of how otherwise fit they may be for consular service, has provoked much criticism of the honorary consul office. See *infra* Part V.C.

55. LEE, *supra* note 3, at 15.

56. *Id.*

57. *Id.* See *supra* note 4.

58. It has, however, been suggested that some career consuls may be carrying out additional activities for their own private gain. LEE, *supra* note 3, at 15.

59. *Id.*

60. *Id.*

61. For two interesting cases interpreting the question of whether honorary consuls enjoy the same privileges and immunities as career consuls, see *Singer v. United States*, 83 F.2d 358 (7th Cir. 1936) (honorary consul found to be exempt from taxation based on construction of treaty between United States and Nicaragua and between United States and Costa Rica, where the honorary consul was an American citizen serving as the honorary consul in Chicago for both Nicaragua and Costa Rica), and compare *Jay-Thorpe, Inc. v. Brown*, 43 N.Y.S.2d 728 (N.Y. Civ. Ct. 1943) (holding that an honorary consul's privilege to decline to testify was not as great as the privilege enjoyed by a career consul, where the honorary consul was an American citizen residing in New Orleans acting as the honorary consul for Greece). The *Jay-Thorpe* decision was recently approved of in *Illinois Commerce Commission v. Salamie*, 54 Ill. App. 3d 465, 369 N.E.2d 235 (1977). *Salamie* involved the refusal of the honorary consul of Lebanon, a naturalized American citizen residing in Illinois, to testify regarding his practice of not legalizing shipping invoices for orders from Illinois firms if the firm was blacklisted by any one of twenty Arab states. After a careful review of the applicable international, national and local laws, the Illinois Appellate Court held against Salamie. The case deserves to be looked at, for it places into modern context the powers which can be exercised by an honorary consul and the clash between different sets of law, each of which purports to regulate the honorary consul.

62. If a diplomatic officer is present, the professional consul's tasks are significantly limited. This is true because the responsibility for negotiating with the host state and protecting nationals of the sending state will fall to the diplomatic representative. In the absence of such a diplomatic officer, however, these tasks will fall to the consular official.

63. Brazilian honorary consuls, for example, are forbidden to celebrate marriages, register Brazilian citizens, enlist them into military service, register and certify their births, marriages and deaths, issue or revoke Brazilian passports, and, unless expressly authorized, issue visas. LEE, *supra* note 3, at 16.

h) *Rank*: Some states do not allow their honorary consuls to hold the rank of consul general, allowing only nationals to hold that rank.⁶⁴

III. INTERNATIONAL LEGISLATION REGULATING HONORARY CONSULS

A. Former Legislation

Honorary consuls have frequently been the subject of international legislation, although always within the context of regulations aimed at the practices of consular officers in general. There has never been international legislation dealing solely with honorary consuls.⁶⁵

The earliest reference to honorary consuls in international legislation is the draft code on consular immunities prepared by the International Law Institute in 1896.⁶⁶ Because the code was written to clarify the immunities to which consular officers were entitled, it did not specifically take up the question of honorary consuls and their status. The code did, however, limit

the title of consul to "agents of the foreign service who, being ressortissants of the State they represent, exercise no functions other than those of consul (consules missi)." It designated as consular agents, "(a) Consuls who are nationals, that is ressortissants of the sending state, but who exercise other functions or have some other calling," and (b) Consuls who by nationality belong either to the State in which they are commissioned or to some State other than the sending State, without regard to whether they exercise or do not exercise other functions or callings.⁶⁷

It is interesting that the Institute should have hit upon the device of restricting the title of consul to career consuls while provid-

64. The Dominican Republic appoints honorary consuls only to the ranks of consuls and vice-consuls, but not consuls general, who must be Dominican citizens. *Id.*

65. Even when honorary consuls have been the subject of international legislation dealing with consular officials, it has usually been the case that only a small part of the legislation, normally one or two articles, have dealt with honorary consuls. This lack of attention was rectified in the Final Act of the 1963 United Nations Conference on Consular Relations. See *infra* text accompanying notes 88-94.

66. The Code is entitled, "Regulations Relating to Immunities of Consuls as Adopted by the Institute of International Law, in its Session of September 26, 1896." The Code is reprinted in STOWELL, *supra* note 28, at 1-5.

67. INSTITUT DE DROIT INTERNATIONAL, TABLEAU GENERAL DES RESOLUTIONS (1873-1956) 27 (Wehberg ed. 1957), reprinted in 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 563 (1970). Article 1 of the Code is the cited section. Articles 18-21 apply specifically to honorary consuls (consular agents to use the wording of the Code), although these articles relate to the inviolability of the consul's archives and his exemption from certain taxes and services. They do not discuss whether or not states should or should not send or receive honorary consuls.

ing honorary consuls with the lesser title of consular agent. Although at one time such a distinction in titles was made, today honorary consuls are generally accorded the title of consul rather than consular agent. The title of consular agent is generally reserved for yet another office.⁶⁸ No doubt the Institute was influenced by Phillimore's well-regarded work on consular practice, which had appeared in the previous decade.⁶⁹

Following the Institute's review of the consular system, the matter was not taken up again for roughly thirty years. The next piece of international legislation was the Havana Convention on Consular Agents, which was declared on February 20, 1928 by the governments present at the Sixth International Conference of American States.⁷⁰ The Havana Convention was based on a draft prepared in 1925 by the American Institute of International Law.⁷¹ Article 3 of the Havana Convention became the model for what is now the current international law on the subject of appointing honorary consuls. As finalized, Article 3 advises that: "Unless consented to by the state where he is to serve, one of its nationals may not act as consul. The granting of an exequatur implies such consent."⁷²

The equivocal position taken by the Havana Convention can be explained by the fact that although a number of Latin American countries were in the practice of sending honorary consuls,⁷³ the whole system of honorary consuls had received a scathing review the previous year in a report prepared by a commission convened by the League of Nations. Known as the Committee of Experts for the Progressive Codification of International Law, the commission

68. Under United States practice, for example, a consular agent is a consular officer who is of a subordinate rank and who carries out his duties as prescribed in regulations promulgated by the Secretary of State. 22 U.S.C. § 3943 (1982).

69. See *supra* note 50.

70. The Convention entered into force on September 3, 1929, and was accepted by the United States on February 28, 1932. It appears at T.S. 843, L.N.T.S. 291. The Convention is somewhat confusing, because it uses the terms "consuls" and "consular agents" interchangeably, but does not define them. WHITEMAN, *supra* note 67, at 562. It does, as Whiteman points out, make a distinction between consuls who do and consuls who do not engage in private business for personal gain.

71. SEN, *supra* note 28, at 205.

72. An exequatur is the formal instrument by which the receiving state accepts the consular official who is presented. See Article 12 of the Final Act of the United Nations Conference on Consular Relations, *infra* note 89.

73. Many Latin American countries continue to send honorary consuls as well as to receive them. Lee found that Brazil and Mexico in particular relied upon honorary consuls to look after their interests. Venezuela relied on honorary consuls to a somewhat lesser extent. See LEE, *supra* note 3, at 304.

released a report in 1927 discussing means by which consular practice between states could be improved. In the course of its report the Committee noted that:

In the present stage of development of the institution of consuls and in the interest of the prestige of the career, the latter class of consuls should no longer exist. In point of fact, most honorary consuls of foreign nationality are far busier with their personal affairs than with those of the country which has conferred the title upon them, and as they generally engage in commerce in their consular area they occasion appreciable loss to other merchants. The commercial invoices submitted to them enable them to obtain valuable information which is of great use to them in their private affairs. They are thus able to compete on an unfair basis with the traders in their area. Moreover, nationals of the country which appoint these foreign consuls do not obtain from them the protection to which they are entitled and which they would always obtain from a consul of their own nationality. Most of the countries in Europe have none but professional consuls, and it is to be hoped that other states will follow the example.⁷⁴

The next discussion of honorary consuls in the international arena came in the form of studies prepared by the International Law Association and Harvard Law School.⁷⁵ The Harvard studies were reduced to a Draft Convention known as the Harvard Research Draft.⁷⁶ Article 1(c) of the Draft defined a career consul as "a consul who is a permanent official of the sending state and who is engaged in no business or profession in the territory of the receiving state other than that of consul."⁷⁷

Interestingly enough, nowhere in Article 1 of the Draft, which is entitled "Use of Terms," does a definition of an honorary consul appear. It is to be presumed, it seems, that an honorary consul is one who is not a permanent official of the sending state and who is engaged in a business or profession in the sending state in addition to that of consul. The Draft also does not discuss whether a state may refuse to accept a consul solely because he is an honorary consul. It would appear, however, that such refusal is permitted, as Article 7 provides that "a state may refuse to admit a person to the exercise of consular functions within its territory without assigning reasons for such refusal."⁷⁸

74. Publication of the League of Nations, V. Legal, 1927, V. 7, p. 4, cited in LEE, *supra* note 3, at 379.

75. SEN, *supra* note 28, at 205.

76. The text of the draft appears in 25 AM. J. INT'L L. 193 (1942), and in LEE, *supra* note 3, at 379.

77. *Id.*

78. *Id.*

Assuming that a state has allowed the admission of an honorary consul, the Draft is silent on whether such a consul possesses all of the rights which would be held by a career consul. The Draft does, however, discuss the immunities of an honorary consul by pointing out that these may be narrowed by the receiving state. Article 26 reads:

A receiving state is not required to grant the exemptions provided for in Articles 20 [exemptions from arrest except in case of serious offense], 23 [exemption from military and public service], 24 [exemption from taxation on income or property] and 25 [exemption from customs duties on articles imported for official or personal use], to a consul who is a national of the receiving state or to a consul who is not a consul of career, provided that it shall exempt every consul from taxes on his income as a consul and from customs duties upon property imported for official use.⁷⁹

The subject of honorary consuls in specific, and consular practice in general, was not taken up again by international bodies until the International Law Commission began a study of the subject at its seventh session in 1955.⁸⁰ It finalized its recommendations at its thirteenth session in 1961 in the form of Draft Articles.⁸¹

Article 1(2) of the Commission's Draft⁸² recognizes that consuls are of two types by stating that:

Consular officials may be career officials or honorary. The provisions of chapter II of this draft apply to career officials and to consular employees; the provisions of chapter III apply to honorary consular officials and to career officials who are assimilated to them under Article 56.

Interestingly enough, the Draft does not specifically define the term honorary consul. A definition adopted by the Commission in 1959, and eliminated at its session in 1960, would have defined an "honorary consul" as any person who did "not receive any regular salary from the sending State and is authorized to engage in commerce or other gainful occupation in the receiving State." The rea-

79. *Id.* It is a favorite technique of international draftsmen to define an honorary consul by explaining what it is not (when compared to career consuls) rather than what it is. It is submitted that much of the confusion that has been caused in discussing honorary consuls is the result of this shortcut (and shortsighted) drafting practice.

80. SEN, *supra* note 28, at 205.

81. *Id.*

82. The draft articles are contained in U.N. Doc. A/CONF. 25/6. A useful comparison can be made with the draft articles which emerged from the twelfth session, which are contained in U.N. Doc. A/4425, and which appears in LEE, *supra* note 3, at 400. Also to be consulted is the Zourek Report, prepared by Jaroslav Zourek, the Special Rapporteur of the Commission. The Zourek Report is U.N. Doc. A/CN.4/108 (April 15, 1957); a copy of it appears in LEE, *supra* note 3, at 387.

son why the definition was dropped and no substitute inserted was explained by the Commission as resulting from the fact that:

The term "honorary consul" is not used in the same sense in the laws of all countries. In some, the decisive criterion is considered to be the fact that the official in question is not paid for his consular work. Other laws expressly recognized that career consuls may be either paid or unpaid, and base the distinction between career and honorary consuls on the fact that the former are sent abroad and the latter recruited locally. . . . [I]n view of the practice of States in this sphere and the considerable differences in national laws with regard to the definition of honorary consul, the Commission decided at its twelfth session, to omit any definition of honorary consul from the present draft, and merely to provide in Article 1, paragraph 2, that consuls may be either career consuls or honorary consuls, leaving States free to define the latter category.⁸³

Articles 57 through 66 of the Commission's Draft Articles list the duties and protections of honorary consuls, following, for the most part, the provisions of the Harvard Draft. Thus, for example, Articles 59 and 63 provide exemptions from taxation, Article 64 provides an exemption from personal service contributions and military service, and Article 58 guarantees the inviolability of consular premises headed by an honorary consul.

In contrast to the silence of the Harvard Draft, however, the Commission's Draft Articles make it quite clear that a consulate headed by an honorary consul is entitled to all of the privileges and protections which would be afforded to a consulate headed by a career consul. Thus, Article 61 provides that "[t]he receiving State is under a duty to accord to an honorary consular official special protection by reason of his official position."⁸⁴ Article 65 requires that such treatment also be accorded by third states, although only with respect to the communications⁸⁵ of the honorary consuls: "Third States shall accord to the correspondence and other official communications of consulates headed by honorary consular officials the same freedom and protection as are accorded to them by the receiving State."

The final article dealing with honorary consuls confronted the

83. Introduction to Chapter III of the Draft Articles.

84. It is generally accepted that the term "special protection" was not meant to signify a specific form of protection. Rather, the word protection was modified by the addition of the word special in order to impress upon states that the duty to protect consuls of any rank was inviolable. In any event, the phrase was deleted from the UN Conference provision, *supra* note 16, which appears in Article 64.

85. Although communications are not defined, except to include correspondence, it is to be presumed that states are expected to read the term liberally so as to include all of the forms of communications, such as electronic mail, which have evolved since the early 1960's.

question of whether there was an affirmative duty to grant recognition to an honorary consul. It was decided that there was no such affirmative duty.⁸⁶ Article 67 therefore provides that "[e]ach State is free to decide whether it will appoint or receive honorary consular officials." In explaining the decision to defer to state practice on the question of whether to accept honorary consuls, the commentary to Article 67 states that: "This article, taking into consideration the practice of those States which neither appoint nor accept honorary consular officials, confirms the rule that each State is free to decide whether it will appoint or receive honorary consular officials."⁸⁷

B. *Current Legislation*

The draft prepared by the International Law Commission formed the basis for a conference of plenipotentiaries convened by the United Nations for the purpose of drawing up a convention on consular relations.⁸⁸ As adopted, the Final Act of the United Nations Conference on Consular Relations⁸⁹ contains two articles that deal specifically with the questions of appointing and receiving honorary consuls. The first is Article 22; the second is Article 68.

Article 22 provides that:

1. Consular officers should, in principle, have the nationality of the sending state.
2. Consular officers may not be appointed from among persons having the nationality of the receiving state except with the express consent of that state which may be withdrawn at any time.
3. The receiving state may reserve the same right with regard to nationals of a third state who are not also nationals of the sending state.⁹⁰

The inspiration for Article 22 was Article 8 of the Vienna Convention on Diplomatic Relations, which was signed on April 18, 1961.⁹¹

86. It is somewhat inaccurate to state that the delegates decided that there was no affirmative duty. A more accurate statement might be that they decided not to decide the issue, as the commentary below shows.

87. The commentary to Article 67 is the shortest of all the commentaries relating to articles dealing with honorary consuls. While the other articles are supplemented by extensive commentaries, it appears that the draftsmen could not even agree on what it was they could not agree on.

88. SEN, *supra* note 28, at 206.

89. The Final Act of the Conference is contained in U.N. Doc. A/CONF.25/13, April 23, 1963. See *supra* note 16 for further citations and history.

90. Article 22 is entitled, "Nationality of Consular Officers."

91. U.N. Doc. A/CONF.20/13, April 16, 1961. The Convention entered into force on April 24, 1964, and the United States became bound on December 13, 1972. 23 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95.

It provides, in almost identical language, that diplomats are to have the same nationality as the appointing state unless the consent of the receiving state (which can be withdrawn at any time) is received prior to the appointment.⁹²

Turning to Article 68 of the United Nations Final Act, it adopts verbatim the language of Article 67 of the International Law Commission's Draft Articles. Thus, honorary consuls are said to be optional in nature and each state is free to decide whether it will appoint or receive such officers.

The decision of the Conference to leave the office optional was recounted as follows:

During discussion of the article [68] in the Second Committee, an adviser to the Soviet delegation (Petrenko) stated that he "strongly supported the optional principle because, although legislation in the Soviet Union did not permit the sending or receiving of honorary consular officials, the Conference was drafting an international convention and many countries made wide use of honorary consuls." The Yugoslav Representative (Levi) considered that while the article was "not of great importance to his country, which both appointed and received honorary consuls," it was valuable because it "represented a compromise between the views of States with differing customs." This view was also endorsed by the Brazilian Representative (Nascimento e Silva).⁹³

Thus the Final Act of the United Nations Conference left the field of honorary consul regulation to the individual states because the plenipotentiaries could not agree on how to regulate the office.⁹⁴

92. The decision to follow the Diplomatic Convention is recounted in the commentary to Article 22 of the International Law Commission's Draft Articles. An interesting, although probably not vital difference, which had been proposed during the discussions of the Commission was whether the phrase "express" in the second paragraph should be omitted from a consular convention. See the commentary to Article 22 of the Draft Articles, paragraph 3. The ultimate decision was to retain the word "express" in the consular convention, although it does not appear in the diplomatic convention. Since presumably a state will know when an exequatur is requested whether or not the consul for whom the exequatur is sought is its own national, it would appear to make no difference whether express consent is required. If it grants the exequatur, the receiving state must mean to approve of the national serving as an honorary consul; if it refuses the exequatur, it does not approve of its national serving as an honorary consul.

93. I UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS VIENNA, 4 MARCH-22 APRIL 1963, Off. Rec., pp. 450-51, reprinted in WHITEMAN, *supra* note 67.

94. There are probably those who would argue that the delegates actually did agree on how to regulate the office by deciding that it was in the best interest of all concerned to have each state decide for itself whether it should accept or receive honorary consuls. Although such a view may have some basis in reality, such a decision must be viewed as an ill-starred one because it failed to provide any rational guidelines for states to follow in deciding whether and under what circumstances honorary consuls should be received, assuming,

IV. STATE PRACTICES REGARDING THE APPOINTING AND RECEIVING OF HONORARY CONSULS

Because of the abdication of international bodies regarding the regulation of honorary consuls, the subject has been left to individual states. State practices are reviewed here in two ways. First, state practices are described in general. Then, the practices of the United States will be reviewed. The United States has been chosen because it represents a hybrid system with respect to honorary consuls. Although the United States does not send honorary consuls, it will receive them from other countries.

A. *The Practices of States with Respect to the Appointing and Receiving of Honorary Consuls*

States vary widely in their use of honorary consuls.⁹⁵ While some states make extensive use of honorary consuls, others have forbidden their use by specific legislation, or have included such prohibitions in treaties concluded with other nations.⁹⁶

In the main, states can be classified as falling into one of three categories: a) those which never appoint honorary consuls and generally oppose the practice; b) those which sometimes appoint honorary consuls and do not generally oppose the practice; and c) those which enthusiastically embrace the practice and as a result have many honorary consuls. States belonging in the first category generally include the nations of Eastern Europe. Those in the second category represent a broad spectrum of countries with diverse political systems and no particular geographical location. The third category is limited to some states in South America and the so-called Scandinavian states.

1. *States which Oppose Honorary Consuls*

States opposing the honorary consul system tend to be mostly those from the bloc of countries under Soviet control. Modern Soviet practice stems from a decree of 1918, which was the first piece of Soviet consular legislation.⁹⁷ The 1918 decree followed the position of the Tsarist government, which had permitted the appoint-

of course, that states are the best judges of whether they require the services of honorary consuls.

95. See LEE, *supra* note 3, at 304.

96. See the specific examples set out below in this Part.

97. Information regarding Soviet consular practice comes from K. GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW* 324-25 (1970).

ment of honorary consuls.⁹⁸ By 1921, however, an instruction of the Soviet government was silent on whether foreign citizens could be appointed as honorary consuls.⁹⁹ The question was put to rest in 1926 when a statute was passed which prohibited the future appointment of any honorary consuls.¹⁰⁰ The banning of honorary consuls was achieved by defining the consular corps as being in the service of the state. In particular, Article 9 of the Soviet Consular Law¹⁰¹ provided that: "Consuls, consular agents, secretaries and other officials of consulates are in the public service of the USSR under the People's Commissariat for Foreign Affairs. They are strictly forbidden to take a direct or indirect part in private institutions and enterprises."

Article 10 of the law excluded foreign citizens from serving as consuls by stating that "Only citizens of the USSR may be appointed consuls or consular agents."¹⁰² By requiring both an absence of personal connection with foreign economic ventures and Soviet citizenship, performance by foreigners of consular functions of any kind was effectively ended.¹⁰³

The Soviet ban on honorary consuls began to be invoked during World War II.¹⁰⁴ As noted by a commentator:

The interwar consular agreements with Poland and Czechoslovakia and the exchange of notes concerning the establishment of consular service with Sweden state that only nationals of the sending country may be appointed as consuls, and that they cannot engage in trade or business in the country of their sojourn. This principle is also restated in all consular conventions concluded by the Soviet Union with other countries. So, for instance, article VI of the Consular Convention with Japan states: "Any consular officer shall be a national of the sending country." Article 3 of the U.S.-Soviet Consular Convention contains the same provision.¹⁰⁵

Following Soviet practice, Hungary put an end to the appointment of honorary consuls in 1950. The law immediately abolished the practice of honorary consul appointments; all Hungarian hon-

98. *Id.*

99. *Id.* at 325.

100. The statute was known as the Consular Law of the U.S.S.R. LEE, *supra* note 3, at 17.

101. *Id.*

102. GRZYBOWSKI, *supra* note 97, at 325.

103. *Id.*

104. LEE, *supra* note 3, at 17, has noted that for some time following the adoption of the 1926 Consular Law, non-Soviet citizens were occasionally permitted to act as consuls. In support is cited a Soviet treaty with Estonia which was concluded in 1929. Article 9 of that treaty permitted the exchange of non-career consuls in trade, but not liberal, professions.

105. GRZYBOWSKI, *supra* note 97, at 325.

orary consuls abroad were forced to relinquish their offices, and no Hungarian citizen could accept future assignments as the honorary consuls of a foreign state.¹⁰⁶ Similarly, Czechoslovakia no longer accepts or appoints honorary consuls.¹⁰⁷ Indeed, of all the countries of Eastern Europe, only Yugoslavia continues to maintain honorary consuls abroad.¹⁰⁸

It has been suggested that there are three explanations for the disappearance of honorary consuls in Communist or socialist states.¹⁰⁹ First, there is little room for private trade and enterprise in a Communist society. Second, with all foreign trade and travel under state control there is relatively little need for career consuls, much less for honorary consuls.¹¹⁰ Third, the appointment of an honorary consul from nationals of the receiving state or a third state may well accentuate the problems of discipline and loyalty.¹¹¹

Some countries outside of the Soviet sphere have also switched to a policy of appointing and receiving only career consuls. After 1950, for example, Iraq changed its policy completely, moving from a consular service heavily dependent on honorary consuls to one based solely on career consuls.¹¹² Uruguay has followed a similar policy, although it still has some honorary consuls abroad.¹¹³

2. *States Which Sometimes Use Honorary Consuls*

A number of states have laws which, while providing for the appointment of a foreign national as an honorary consul, give preference to the appointment of a citizen of the state. Thus, for example, Article 53 of Haiti's consular law states that if Haitian citizens are available, one of them, rather than an alien national, should be appointed.¹¹⁴ If no Haitian national is available, however, an alien national may then be appointed if he enjoys a good reputation and social position and possesses sufficient means to properly represent the Haitian consulate.¹¹⁵

106. LEE, *supra* note 3, at 17.

107. *Id.*

108. *Id.* at 17-18.

109. *Id.* at 18.

110. *Id.* Lee points out at 18 that communist states have filled the gaps left by the banning of honorary consuls by increasing use of trade delegations, trade agencies and commercial attachés.

111. *See infra* Part V.A.

112. LEE, *supra* note 3, at 19-20.

113. *Id.* at 19.

114. *Id.* at 16.

115. *Id.*

France's consular decree is similar, stating that the first step in appointing a consul is to determine whether a distinguished Frenchman is available for the post.¹¹⁶ If none are available, a foreigner may be appointed.¹¹⁷ Similar preference for a country's own citizens can be found in the Greek and Danish regulations.¹¹⁸

3. *States Which Favor the Practice of Appointing Honorary Consuls*

A few countries make extensive use of honorary consuls. Thus:

In the deliberations before the 1956 session of the United Nations International Law Commission, the importance of honorary consuls was again underscored by Mr. Francois [of the Netherlands] who stated that the Netherlands appointed only 20 career consuls as against 500 honorary consuls. The Netherlands, he said, needs consuls in all ports of the world. Since a small port could not financially justify the maintenance of a career consul, an honorary consul would be appointed who already had another occupation. Mr. Amado [of Brazil] similarly stressed that Brazil attaches a great deal of importance to honorary consuls who are extremely useful in Lausanne and Louvain, for instance, where there are several hundred Brazilian students.¹¹⁹

A commentator has explained that "small countries like Holland, Finland or Belgium maintain a vast network of consulates, mostly honorary consuls who watch over the interest of their nationals and explore trade opportunities"¹²⁰

These small countries are the reason why honorary consuls continue in existence. Indeed, it has been written that the proposal of the League of Nations Committee of Experts¹²¹ to abolish honorary consuls failed in the face of opposition from countries such as Finland, the Netherlands and Switzerland, which feared the vast cost that would be incurred from a system based solely on professional consuls.¹²² Clearly the greater use of honorary consuls is by small states. In 1957, for example, a survey found that Belgium had 385 honorary consuls and 53 career consuls, Denmark had 480 honorary consuls and 20 career consuls, Finland had 323 honorary consuls and 9 career consuls, the Netherlands had 470 honorary consuls and 66 career consuls, Norway had 603 honorary consuls and

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 19.

120. GRZYBOWSKI, *supra* note 97, at 325.

121. *See supra* note 74.

122. LEE, *supra* note 3, at 19.

45 career consuls, and Sweden had 490 honorary consuls and 140 career consuls. Thus honorary consuls comprised 96% of Denmark's consular service; the figure was even higher for Finland.¹²³ Current statistics show little change. In 1984, Sweden had 427 honorary consuls as against 23 career consuls.¹²⁴ The Netherlands had 425 honorary consuls and 86 career consuls.¹²⁵ Finland had 308 honorary consuls and 35 career consuls;¹²⁶ Denmark had 494 honorary consuls and 16 career consuls;¹²⁷ and Norway had 498 honorary consuls and 27 career consuls.¹²⁸

B. *The Practice of the United States Regarding the Sending and Receiving of Honorary Consuls*

As noted earlier, the United States has a hybrid system with regard to honorary consuls. While it does not send honorary consuls, it will receive them from other countries except where a specific treaty, such as the previously mentioned U.S.-U.S.S.R. consular treaty, prohibits the receiving of honorary consuls.¹²⁹

1. *United States Practice with Regard to the Appointment of Honorary Consuls*

Early in its history the United States did appoint foreign nationals as honorary consuls, although with a measured amount of reluctance. Addressing Congress in 1778, John Adams and Benjamin Franklin made the following suggestion:

If Congress should think proper [sic] to appoint consuls, we are humbly of the opinion, that the choice will fall most justly, as well as naturally, on Americans, who are, in our opinion, better qualified for this business than any others; and the reputation of such an office, together with a moderate commission on the business they may transact, and the advantages to be derived from trade, will be a sufficient inducement to undertake it, and a sufficient reward for discharging the duties of it.¹³⁰

123. *Id.* at 304.

124. Letter to the Author from Hans Andersen, Deputy Consul General, Swedish Consulate, New York City, dated December 10, 1984.

125. Letter to the author from Roel Bouwman, Assistant Chancellor, Consulate General of the Netherlands, New York City, received December 19, 1984.

126. Letter to the author from Henry Brunberg, Deputy Consul General, Consulate General of Finland, New York City, dated January 3, 1985.

127. Letter to the author from V. Villadsen, Consul General, Consulate General of Denmark, New York City, dated March 1, 1985.

128. Letter to the author from Bjarne Grindem, Consul General, Royal Norwegian Consulate General, New York City, dated February 19, 1985.

129. *See supra* note 105.

130. 7 JOHN ADAMS' WORK 20, reprinted in J. MOORE, A DIGEST OF INTERNATIONAL LAW

Thirteen years later Thomas Jefferson, while serving as Secretary of State, explained the then current practice of the United States regarding the use of honorary consuls:

Where a port is important enough to merit a consular appointment, if there is a deserving native there, he is named consul, notifying him that whenever a citizen settles there he will be named consul, and that during his residence the functions of the vice-consul will cease, but revive again on his departure; in the meantime the vice-consul of one port and its vicinities has no dependence on the consul of another; each acts independently in his department

. . . .¹³¹

The practice of avoiding appointing honorary consuls increased with each passing year. By 1819 Secretary Adams was able to write that the invariable practice of the government had become to appoint an American citizen to any consular port.¹³² In 1846 Secretary of State Buchanan remarked that during the present administration "[t]he President . . . had this subject under consideration, and determined to appoint no consuls who were not American citizens, and, indeed, several consuls have been removed because they did not possess this qualification."¹³³

The objection to honorary consuls was codified in 1856 when a law was passed requiring principal consular officers to be citizens of the United States.¹³⁴ In 1867 payment of compensation to principal consular officers who were not American citizens was forbidden.¹³⁵ In 1874, however, both of these provisions were expunged,¹³⁶ although this may have been the result of a drafting oversight.¹³⁷

The matter was taken up again in 1906, when a law was passed under which no person appointed to an American consulate who was not an American citizen could receive a salary of more than \$1,000 a year.¹³⁸ Despite such laws, however, American practice did

(Vol. V), § 697, at 9 (1906).

131. *Id.* at 10.

132. *Id.*

133. *Id.*

134. *Id.* at 11.

135. *Id.*

136. *Id.*

137. As Moore notes, *id.*, Congress adopted Revised Statutes in 1874. These revised statutes kept the prohibitions against non-citizens serving in diplomatic positions, but did not carry over the provisions as regards consular officers. This failure to carry over the provisions may have been a legislative oversight, since nothing in the legislative history of the Revised Statutes indicates that Congress meant to lift the prohibitions against having consular offices filled by non-citizens.

138. *Id.* at 12.

occasionally run into the question of honorary consuls and their status. In 1920 a situation arose where the consul of a post was absent. Two vice-consuls were present at the post. One was a career consul while the other was an honorary consul. The State Department held that the career consul was to assume the post until the consul returned, even though the honorary consul had received his commission at an earlier date.¹³⁹ Later that month the State Department made its position clear in a telegram to the American Consul at Athens by saying: "Career vice consuls rank non-career men."¹⁴⁰

Still later in that year, the question arose for a third time. A letter from the American Consul General at Capetown raised the issue of who should receive the appointment of Dean of the Consular Corps. The State Department replied:

[I]n cases which have arisen in the American service, it has been the practice of the Department to rank an officer of career over one who holds an honorary title, and it would seem desirable in all such cases as the one at hand, that the ranking career officer be selected as the Dean of the Corps.¹⁴¹

In 1924 Congress passed the Rogers Act¹⁴² which instituted a complete reorganization of the American consular service by combining the diplomatic service and the consular corps into a single Foreign Service of the United States.¹⁴³ The Act established four classes of consular officers, but made no mention of honorary consuls. No honorary consuls have been appointed by the United States since passage of the Rogers Act.¹⁴⁴

This does not mean that the term honorary consul is completely unknown in present day American practice. There have been

139. Consul Jaeckel to Secretary Lansing, No. 60, Dec. 27, 1919 and No. 52, Jan. 24, 1920, reprinted in HACKWORTH, *supra* note 4, at 622.

140. Secretary Lansing to the Consul at Athens, telegram of Jan. 29, 1920, *id.* at 112.

141. Consul General Murphy to the Department of State, no. 2696, Mar. 17, 1920, *id.* at 662.

142. Entitled as "An Act For the reorganization and improvement of the Foreign Service of the United States, and for other purposes," the Act was passed on May 24, 1924 (43 Stat. 140) and was codified at Title 22 of the Code. As amended, the Act now appears at 22 U.S.C. §§ 3901-4226 (1982).

143. It has become common today for states to have combined diplomatic and consular services, although at one time the two services were separate and distinct, and shared many professional rivalries. France, for example, amalgamated its services in 1883; Britain did not do so until 1943. SEN, *supra* note 28, at 204.

144. Despite recent changes in the Foreign Service Act, appointments of honorary consuls appear to be technically still possible under 22 U.S.C. § 3941(d)(1) (1982). This proposition may be open to argument. In any event, it seems safe to say that the proposition will never be tested.

times, for example, when consular agents of the United States, who are subordinate to the consul general but are American citizens, have had their titles upgraded to the rank of honorary consul.¹⁴⁵ This has been done whenever the consular agent is carrying out his duties in an area where there are large numbers of other consuls who hold the rank of honorary consul. This is, of course, merely a cosmetic change designed to place the American consular agent on an equal footing with the officers of other countries who appoint honorary consuls, because the American "Honorary Consuls" are citizens of the United States. Suggestions that American consular officers other than consular agents be allowed to use the title Honorary Consul have always been rejected.¹⁴⁶

2. *The Practice of the United States with Respect to Receiving Honorary Consuls*

The appointment of an American citizen as the honorary consul of a foreign power raises, *ab initio*, a question of constitutional interpretation. Article I, section 9, clause 8 of the Constitution of the United States provides that:

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office or title of any kind whatever, from any king, prince or foreign state.¹⁴⁷

In light of the foregoing provision, Secretaries of State Frelinghuysen and Davis advised the Danish government in 1883 that no person holding an office of the United States could be recognized as a consular officer of a foreign state.¹⁴⁸ The question of who is subject to this rule has spawned a fair number of requests for guidance from the State Department. In response, the Department has held that members of Presidential Commissions,¹⁴⁹ federal civil service employees,¹⁵⁰ and persons serving as National Labor Relations Board employees¹⁵¹ could not serve as honorary consuls while

145. WHITEMAN, *supra* note 67, at 564, where the title is described as one of courtesy.

146. *Id.*

147. The clause is discussed in *Downes v. Bidwell*, 182 U.S. 244, 277 (1901).

148. Notes to Denmark, VIII. 136, 138, 146, and 149, *reprinted in* MOORE, *supra* note 130, at 18.

149. Department of State File POL 17 DEN-US/9-365, *reprinted in* WHITEMAN, *supra* note 67, at 566.

150. Department of State File 602.0011/6-354, *id.* at 566.

151. M. NASH, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1978 637 (1982), *citing* Department of State File No. P78 0131-2308.

still employed by the federal government. State and local officials, however, have been deemed not to be under any such disability. Thus, a local probate judge was permitted to serve as the honorary consul of Nicaragua.¹⁵² In addition, an annuitant of the U.S. Civil Service¹⁵³ and a reserve officer of the U.S. Armed Forces¹⁵⁴ were allowed to serve as consular officials for foreign governments because it was deemed that they were not employees of the government. In one instance, however, an Assistant Solicitor General of a Georgia state court was denied the right to become the Honorary Consul of Liberia. The State Department felt that his duties as an Assistant Solicitor were "not compatible with those of a foreign consular officer."¹⁵⁵ Although there is no recent case law on the subject, nineteenth century Supreme Court cases followed the rule that consuls should generally not have the nationality of the receiving state.¹⁵⁶ Assuming that the hurdle of article I is cleared, however, the United States recognizes honorary consuls in the same manner as it recognizes professional consuls.¹⁵⁷

V. OBJECTIONS TO THE USE OF HONORARY CONSULS

As stated earlier in this article,¹⁵⁸ there are three objections to the practice of receiving honorary consuls. Summarized, those ob-

152. Department of State File 702.1711/3-1347, *reprinted in* WHITEMAN, *supra* note 67, at 565.

153. Department of State File POL 17-2 US-MEX, *id.* at 567.

154. This result obtained because 10 U.S.C. § 1032 (1976) expressly permitted a Reservist to accept civil employment with a foreign government or concern. Section 1032 was repealed, however, on August 17, 1977, by Pub. L. 95-105, Title V, § 509(d)(1), 91 Stat. 860. Under the new law it is still possible for a reservist to accept an honorary consulship, if he first receives permission to do so from the Secretary of State and the Secretary of the branch in which he holds his rank. The matter is discussed in J. BOYD, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1977 338-340 (1979).

155. Department of State File No. P78 0103-0928, *reprinted in* NASH, *supra* note 151, at 637.

156. The rule was followed in *Bors v. Preston*, 111 U.S. 252 (1884) and in *In re Baiz*, 135 U.S. 252 (1890).

157. According to Department of State File No. P77 0139-1963, *reprinted in* NASH, *supra* note 151, at 317:

The State Department regularly recognizes honorary consular officers through the usual mechanism applied to other consular officers. Notification of their appointment is supplied by the appropriate embassy, and the Department then reviews the other officer's credentials to determine his acceptability for the position. Once an honorary consular officer has been recognized, he is regarded as possessing the authority to perform normal consular functions, subject to any limitation which may be imposed by the sending country.

Id.

158. See *supra* text accompanying notes 19-22.

jections are: (1) creation of dual allegiances; (2) unfair trade position; and (3) lack of knowledge by the honorary consul regarding the appointing state.

A. *Creation of Dual Allegiances*

In deciding a case nearly one hundred years ago involving honorary consuls, the United States Supreme Court found that:

In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself.¹⁵⁹

The problems faced by an honorary consul when the interests of his home and appointing states clash are illustrated in a case known as *Rex v. Ahlers*.¹⁶⁰ In that case, Ahlers was a German subject by birth. He had, however, lived in England for thirty years and in 1905 became a naturalized British subject. During that same year he began serving as the honorary consul of Germany in Sunderland.

On August 1, 1914, Germany declared war on Russia, and Ahlers began helping German nationals in England arrange passage back to Germany to serve in the German war effort. At 11:00 p.m. on August 4, 1914, England announced that a state of war existed between it and Germany. Ahlers continued to help German nationals return to Germany to fight in the war until August 6, 1914. On the previous day, however, he had learned that a state of war had been announced between Germany and England.

Ahlers was tried and convicted of treason. By helping German nationals return to their homeland following the declaration of war, he was found to have been assisting and aiding the enemies of the English King, to whom he owed a duty of allegiance. On appeal, the finding of treason was overturned because of a defective jury instruction. Thereafter, the matter was not prosecuted. The case is, however, a clear illustration of the problems which can be suffered by an honorary consul caught between conflicting loyalties.

159. *In re Baiz*, 135 U.S. at 427-28 (citing Wheaton, 8th ed. § 210; 2 Twiss, *Law of Nations*, 276, § 186; 2 Phill. *Int. Law*, 171).

160. [1915] 1 K.B. 616. For a case involving the application of the Trading with the Enemy Act (U.S.) to the decedents of an honorary consul, see *Niehaus & Co. v. United States*, 373 F.2d 944 (Ct. Cl. 1967).

B. *Unfair Trade Advantages*

As pointed out in the Report of the Committee of Experts of the League of Nations, honorary consuls are perceived as enjoying an unfair advantage over other local businessmen because they have access to valuable classified commercial documents.¹⁶¹ Of course, in their report to Congress in 1778, John Adams and Benjamin Franklin thought that one of the advantages to be stressed when offering the position of consul was the likelihood that profit could be made from the position.¹⁶²

C. *Lack of Knowledge about the Appointing State*

The final problem with honorary consuls is said to be that they frequently know little or nothing about their appointing state, and thus do a poor job in carrying out their duties.¹⁶³

The substandard performance of some honorary consuls is partially due to the appointing state. Appointing states generally do not provide honorary consuls with training in consular affairs, assign honorary consuls to less important posts which tend to be neglected,¹⁶⁴ and reserve certain functions exclusively to career officers.¹⁶⁵

Problems also come about, however, because of the notorious practice of selling honorary consulships to the highest bidder, a fact which has not helped the already low esteem in which the public generally holds honorary consuls.¹⁶⁶

161. See *supra* note 74. See also the *Salamie* case, which is discussed *supra* note 61.

162. See *supra* note 130.

163. There exists, however, evidence to support the contention that in certain situations an honorary consul who is a national of the receiving state actually does a *better* job than would be done by a consul who was a national of the appointing state. In an 1856 letter between Attorney General Cushing and Secretary of State March, *reprinted in* STOWELL, *supra* note 28, at 571-76, it is said that:

[T]he consul, when he is a citizen or subject of the country where he resides, can, by means of local knowledge or influence, promote the interests of the employing government more effectually than one of its own subjects could do, in all the ordinary relations of commerce at least, if not in political matters. The United States have themselves experienced this in the case of some of their own consuls, subjects of the country in which they reside, who have been useful to us, in circumstances where nothing could have been accomplished by an American.

Id.

164. For a description of just how neglected most honorary consulates are, see Huntley, *Why More Cities Seek Foreign Consulates*, U.S. NEWS & WORLD REPORT, Jan. 16, 1984, at BC 1.

165. See *supra* note 63.

166. Consuls probably received their first "bad press" from seamen in the early part of the nineteenth century, when it was routine for consuls (career as well as honorary) to exact

The practices surrounding the filling of honorary consul positions have drawn comments from both diplomats and casual observers. In 1969 Wendell Blancke, a career officer in the United States Foreign Service, authored a work in which he described his experience with honorary consuls by saying:

[I]n developed countries [the consular service] tends to be made up largely of consuls *ad honorem*—private citizens of the host country who have made some contribution (not infrequently financial) for the luster of an honorary consulship. (In Germany, where titles mean much, a consul general of one of the smallest European states was approached by a burgher who averred that the honorary consulship at the seaport where he lived would be worth \$20,000 to him.)¹⁶⁷

In 1979 John Ardagh returned to the United States to write a book describing his experiences while travelling through the cities of Europe. He commented on the honorary consul system in a chapter relating his visit to Stuttgart, Germany. There he wrote:

All Germans love a title It is thus no surprise that in Stuttgart, as in other big German towns, rich businessmen vie with each other to acquire honorary consulships from small Third World countries. Sometimes they even buy these, for 50,000 DM or much more. The titles, however empty in themselves and however footling the work the post demands, provide an immediate passport to a new world of social respect. And so there exists in Stuttgart a fantasy diplomatic life. Countries as tiny and remote as El Salvador and Tchad, with virtually no contact with Baden-Wurttemberg, are represented. Of the thirty or so consuls in the town, only five or six are foreign career diplomats; the rest are local Germans with honorary status, and I would guess that a third or more of these had bought their posts, in some cases through the notorious Munich title-broker, Hans Hermann Weyer. A businessman never admits to having bought his title, yet he probably will feel that the large sum has been well spent. He gets no diplomatic immunity, but he has perks of other kinds. He may be a small garage owner, or a maker of sanitary fittings or underwear, so the status of "consul" lifts him out of his narrow business rut into the social Olympia¹⁶⁸

exorbitant fees for their services. NORRIS, *supra* note 44, § 55, at 99, points out that consuls serving in this period were often merchants themselves, and thus more anxious to receive their fees than to protect the American mariner. See also The Coriolanus, F. Cas. (E.D. Pa. 1839) (7,380). More bad press of the type that the general public was likely to become aware of came in 1973, with the publication of Graham Greene's *The Honorary Consul*. In the novel a British citizen living in Argentina fulfills his duties as British honorary consul in the most terrible ways imaginable. He is an alcoholic, a frequenter of bordellos, an extortionist, and a cheat. In 1983, the novel was turned into a major motion picture starring Michael Caine as the honorary consul. It did not, however, do well at the box office, where it was shown under the title *Beyond the Limit*. It co-starred Richard Gere.

167. W. BLANCKE, *THE FOREIGN SERVICE OF THE UNITED STATES* 240-41 (1969).

168. J. ARDAGH, *A TALE OF FIVE CITIES: LIFE IN EUROPE TODAY* 45 (1979).

Ardagh also found that the charges of unfair competition and lack of knowledge about the appointing state were true:

One rich and respected local businessman has thought it worth his while to be consul of one of the smallest Third World states. A colleague said of him "Being a consul does actually help his business—he goes to a score of diplomatic parties a year, and these bring new contracts . . ." A manufacturer representing an even tinier state told me that he had barely heard of it before his appointment. Nor were there any citizens of that state living locally; yet he threw a big consular party each year for 200 guests, in a leading hotel.¹⁶⁹

VI. PROPOSALS TO REFORM THE APPOINTING AND RECEIVING OF HONORARY CONSULS

It is submitted that many of the problems with the present honorary consul system, which have undoubtedly led to the refusal by many states to recognize honorary consuls, stem from the failure of the present system to address the concerns of dual national allegiances, unfair competition and lack of knowledge about the appointing state. It would, therefore, be desirable to reform the current system.

It is not envisioned that any state would be forced to accept honorary consuls. Such a requirement would not only clash with current national practices (and therefore be unlikely to be enacted) but would seriously draw into question the notion of a state's right to assert its sovereignty within its own territories. This would have the effect of returning us to the unfortunate experiences suffered by many less-developed countries at the end of the nineteenth and beginning of the twentieth centuries.¹⁷⁰

What is contemplated is a reforming of the system which, if accomplished, would answer the criticisms lodged against the present system and make states more likely to accept honorary consuls. No change would be made in the current system with regard to the divergent practices of states in the sending of honorary consuls, since criticisms have not been lodged against the sending of honorary consuls.¹⁷¹

169. *Id.*

170. *See supra* note 32.

171. In other words, the decision by a state to not send an honorary consul only affects that state. The decision not to receive an honorary consul, however, has an adverse impact on a state other than the state making the choice to refuse the admission of the honorary consul.

A. *Proposed Legislation*

The type of legislation which is being called for would replace Article 68 of the Final Act of the United Nations Conference on Consular Relations. It could be drafted as follows:

Article 68. *Exercise of consular duties by honorary consular officials*

A. Definition: An honorary consul is a consular officer who

- 1) is a national of a State other than the sending State;
- 2) as a general rule is not salaried;
- 3) is permitted to engage in occupations other than consul; and,
- 4) enjoys immunities which may not be co-extensive with those of consuls designated as career consuls.

The fact that a particular individual does not meet all of the qualifications listed above does not mean that he is not an honorary consul. Due regard will be given in each case for all other factors which, in the circumstances, may weigh on the question of whether the particular individual is a consul of career or honorary status.

B. An honorary consul properly submitted to a State should not be refused acceptance if a genuine link is established between the honorary consul and the appointing State to the satisfaction of the receiving State, as described in paragraph C, below.

C. A genuine link between an honorary consul and the appointing State should, in most instances, be found to exist if:

- 1) the position has been secured without the exercise of any undue influence;
- 2) the honorary consul-designate has received sufficient training from the appointing State to enable him to carry out his duties in a competent and efficient manner;
- 3) there is a bona fide need for an honorary consul to be appointed in the place where the appointment is requested.

D. An honorary consul is to carry out the duties of his offices faithfully, while at the same time respecting the rights of the receiving State. In cases where the rights of the appointing and receiving States are incompatible, the honorary consul is under an affirmative duty to fulfill his duties to the receiving State if he is a national of the receiving State. If he is a national of a third State, he is under an affirmative duty to assume a neutral position as to both the appointing and receiving States. Violation of this provision shall result in the immediate loss of the office of honorary consul and shall subject the violator to civil and criminal penalties to be determined by the appointing and receiving States at the time of the appointment of the honorary consul.

E. Whenever, in the course of his official duties, an honorary consul receives, reviews, learns of or otherwise comes into possession of any information which could or would inure to the private benefit of the honorary consul if used for private purposes, either directly or through another person or

entity, the honorary consul is under an affirmative duty to not use or provide such information to anyone else with the intention of realizing, directly or indirectly, private gain. Violation of this provision shall result in civil and criminal penalties to be determined by the appointing and receiving States at the time of the appointment of the honorary consul. It shall be a complete defense to all actions brought for violation of this paragraph that the honorary consul would have come to the same information at the same time through other means.

B. *Strengths of the Proposal*

The above proposal should result in a regime which effectively answers the concerns which have been expressed with regard to the current honorary consul system.

Paragraph A, which defines the office, strikes a balance between the need for a definition of what an honorary consul is, and the reality that many nations have attached differing meanings to the term. The need to provide a definition is obvious, since the paragraphs which follow paragraph A apply only to honorary consuls.

Paragraphs B and C introduce the concept of genuine link, which has been applied in other international settings.¹⁷² The purpose of paragraph B is to address the problems that stem from the appointment of persons who either lack the necessary information to carry out the position, or who have received their positions through bribes or other improper avenues, or who are not needed in the particular region in which they seek to serve.

Under Paragraph C the appointing state must prove to the receiving state that it has properly trained the individual, that a need exists for such an individual,¹⁷³ and that there were no im-

172. Most readers will be familiar with the *Nottebohm* case (Liechtenstein v. Guatemala), [1955] I.C.J. 4, wherein it was held that Liechtenstein could not assert a claim on behalf of Nottebohm, whom it claimed as a citizen, because there was no genuine link between Liechtenstein and Nottebohm (Nottebohm was actually a resident of Guatemala, and held German citizenship at the time he sought Liechtensteinian citizenship. He did so because of the threat of World War II). This principle was, in a watered down form, accepted by maritime states when drafting the Convention on the High Seas, which entered into force on September 30, 1962 and had 56 states as parties by January 1, 1980. 450 U.N.T.S. 82, 13 U.S.T. 2312. Article 5 of the Treaty provides that "[t]here must exist a genuine link between the state and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over the ships that fly its flag." *Id.* The concept, in expanded form, has now been drafted into the recently finalized United Nations Convention on the Law of the Sea (UNCLOS III). U.N. Doc. A/CONF.62/122, 7 October 1982, reprinted in 21 INT'L LEGAL MATERIALS 1261 (1982). There, the concept is found in Article 94.

173. An example of there being a need for a specific honorary consul is the use by

proper motives in appointing the individual. Providing for these matters should greatly improve the quality of the honorary consular office while making sure that there is a need for his services.

Paragraph D is designed to address problems like that in *Rex v. Ahlers*.¹⁷⁴ It provides for a clear guide in cases where the honorary consul is torn between the interests of the appointing and receiving states. In addition, it provides that a failure to observe the guide can be enforced by civil and criminal sanctions. Of course, a state would also be free, under general consular practice, to withdraw recognition of the honorary consul for any infraction of the rule.¹⁷⁵

Finally, Paragraph E is designed to address the problem of unfair competition by prohibiting the honorary consul from profiting from information he obtains in the course of his official duties, or by passing such information to others with the intention of profiting thereby.¹⁷⁶ Civil and criminal sanctions are provided for violations of this rule, and once again the receiving state could withdraw recognition from the honorary consul for violations. A complete defense is established, however, if the honorary consul is able to prove that he would have obtained the same information from other, non-privileged sources.¹⁷⁷

This proposal, or one similar to it, would eliminate the objections which have been voiced to the honorary consul system as it is presently practiced. It would preserve the honorary consul system for those countries that wish to use it, thus providing an alterna-

Brazil of an honorary consul in Lausanne, as well as in Louvain, to assist the several hundred Brazilian students living in the area. *See supra* text accompanying note 119.

174. *See supra* notes 159-60 and accompanying text.

175. *See* Articles 23 and 25 of the Final Act of the United Nations Conference on Consular Relations regarding the right of a receiving state to terminate the acceptance of a consular officer. *See supra* note 16.

176. It should be pointed out that Article 66 of the Draft Articles prepared by the International Law Commission, *supra* note 82, stated in explicit language that honorary consuls had a duty "not to misuse their official position for the purpose of securing advantages in any private activities in which they may engage." This language was *not* included in the final version of Article 66, which appears in Article 55 of the Conference, *supra* note 16. As for the passing of information by the honorary consul to others, that too is prohibited. Those familiar with American corporation law will recognize the rule as having been taken from the rules which have been developed in the course of Rule 10b-5 litigation regarding the advising of certain selected clients of material information while withholding such information from other clients in connection with securities. As to this so-called "tipster rule," see cases such as *Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974).

177. The defense provided for comes from the so-called "inevitable discovery" rule which has been developed in applying the exclusionary rule in connection with fourth amendment cases. *See, e.g.*, *State v. Williams*, 285 N.W.2d 248 (Iowa 1979), a case subsequent to *Brewer v. Williams*, 430 U.S. 387 (1977).

tive to the impossible choice of either having an expensive career consular system or not being represented at all.¹⁷⁸

VII. CONCLUSION

The use of honorary consuls provides many states with the ability to watch over national interests, protect their citizens, and expand trade and commerce in a way which they would not be able to do without such officers. Unfortunately, the present practices of appointing honorary consuls who have no knowledge of the appointing state, often because they have made a financial contribution or purchased the position, coupled with the threat to national allegiances and the possibility of unfair business advantages, have endangered the office of Honorary Consul.

As this article has shown, a uniform regime can be formulated to correct the problems of the present system. Whether such a regime will be enacted remains to be seen. Failure to address the weaknesses of the honorary consul institution in a timely fashion may very well lead to its demise.

178. The need for representation in many ports and cities was noted more than a hundred years ago by Attorney General Cushing in an 1855 letter to Secretary of State Marcy:

Numerous ports exist, which are more or less remote from the location of any consul, but in which, nevertheless, consular services are needed on the spot. Must the consul in every such case go there for the special occasion? If so, he incurs expenses, and leaves his own port without his presence. On the other hand, if the consular services are not such as must of necessity be performed on the spot, it will be inconvenient and expensive for the shipmaster to be compelled to leave his ship, and, perhaps, with his officers and men, in extending a protest for instance, to repair to the place of residence of the consul.

STOWELL, *supra* note 28, at 528-29.