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Abstract

This Note analyzes the immunity from service of process of consular officers under the Vienna Convention on Consular Relations (Consular Convention). It is concluded that personal service on a consular officer is invalid under the Consular Convention, but that mail service may be effective.

CONSULAR IMMUNITY FROM SERVICE OF PROCESS UNDER THE VIENNA CONVENTION ON CONSULAR RELATIONS

INTRODUCTION

Consider the hypothetical case of a New York bank seeking to enter into a loan agreement with a foreign borrower who does not have an office in New York. While the bank wants to bring any action arising from the agreement in the District Court for the Southern District of New York or the courts of the State of New York,¹ the borrower refuses to designate a commercial agent for service of process.² The borrower's State maintains a consulate in New York. The borrower otherwise has no contact with New York sufficient to support jurisdiction.³ Presumably, the consul could be designated agent for service of process.⁴ Such service, then, would

1. Logan, *Term Loan Agreements*, in INTERNATIONAL FINANCIAL LAW 11, 17 (R. Rendell ed. 1980); Mitchell & Wall, *The Eurodollar Market: Loans & Bonds*, in INTERNATIONAL FINANCIAL LAW 53, 55 (R. Rendell ed. 1980); see, e.g., J. STEVENSON & W. WILLIAMS, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, part III, folio 5, § III-5.2(a)(viii), at 14-16 (2d ed. 1980).

2. The refusal to use a commercial agent may, in the case of a quasi-official borrower (i.e., a state-sponsored airline), stem from the notion that such an appointment might be an affront to sovereignty. In an extreme case, unfamiliarity with the use of commercial agents may result in the fear that the agent might somehow be manipulated by the lender to the borrower's detriment. Appointing the consul as agent for service of process would obviate the need to deal with an "alien" third party who, as a national of the lender's State, might be suspected of partiality toward the lender or who might be otherwise unsuitable to act as representative of the borrower. While the problem may not seem serious to those accustomed to the use of commercial agents, consider the hypothetical case of the Kansas Corn Company, doing business for the first time in the People's Republic of China. Kansas Corn may be wary about appointing the People's Process Service Company as its agent for service of process if it is unfamiliar with the laws and business practices of the People's Republic, but may feel comfortable designating a United States trade representative or United States consular officer to act as its agent.

3. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (defendant must have "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))); see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action . . ."); cf. *Shaffer v. Heitner*, 433 U.S. 186 (1977) (*International Shoe* minimum contacts test extended to actions quasi in rem).

4. Cf. Wall, *Waiver of Sovereign Immunity Under United States Law*, INT'L FIN. L. REV. 28 (November, 1982). "Both federal and New York law permit the parties to stipu-

satisfy both nexus and notice requirements for jurisdiction.⁵ The question is whether a consular officer is immune from service of process.

This Note analyzes the immunity from service of process of consular officers under the Vienna Convention on Consular Relations⁶ (Consular Convention). It is concluded that personal service on a consular officer is invalid under the Consular Convention,⁷ but that mail service may be effective.⁸

late in the loan agreement the means of effecting service of process. In particular, the FSIA provides that such process may be served in accordance with any special arrangement made between the parties." *Id.* at 31.

5. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

6. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [hereinafter cited as Consular Convention]. The Convention was ratified on behalf of the United States on November 12, 1969. This ratification was deposited with the Secretary-General of the United Nations on November 24, 1969, and was entered into force with respect to the United States on December 24, 1969. The following countries have ratified the Convention:

Algeria, Antigua & Barbuda, Argentina, Australia, Austria, The Bahamas, Bangladesh, Belgium, Benin, Bhutan, Bolivia, Brazil, Cameroon, Canada, Cape Verde, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Fiji, Finland, France, Gabon, Federal Republic of Germany, Ghana, Greece, Grenada, Guatemala, Guyana, Haiti, Holy See, Honduras, Iceland, India, Iran, Iraq, Ireland, Italy, Jamaica, Jordan, Kenya, Republic of Korea, Kuwait, Laos, Lebanon, Lesotho, Liechtenstein, Luxembourg, Madagascar, Malawi, Mali, Mauritius, Mexico, Morocco, Mozambique, Nepal, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Rwanda, St. Lucia, Senegal, Seychelles, Solomon Islands, Somalia, Spain, Surinam, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Tonga, Trinidad & Tobago, Tunisia, Turkey, United Arab Emirates, United Kingdom, United States of America, Uruguay, Upper Volta, Venezuela, Republic of Viet Nam, Yugoslavia, Zaire.

U.S. Dep't of State, TREATIES IN FORCE 216-17 (1982). The Convention has not been the subject of any implementing legislation in the United States.

7. See *infra* text accompanying notes 120-26; see also text accompanying notes 50-85.

8. See *infra* text accompanying notes 127-30; see also text accompanying notes 86-116. Note that while bilateral treaties to which the United States is a party may "confirm, supplement, extend or amplify" the Consular Convention, *supra* note 6, art. 73, this Note will be limited to consideration of the Convention only. Service of process on a foreign sovereign may be made in accordance with the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391, 1441, 1602-1611 (1976) and will not be considered in this Note.

The United States is a party to many bilateral consular treaties. *E.g.*, Consular Convention, Sept. 2, 1969, United States-Belgium, 25 U.S.T. 41, T.I.A.S. No. 7775

I. ROLES OF CONSULS AND DIPLOMATS

Obtaining personal jurisdiction over a party "present" in the jurisdiction is to exercise control over the party; historically, this control has been quasi-criminal in nature.⁹ The stigma thus associated with this exercise of control¹⁰ may be particularly repugnant in an international context, where the party on whom process is served is to some extent a representative of the foreign sovereign.¹¹ Consider the incident involving Oksana Kasenkina,¹² a Soviet citizen who attempted to defect. Mrs. Kasenkina appealed for refuge to the editor of a Russian language newspaper, and took shelter at a farm managed by a Russian emigre group. Amidst charges by the Soviet ambassador that Mrs. Kasenkina had been kidnapped, she was taken to the Soviet consulate in New York. Concerned that Mrs. Kasenkina was being held against her will, the New York Supreme Court unwittingly heightened the controversy when it issued a writ of habeas corpus ordering the consul to pro-

[hereinafter cited as Belgian Convention]. The extent to which such treaties provide for consular immunity may differ from that of the Convention. *Compare id.* art. 7(1) ("A consular officer shall be entitled to the respect and high consideration of the authorities of the receiving State with whom he comes in contact in the performance of his functions.") with Consular Convention, *supra* note 6, art. 40 ("The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity."). In any particular case, an applicable bilateral treaty must be consulted. In the case of a conflict between the treaty and the Convention, the terms of the treaty would control. *Id.* art. 73:

1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.
2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

Id.

The State Department has indicated that, where no direct conflict exists, the agreement allowing greater privileges will prevail. *See* Letter from Attorney Advisor Mitchell to Consul Veasy, British Embassy (July 17, 1968), *reprinted in* 7 M. WHITE-MAN, DIGEST OF INTERNATIONAL LAW 720-21 (1970).

9. Developments in the Law, *State-Court Jurisdiction*, 73 HARV. L. REV. 909, 915-16 (1960).

10. Note, for example, Justice Holmes' remark that "[t]he foundation of jurisdiction is physical power" *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

11. *See infra* text accompanying notes 15-28.

12. For a report of the incident, see Preuss, *Consular Immunities: The Kasenkina Case*, 43 AM. J. INT'L L. 37 (1949); *see also* L. LEE, CONSULAR LAW AND PRACTICE 242-45 (1961) (another author's account of the incident).

duce Mrs. Kasenkina in court.¹³ The writ was served on a consul on the steps of the consulate, and a furor arose over the supposed violation of international law.¹⁴

The scope of the immunity of consuls is an unsettled area of the law.¹⁵ More attention has been focused on the immunity of diplomats.¹⁶ To analyze the immunity of consuls, then, it may be useful to distinguish their role and corresponding immunities from those of the diplomat.

Traditionally, the consular representative functions in the area of international trade, and does not act as an "intermediar[y] through whom matters of State [are] discussed between Government and Government."¹⁷ The consul's functions were originally confined to the protection of nationals

13. Preuss, *supra* note 12, at 39.

14. *Id.* The Soviet ambassador sent an angry letter of protest to the State Department. "The Embassy said that the delivery of the writ was in complete contradiction of the rights its foreign consulates enjoy and should enjoy . . ." *Id.* While the issue in the Kasenkina case may more precisely be the inviolability of the consular premises, the dignity of the consul is equally at issue.

The State Department has recognized that, where a bilateral treaty provides for the inviolability of the consular premises, service of process in foreign consulates will be invalid. Letter from the U.S. Dep't of State to the Sheriff of Los Angeles County (Apr. 17, 1939), *reprinted in* 4 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 737 (1942). Therefore, service of process in foreign consulates would be prohibited by the Consular Convention. See Consular Convention, *supra* note 6, art. 31. United States case law reaches a similar result, although it does not decide whether a consul may be served. See *Lonsdale Shop, Inc. v. Bibily*, 126 Misc. 445, 213 N.Y.S. 170 (Mun. Ct. 1925) (motion to vacate service granted, but without prejudice to service outside the consular premises). *Lonsdale Shop* seems to raise the possibility of service on a consular officer, but is to be distinguished from the problem being considered in this Note as being decided on the basis of provisions in a bilateral treaty calling for the inviolability of the consulate. Compare *id.* with *Tailored Woman, Inc. v. Bibily*, 126 Misc. 359, 212 N.Y.S. 704 (Mun. Ct. 1925) (motion to vacate service denied where service was made outside the consular premises). It may also be useful to consider *United States v. Tarcuanu*, 10 F. Supp. 445 (S.D.N.Y. 1935).

15. The problem of a consul's immunity seems never to have been adjudicated. An examination to some extent is therefore necessary of the treatment of the service of process problem in the diplomatic context, under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter cited as Diplomatic Convention]; see also Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (implementing the Diplomatic Convention).

16. See, e.g., Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91 (1976); Przetacznik, *The Protection of Foreign Officials Under International Law*, 9 ANGLO-AM. L. REV. 177 (1980); Valdez, *Privileges and Immunities Under the Vienna Convention on Diplomatic Relations and The Diplomatic Relations Act of 1978*, 15 INT'L LAW. 411 (1981).

17. Beckett, *Consular Immunities*, 21 BRIT. Y.B. INT'L L. 34, 35 (1944).

and nationals' interests in the receiving State, the promotion of trade, and the representation of the sending State in matters of merchant shipping.¹⁸ Those functions have evolved to include issuance of passports, travel documents and visas; issuance of certificates regarding merchandise; validation of marriages and divorce and notarial and registration services.¹⁹

The diplomat, on the other hand, is the representative in the receiving State of the sovereign sending State.²⁰ The diplomat's duties are therefore of a more general political, rather than commercial, character.²¹ Hence, the diplomat is entitled to the same rights, duties and privileges in the receiving State as is the sovereign.²² These are broader than those of the consul.

Three distinct theories have influenced the development of diplomatic privileges and immunities.²³ The extraterritoriality theory presupposes that the embassy is part of the territory of the sending State.²⁴ The representative character theory assumes that the members of the diplomatic mission em-

18. *Id.*; see also J. BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIÉ* 22-23, 150 (M.C. Lardy trans. 1870); Parry, *The British Consular Conventions*, in *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW* 122, 125 (1965).

19. See J. BLUNTSCHLI, *supra* note 18, at 150-61; 2 C. HYDE, *INTERNATIONAL LAW* 1346-67 (2d rev. ed. 1947); L. LEE, *CONSULAR LAW AND PRACTICE* 59-220 (1961); Beckett, *supra* note 17, at 36; Parry, *supra* note 18, at 122.

20. See J. BLUNTSCHLI, *supra* note 18, at 122-24; C. HYDE, *supra* note 19, at 1290-94; I. E. SATOW, *A GUIDE TO DIPLOMATIC PRACTICE* 188-89 (2d ed. 1922). See generally *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 81, comment a (1965) [hereinafter cited as *RESTATEMENT*] which states:

diplomatic representatives are concerned primarily with the conduct of foreign relations between the respective States, whereas the consular representatives are concerned with relations with the local authorities, with the details of commercial intercourse and travel of the sending State's nationals in the receiving State, of the sending State's relations with its own nationals in the receiving State.

21. See generally *RESTATEMENT*, *supra* note 20, comment a.

22. *Cf. id.*

23. Preuss, *Capacity for Legation & the Theoretical Bases of Diplomatic Immunities*, 10 *N.Y.U.L.Q.* 170, 185 (1933); see Pritzetacznik, *supra* note 16, at 192 ("[A]ny violence to the diplomatic agent . . . affronts the sovereign he represents."); [1958] 2 *Y.B. INT'L L. COMM'N* 94-95, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (remarks of Messrs. Martine-Daftary, Fitzmaurice and Zourek discussing whether commercial attaches and trade representatives should be accorded diplomatic privileges and immunities, based on their functions).

24. See, e.g., L. OPPENHEIM, *INTERNATIONAL LAW* 629 (4th ed. 1928), quoted in Preuss, *supra* note 23, at 184 (" '[E]nvoys must, in most respects, be treated as though they were not within the territory of the receiving States.' "); see also W. FRANKLIN,

body the sovereign.²⁵ Finally, the functional necessity theory enables the diplomatic staff to exercise those privileges and immunities necessary to the performance of its function.²⁶ These theories must also influence attitudes concerning the propriety of service of process on international representatives. If either the extraterritoriality theory or the representative character theory "governs" the view of the international community with respect to the person of the diplomat or the consular officer, service on either would be seen as an invasion of sorts of the sending State by the receiving State. The functional necessity theory, however, separates the sovereign sending State from the person of the diplomat or the consular officer, and allows the receiving State more freedom in its dealings with either the diplomat or the consular officer.

The functional necessity theory has, in fact, generally governed the privileges and immunities enjoyed by consular representatives.²⁷ Ordinarily, they have been entitled to immunity for acts considered within the scope of their consular functions, and have not enjoyed the more complete immunity of diplomats.²⁸ The functional necessity theory is gaining acceptance as the proper gauge by which to determine the privileges and immunities of diplomats.²⁹

PROTECTION OF FOREIGN INTERESTS 7-15 (1969) (history and development of doctrine of extraterritoriality).

25. See Przetacznik, *supra* note 16, at 192.

26. See [1958] Y.B. INT'L L. COMM'N, *supra* note 23, at 94-95.

27. See, e.g., RESTATEMENT, *supra* note 20, comment a ("The broad personal immunities enjoyed by diplomatic agents have not been found necessary for the reasonably unhampered performance of [consular] functions.").

28. See *United States v. Wong Kim Ark*, 169 U.S. 649, 678 (1898); C. HYDE, *supra* note 19, at 1322-67; Beckett, *supra* note 17, at 37; Valdez, *supra* note 16, at 418. Another traditional area of consular immunity is with respect to the inviolability of consular archives. See Consular Convention, *supra* note 6, art. 33.

29. See [1958] Y.B. INT'L L. COMM'N, *supra* note 23, at 94-95. The modern trend restricting sovereign immunities, see, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976); see also Belotsky, *The Effect of the Diplomatic Relations Act*, 11 CALIF. W. INT'L L.J. 354, 357 (1981); Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TULANE L. REV. 661, 672-73 (1980), perhaps indicates an expansion of traditional ideas concerning "agents" of foreign sovereigns, including an expansion of the international perception of what represents an "attack on [the] person, freedom or dignity" of the consular officer. Since the court in *Renchard v. Humphreys & Harding, Inc.*, 59 F.R.D. 530 (D.C. Cir. 1973), satisfactorily answered the concerns of the court in *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965), mail service is within the boundaries of "due respect" currently prescribed by international law.

II. TREATMENT OF CONSULAR AND DIPLOMATIC IMMUNITY IN INTERNATIONAL CONVENTIONS

The Vienna Convention on Diplomatic Relations³⁰ (Diplomatic Convention) and the Consular Convention use nearly identical language to describe the reason for special treatment of consular representatives and diplomats. The opening recitations of the Consular Convention include: “*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States”³¹ These may be compared to those of the Diplomatic Convention: “*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”³²

The argument that the diplomat remains the official entitled to greater deference in the receiving State is persuasive, although neither Convention sets out an easily applied standard against which treatment of diplomatic agents³³ and consular officers³⁴ might be gauged. The diplomat’s absolute immunity from the criminal jurisdiction of the receiving State is firmly stated,³⁵ while the Consular Convention would, if pursuant to “competent judicial authority,” subject the consular officer to arrest in the case of a “grave crime.”³⁶ It does not, however, outline the parameters of that crime.³⁷ Neither the

30. Diplomatic Convention, *supra* note 15.

31. Consular Convention, *supra* note 6.

32. Diplomatic Convention, *supra* note 15.

33. *Id.* art. 1(e).

34. Consular Convention, *supra* note 6, art. 1(d).

35. The Diplomatic Convention, *supra* note 15, art. 31 states:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction

Id. (exceptions omitted); *see also id.* art. 29:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Id.

36. *See infra* note 37.

37. The Consular Convention, *supra* note 6, states that “[c]onsular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime

diplomat nor the consul is obliged to give evidence as a witness,³⁸ but the succinct statement of the Diplomatic Convention³⁹ subtly underlines the favored status of the diplomat.⁴⁰ Under no circumstances does the Diplomatic Convention allow entry on the premises of the mission without the consent of the head of the mission.⁴¹ The Consular Convention expressly provides an exception to this inviolability.⁴²

The heart of the substantive immunities problem is the

and pursuant to a decision by the competent judicial authority." *Id.* art. 41. The Convention recognized the difficulty in reconciling international points of view as to what constitutes a "grave crime," but the problem remains. Problems of language added to the dilemma and "[i]n the long run one feels that this problem is still far from solved." Silva, *The Vienna Conference on Consular Relations*, 13 INT'L & COMP. L.Q. 1214, 1226 (1974).

38. The Consular Convention, *supra* note 6, sets out the consular officer's responsibility as follows:

Liability to give evidence

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.
2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions
3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions

Id. art. 44. The Sixth Amendment may require the issuance of compulsory process in a criminal case. See *Ohio v. Roberts*, 448 U.S. 56 (1980); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970); see also Stewart, *Consular Privileges & Immunities Under the Treaties of Friendship, Commerce and Consular Rights*, 21 AM. J. INT'L L. 257, 261 (1927).

39. See Diplomatic Convention, *supra* note 15, art. 31(c)(2) ("A diplomatic agent is not obliged to give evidence as a witness.").

40. Compare Diplomatic Convention, *supra* note 15, art. 31 with Consular Convention, *supra* note 6, art. 44. The Consular Convention states that "no coercive measure or penalty" may be applied to the reluctant consular witness, but expressly states that the consul may be called as a witness, with the caveat that the giving of such testimony by the consular officer may not interfere with his duties. *Id.*

41. Diplomatic Convention, *supra* note 15, art. 22. Compare *id.* with Consular Convention, *supra* note 6, art. 31.

42. Consular Convention, *supra* note 6, art. 31:

Inviolability of the consular premises

1. Consular premises shall be inviolable to the extent provided in this Article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post The consent of the head of the consular post may . . . be assumed in case of fire or other disaster requiring prompt protective action.
3. Subject to the provisions of paragraph 2 of this Article, the receiving

heart of the immunity from service problem: Will the action of the receiving state be an affront to the dignity of the foreign representative? Article 40 of the Convention sets out the personal inviolability of the consul as follows:

Protection of Consular Officers

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.⁴³

In combining language of two sections of the Consular Convention,⁴⁴ the Diplomatic Convention's statement of the personal inviolability of diplomatic agents has the effect of being much stronger than that of the Consular Convention. Article 29 of the Diplomatic Convention states:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.⁴⁵

It may be concluded that this variance stems from the distinction in the functions of diplomatic agents⁴⁶ and consular of-

State is under a special duty to take all appropriate steps to protect the consular premises . . . and to prevent . . . impairment of its dignity.

The Diplomatic Convention, *supra* note 15, art. 22, reads:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission . . . and to prevent any . . . impairment of its dignity.

Id. Note, however, that while the express limitations of the Consular Convention were included, there was some discussion of the necessity for their inclusion since consent of the head of the consular post to enter the premises would be assumed in the case of *force majeure*. There is some indication that the same may also be true of entry onto the premises of the diplomatic mission. See, e.g., Silva, *supra* note 37, at 1224-25.

43. Consular Convention, *supra* note 6, art. 40.

44. See *id.*, arts. 40, 43(1).

45. Diplomatic Convention, *supra* note 15, art. 29.

46. *Id.* art. 3. This article provides:

1. The functions of a diplomatic mission 'consist *inter alia* in:
 - (a) representing the sending State in the receiving State;
 - (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 - (c) negotiating with the Government of the receiving State;
 - (d) ascertaining by all lawful means conditions and developments in the

ficers⁴⁷ and is firmly rooted in international law.⁴⁸ In order to

receiving State, and reporting thereon to the Government of the sending State;

- (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Id.

47. Consular Convention, *supra* note 6, art. 5.

Consular functions consist in:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending

determine, then, whether service of process may be made on a consular officer, it must be considered whether such service violates the respect due the officer, or represents an "attack on [his] person, freedom or dignity."⁴⁹

III. *PERSONAL SERVICE*

Courts are understandably reluctant to define the boundaries of the respect due consuls and diplomats, particularly with regard to the "person, freedom or dignity" standard set out in the Conventions.⁵⁰ In *Vulcan Iron Works, Inc. v. Polish American Machinery Corp.*,⁵¹ for example, an employee of the Polish Commercial Counselor's office refused to answer subpoenas, insisting that he was immune by virtue of his diplomatic status.⁵²

State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

- (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
- (l) extending assistance to vessels and aircraft mentioned in subparagraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;
- (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Id.; see also *id.* arts. 3, 6-8. The list contained in article 5 is not exhaustive. See *Silva*, *supra* note 37, at 1221-22.

48. See text accompanying notes 15-29.

49. Compare Consular Convention, *supra* note 6, art. 40 with Diplomatic Convention, *supra* note 15, art. 29. See generally *supra* note 40.

50. Deference to the executive branch is ordinarily the rule on questions of immunity. See, e.g., *Mexico v. Hoffman*, 324 U.S. 30 (1945); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

51. 479 F. Supp. 1060 (S.D.N.Y. 1979).

52. *Id.* The case follows a diplomatic rather than a consular analysis. See *id.*; see also *Vulcan Iron Works, Inc. v. Polish Am. Mach. Corp.*, 472 F. Supp. 77 (S.D.N.Y. 1979) (before the court on a motion to reargue Judge Lasker's earlier denial of plaintiff's motion to hold defendants in contempt for their refusal to answer the subpoenas. See 479 F. Supp. at 1063.).

The court did not address the issue of the employee's immunity from service of process, but found that he did not enjoy the status he claimed, since such status was conditioned on notification to the State Department of the employee's appointment.⁵³ The State Department was not so notified.⁵⁴

Similarly, the Second Circuit in *Victory Transport, Inc. v. Comisaría General de Abastecimientos y Transportes*⁵⁵ did not address the question of immunity from service of process, although it did address the question of the validity of service. In an action to compel arbitration, it was found that the Spanish Consul General had consented to the jurisdiction of the district court.⁵⁶ He had done so by agreeing to arbitrate in New York a dispute involving a branch of his government.⁵⁷ Given such consent, the court found no need to question the propriety of service in this case,⁵⁸ but held that the sole purpose of the service was to give notice to appellant Comisaría that proceedings had begun.⁵⁹ The court further found that "[n]o rule of international law requires special treatment for serving branches of foreign sovereigns."⁶⁰

The issue of consular immunity from service of process was also avoided in *Purdy Co. v. Argentina*.⁶¹ Under the terms of a letter of credit, the Argentine consul was to authenticate invoices as a condition to payment to the domestic corporation.⁶² When a dispute arose, service of process was made on the Argentine consul in Chicago.⁶³ Purdy argued that the function of the consul in legalizing documents pursuant to the

53. 479 F. Supp. at 1065, 1067.

54. *Id.* at 1067.

55. 336 F.2d 354 (1964).

56. *Id.* at 363.

57. *Id.*

58. Service was by registered mail on appellant's office in Madrid, pursuant to an *ex parte* order permitting such service. *Id.* at 356-57.

59. *Id.* at 364.

60. *Id.* (citing SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 350, 351 (1959)).

61. 333 F.2d 95 (7th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

62. 333 F.2d at 96.

63. *Id.* Service was also made on the Dirección General de Fabricaciones Militares, a branch of the foreign sovereign, in Buenos Aires. As to the validity of that service, the court held that neither the establishment of a letter of credit with an Illinois bank nor the legalization of invoices as a condition precedent to payment were sufficient "minimum contacts" to justify extraterritorial service in this case under FED. R. Civ. P. 4(f) and 4(d)(7). See 333 F.2d at 97-98.

terms of the contract was sufficient to constitute the consul an agent for service of process in the case.⁶⁴ The court disagreed, holding that absent an express designation of the consul as agent for service of process, the consul was not such an agent.⁶⁵ The court did not reach the question of the consul's immunity from service of process.⁶⁶

64. 333 F.2d at 96.

65. *Id.* at 97.

66. An earlier default judgment entered against Argentina was vacated on Argentina's special and limited appearance, its motion to quash service of process and to dismiss. *Id.* at 96. One wonders why, given Purdy's service of process contention, Argentina did not raise the narrower issue of their consul's immunity from service of process, and plead sovereign immunity in the alternative as a release from the court's jurisdiction. The Seventh Circuit might have been forced to address the immunity from service of process question had they not been able to find that exercise of a consular function in this case (the legalization of documents) was by itself insufficient to make the consul an agent for service of process. *See also* *Vicente v. Trinidad*, 83 Misc. 2d 101, 372 N.Y.S.2d 369 (1975), *rev'd* 53 A.D.2d 76, 385 N.Y.S.2d 83 (1976), *aff'd* 42 N.Y.2d 930, 397 N.Y.S.2d 1007 (1977). That case concerned a hearing to determine if the court had personal jurisdiction over defendant Trinidad and Tobago. Service had been made in a variety of ways: by registered mail on the Attorney General of Trinidad and Tobago; in person on defendant's mission to the United Nations; in person on defendant's Industrial Development Corporation in New York; in person on defendant's Tourist Board in New York; and in person on the offices of British West Indies Airlines in New York. 83 Misc. 2d at 102-03, 372 N.Y.S.2d at 371. Despite defendant's objection to the validity of service, defendant conceded that the Attorney General is authorized under the laws of Trinidad and Tobago to receive service of process for the defendant. *See* THE REPORT OF THE HOUSE JUDICIARY COMMITTEE OF THE JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7-8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604. "It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted." 1976 U.S. CODE CONG. & AD. NEWS at 6624. The New York Supreme Court held, therefore, that such service was effective to confer jurisdiction. The court did not need to reach the immunity question, which may have shed some light on the area. (The Appellate Division reversed, ruling that since there was no identity between the sovereign and the entities served, service on these entities would not be sufficient to obtain jurisdiction over the sovereign. 53 A.D.2d 76, 385 N.Y.S.2d 83 (1976).)

Nor does the executive branch seem inclined to sharpen the line of demarcation between permissible and impermissible conduct with respect to foreign representatives. Its intention is clear, however, that personal service is outside the boundaries of good foreign relations. *Cf. supra* text accompanying notes 12-14.

Consider the provisions made for service of process where the intent is to obtain jurisdiction over the sovereign. 1976 U.S. CODE CONG. & AD. NEWS at 6623-25. Particularly puzzling is the language pertaining to service on diplomatic and consular representatives: "It is . . . contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines, Ltd. v. Moore* * * *, or upon consular representatives, *Oster v. Dominion of Canada* * * *." *Id.* at 6624 (cita-

Although no court has decided whether personal service on a consular officer is such an "attack on . . . person, freedom or dignity"⁶⁷ as to be void, there are cases from which analogies may be drawn. It has been held, for example, that an ambassador is immune from personal service of process, even though the ambassador was not being joined as a defendant.⁶⁸ Appellant in *Hellenic Lines, Ltd. v. Moore*⁶⁹ had filed a libel action against the Republic of Tunisia and directed service in that action to be made on the Tunisian ambassador.⁷⁰ The marshal refused to make service, claiming that the ambassador was immune by virtue of his status as a diplomat.⁷¹ A mandamus action was brought against the marshal to compel service.⁷² Recognizing that the issue had not previously been decided, the court turned to the "person, freedom or dignity" language of the Diplomatic Convention, although at that time it had neither been ratified by the Senate nor proclaimed by the President.⁷³ After consulting the State Department,⁷⁴ the court held that such service would violate the diplomatic status of the ambassador, and granted the marshal's motion to dismiss the mandamus action.⁷⁵

An interesting case upholding personal service on a consul is *United States v. Wilburn*.⁷⁶ The Mexican vice consul was sub-

tions omitted). While the use of the word "contemplated" casts some doubt on the strength of the legislature's objection to service on diplomatic or consular representatives, the objection is nonetheless apparent.

67. Consular Convention, *supra* note 6, art. 40.

68. See *infra* notes 69-75 and accompanying text.

69. 345 F.2d 978 (D.C. Cir. 1965).

70. *Id.* at 979.

71. *Id.*

72. *Id.*

73. *Id.* at 980. The court stated that:

Although we have held that diplomatic immunity is violated by joining a diplomatic officer as a defendant to a suit, *Carrera v. Carrera*, 84 U.S. App. D.C. 333, 174 F.2d 496 (1949), we have never decided whether it is violated by service of process on a diplomatic officer in an attempt to join, not him, but his sending state. There is little authority in international law concerning whether service of process on a diplomatic officer as an agent of his sending country is an "attack on his person, freedom or dignity" prohibited by diplomatic immunity.

345 F.2d at 980. Note too that the court treated the Diplomatic Convention as within the body of international law. See generally *id.* at 980-81.

74. *Id.* at 980.

75. *Id.* at 980-81.

76. 497 F.2d 946 (5th Cir. 1974).

poenaed to appear as a witness in a divorce action. Attempted personal service on the vice consul was made at her residence.⁷⁷ The objection was that Articles 28 through 35 of the Consular Convention provide "a complete immunity from state process for consular officials, records and premises from seizure, subpoena or arrest."⁷⁸ The court did not feel that these articles were controlling in the case,⁷⁹ but rather turned to Article 44, Liability to give evidence,⁸⁰ for resolution.⁸¹ Recognizing that, under the Convention, "[m]embers of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings,"⁸² the court reasoned that service of the subpoena did not violate the terms of the treaty.⁸³ The court did not consider, however, whether such service may have violated the "person, freedom or dignity" standard of Article 40.

Despite the fact that ambassadors enjoy a more privileged status than do consuls, it can be reasoned from *Hellenic Lines, Ltd. v. Moore*⁸⁴ that personal service on a consular officer at her home would not be within the boundaries, albeit vaguely defined, of the treaty.⁸⁵ While *Wilburn* would appear to be to the contrary, that case was wrongly decided in that the court did not apply the Consular Convention's "person, freedom or dignity" standard to the facts before it.

77. *Id.* at 947.

78. *Id.*

79. *Id.*

80. Consular Convention, *supra* note 6, art. 44.

81. 497 F.2d at 948.

82. Consular Convention, *supra* note 6, art. 44.

83. *See* 497 F.2d at 948.

84. 345 F.2d 978 (D.C. Cir. 1965).

85. *But cf.* Illinois Commerce Commission v. Salamie, 54 Ill. App. 3d 465, 369 N.E.2d 235 (1977). An Illinois citizen, serving as honorary Lebanese consul, was subpoenaed to testify before the Illinois Commerce Commission regarding the Arab boycott, 54 Ill. App. 3d at 468, 369 N.E.2d at 237. The court relied on the Consular Convention, *supra* note 6, art. 71. Noting that privileges enjoyed by honorary consuls are more limited in scope than are those enjoyed by other consular officers, the court held that Salamie could only refuse to testify as to matters connected with the exercise of his functions as honorary consul. 54 Ill. App. 3d at 472, 369 N.E.2d at 240. The court further decided that the determination of the scope of those functions was to be made by the court and by the Commission, not by the consul, and the case was remanded for such determination. 54 Ill. App. 3d at 472, 476, 479-80, 369 N.E.2d at 240, 242-43, 245.

IV. MAIL SERVICE

To date, no case has considered whether service by mail⁸⁶ on a consular officer would violate the terms of the Consular Convention. There are, however, cases from which analogies may be drawn. In *Caravel Office Building Co. v. Peruvian Air Attaché*,⁸⁷ for example, service by certified mail on the Peruvian Air Attaché was held not violative of the predecessor⁸⁸ of the Diplomatic Relations Act of 1978.⁸⁹ The court concluded that such service was not barred by statute "as no restraint of person or property would result therefrom."⁹⁰

While such language could be favorably compared with the "person, freedom or dignity" standard of the Consular Convention,⁹¹ an examination of the use of precedent in *Caravel* is warranted. The court in *Caravel* based its holding on the decision of the District Court for the District of Columbia in *Renchard v. Humphreys & Harding, Inc.*,⁹² whose facts are distinguishable from those of *Caravel*. In *Renchard*, an action for damages had been brought against the Federal Republic of Brazil.⁹³ Plaintiff complained that his home had been damaged as a result of the construction of the Brazilian Embassy.⁹⁴ Attempted service on the Government of Brazil was by service on Brazil's attorney,⁹⁵ by registered mail on the Brazilian Embassy in Washington, D.C. and by registered mail on the Ministry of

86. See FED. R. CIV. P. 4(d)(8); N.Y. CIV. PRAC. LAW § 308 (McKinney Supp. 1983-1984).

87. 347 A.2d 280 (D.C. 1975).

88. 22 U.S.C. §§ 252-254, repealed by Pub. L. 95-393, § 3(a)(1), 92 Stat. 808 (1978), and replaced by The Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (1982). The earlier statute provided for broader diplomatic immunity than does the current statute. See S. REP. No. 958, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1935, 1936. See generally Note, *Diplomatic Immunity: Implementing the Vienna Convention on Diplomatic Relations*, 10 CASE W. RES. J. INT'L L. 827 (1978); Note, *Diplomatic Privileges and Immunities—The Diplomatic Relations Act of 1978: A Congressional Response to a Vexing Problem*, 22 HOW. L.J. 119 (1979).

89. 22 U.S.C. §§ 254a-254e.

90. 347 A.2d at 282.

91. Consular Convention, *supra* note 6, art. 40.

92. 59 F.R.D. 530 (D.C. Cir. 1973).

93. *Id.*

94. *Id.*

95. Service was presumably personal. No mention is made by the court of the method used in this instance, although the court does point out when service was made by registered mail. See *id.* at 531.

External Relations of the Government of Brazil in Brasilia.⁹⁶ Citing the decision of the Second Circuit in *Petrol Shipping Corp. v. Kingdom of Greece*,⁹⁷ the court upheld both methods of service by registered mail,⁹⁸ pursuant to Rule 83 of the Federal Rules of Civil Procedure.⁹⁹

An important distinction, however, is that service in *Renchard* was made on the embassy, and not on any representative of the sovereign. The court in *Petrol Shipping*, on which the *Renchard* court based its holding,¹⁰⁰ was careful to point out that it was not deciding the propriety of service on a representative of the sovereign: "This is not to say that service on the sovereign may be effected on any representative of the sovereign * * *. We hold only that service on the branch which is a party to the contract sued on is sufficient."¹⁰¹ Some doubt is therefore cast on the applicability of *Caravel* in this case.

In allowing service by mail, however, the *Renchard* case addresses the question of immunity, and may indirectly support the result in *Caravel*:¹⁰²

The purposes of diplomatic immunity are not violated by registered mail service upon the embassy. Unlike the situation where a federal marshal attempts service upon an ambassador personally, the delivery of a letter to the embassy does not affront the ambassador's personal dignity.

96. *Id.*

97. 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966). In an action to compel Greece to proceed to arbitration, service by ordinary mail was upheld under Fed. R. Civ. P. 83 because Fed. R. Civ. P. 4 did not apply to service on a foreign government. See 360 F.2d at 108-09.

98. 59 F.R.D. at 531.

99. FED. R. CIV. P. 83, which states:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

See also 28 U.S.C. § 2071 (1976) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). See generally 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1083 (1969); Miller, *Service of Process on State, Local, and Foreign Governments Under Rule 4, Federal Rules of Civil Procedure—Some Unfinished Business for the Rulemakers*, 46 F.R.D. 101, 132, 134 (1969).

100. See *supra* notes 97-98 and accompanying text.

101. 360 F.2d at 110 (citation omitted).

102. Note, too, that neither in *Renchard* nor in *Petrol Shipping* was consent to service considered necessary. See 360 F.2d at 109 n.2; 59 F.R.D. at 531.

Nor does registered mail service cause public embarrassment to the ambassador or cause him to restrict his movements to avoid being served with process. Although receipt of registered mail service may cause the ambassador to divert some time from his diplomatic functions, this objection is unrealistic in the modern world of diplomatic relations. A large embassy like Brazil's is similar to a modern business operation. The ambassador has a sizeable and competent staff to handle many routine matters. Indeed, it is likely that a summons and complaint received in the mail would be sent directly to the embassy's retained law firm without even coming to the ambassador's attention.¹⁰³

This answers the concerns of the court in *Hellenic Lines, Ltd. v. Moore*,¹⁰⁴ where personal service had been prohibited.¹⁰⁵ And while it must be mentioned again that service in *Renchard* ran to the embassy and not the ambassador,¹⁰⁶ this language is the closest treatment by a court to date of the "person, freedom, or dignity" standard of both Conventions.¹⁰⁷

In a concurring opinion in *Hellenic Lines, Ltd. v. Moore*,¹⁰⁸ Judge Washington seems to raise briefly the possibility of service by registered mail on an ambassador.¹⁰⁹ He draws no conclusions as to the validity of such service,¹¹⁰ and in fact points

103. 59 F.R.D. at 532.

104. 345 F.2d at 980-81 n.5. The court quotes a letter from Leonard C. Meeker, Acting Legal Adviser of the Department of State, to Nathan J. Paulson, Clerk of the United States Court of Appeals for the District of Columbia Circuit (Jan. 13, 1965) [hereinafter cited as Meeker Letter]:

On possible impairment of a diplomatic officer's performance of official duty, the State Department said, "It is quite probable that such impairment would be caused; the degree of it would depend on the circumstances. An ambassador and his government would in all likelihood consider that he had been hampered in the performance of his duties if, for example, (a) the ambassador felt obliged to restrict his movements to avoid finding himself in the presence of a process server; or (b) he were diverted from the performance of his foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances; or (c) the manner of service had been publicly embarrassing to him and called attention to the infringement of his personal inviolability.

105. See *supra* notes 69-75 and accompanying text.

106. See *supra* note 96 and accompanying text.

107. See *supra* notes 43, 58.

108. 345 F.2d 978. See text accompanying notes 69-75.

109. 345 F.2d at 983.

110. The question was not before the court. 345 F.2d at 983 n.4.

to a State Department letter indicating that while service by registered mail "might avoid some of the problems inherent in personal service by a marshal * * *, it would raise others" ¹¹¹ Service by mail on an ambassador probably does not comply with the standards of the Diplomatic Convention, ¹¹² but the language in *Renchard* may support a broader view in the case of consular representatives. ¹¹³ A consul should not be accorded greater deference than an embassy, ¹¹⁴ and *Renchard* upheld service on an embassy. ¹¹⁵ Service on a consul should be no more an affront to the dignity of the sovereign than is service on an embassy. ¹¹⁶

CONCLUSION

The consul is straddled precariously between the commercial world and the world of diplomatic relations. ¹¹⁷ The uncertain status of the consular officer in foreign affairs warrants caution in the consideration of service of process on the of-

111. *Id.* (quoting Meeker Letter, *supra* note 104); *see also id.* at 983 n.5 ("In the Department's experience, diplomatic missions have frequently expressed great concern when service of process has been attempted by mail addressed to the ambassador or another diplomatic officer.").

112. *See supra* notes 33-49 and accompanying text.

113. *See supra* note 103 and accompanying text.

114. An embassy is linked to the diplomat, not to the consul, and the respect accorded the embassy should also be so linked. *See supra* text accompanying notes 15-28; *see also* Diplomatic Convention, *supra* note 15, art. 22:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

Id.

115. *See supra* notes 92-99 and accompanying text.

116. Note that the "person, freedom, dignity" language is that of the Diplomatic Convention. *See infra* note 45 and accompanying text. The diplomat is the representative of the sovereign in the receiving State. *See infra* notes 20-22 and accompanying text. Given that the distinction consul-as-commercial-agent as opposed to consul-as-representative-of-the-sovereign is blurred, *see infra* text accompanying notes 15-28; *see also* text accompanying note 117, it should be concluded that the "person, freedom, dignity" standard set out by the Consular Convention, *supra* note 43 and accompanying text, safeguards the dignity of the sovereign, and not that of the consul. Therefore, only the sovereign may waive the immunity. Consent by the consul to service should be ineffective to obtain jurisdiction.

117. *See supra* text accompanying notes 15-28.

ficer. The Kasenkina incident is an example of the repercussion that could be the result of service deemed "improper" by the international community.¹¹⁸ The Consular Convention recognizes this problem, and responds by the inclusion of Article 40, Protection of consular officers.¹¹⁹ The standard of "due respect" and protection of the officer's "person, freedom [and] dignity" controls, despite the lack of definition of that language.

For these reasons, personal service of process must be considered prohibited by the Consular Convention.¹²⁰ Notwithstanding the result in *United States v. Wilburn*,¹²¹ *Hellenic Lines, Ltd. v. Moore*¹²² should be considered as controlling, given that its holding was based on an identical standard in the Diplomatic Convention.¹²³

The status of the consular officer is less politically sensitive than that of the diplomat, since the consular officer's functions are primarily those of a commercial agent.¹²⁴ Similarly, there is a correlation between the scope of the functions of the consul and the scope of his immunities, as there is in the case of the diplomat.¹²⁵ Arguably, that correlation of function and immunity should allow parties more freedom in their dealings with consular officers than with diplomatic agents, as should the more limited "official acts" substantive immunity of the

118. See *supra* notes 12-14 and accompanying text.

119. Consular Convention, *supra* note 6, art. 40; see text accompanying note 43.

120. See text accompanying notes 50-85.

121. 497 F.2d 946; see text accompanying notes 76-83.

122. 345 F.2d 978; see text accompanying notes 69-75. Given that the scope of consular immunity is more narrow than that of diplomatic immunity, and given that *Hellenic Lines* was decided at a time when diplomatic immunities were broader (under 22 U.S.C. §§ 252-254) than they are today (under 22 U.S.C. §§ 254a-254e), an argument could be made that the result in *Hellenic Lines* does not prohibit personal service on consular officers. The argument may perhaps be more persuasive given the holding in *Wilburn*. For reasons already discussed, such an argument would be unwise. See *supra* notes 50-85 and accompanying text.

123. See text accompanying notes 69-85.

124. See text accompanying notes 15-23.

125. 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 730 (1942); C. HYDE, *supra* note 19, at 1266-69; see *supra* note 28 and accompanying text; see also Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67 (1966); Note, *Consular Immunity: In Law and in Fact*, 47 IOWA L. REV. 668 (1962) (academic commentary). For the modern treatment of this correlation, compare Diplomatic Convention, *supra* note 15, arts. 22, 24, 29, 31 with Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976). See generally J. BLUNTSCHLI, *supra* note 18, at 122-44.

consular officer.¹²⁶

Service by registered mail is not, however, precluded by the Consular Convention.¹²⁷ Since *Renchard v. Humphreys & Harding, Inc.*¹²⁸ supports an argument for service by mail on a diplomatic agent, the same argument will support similar service on a consular officer. Consequently, service by registered mail should be valid.¹²⁹ It is therefore recommended that in drafting agreements provision be made by the parties for such service.¹³⁰

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126. See *supra* note 28 and accompanying text.

127. See text accompanying notes 86-116.

128. 59 F.R.D. 530; see text accompanying notes 92-99.

129. See text accompanying notes 86-116. The procedural device which would allow such service is FED. R. CIV. P. 83. See *supra* note 99.

130. See, e.g., Mitchell & Wall, *supra* note 1, at 65 (sample contractual provision providing for consent to jurisdiction).