

September 1998

Why Is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of *Matimak Trading Co. v. Khalily and D.A.Y.*

Teresa M. Mozina

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

Teresa M. Mozina, *Why Is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of Matimak Trading Co. v. Khalily and D.A.Y.*, 10 Pace Int'l L. Rev. 575 (1998)

DOI: <https://doi.org/10.58948/2331-3536.1266>

Available at: <https://digitalcommons.pace.edu/pilr/vol10/iss2/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

NOTES

WHY IS THERE ANY QUESTION? HONG KONG AND ALIENAGE JURISDICTION: A CRITICAL ANALYSIS OF *MATIMAK TRADING CO. V. KHALILY AND D.A.Y.*

| | | |
|------|---|-----|
| I. | INTRODUCTION | 576 |
| II. | ALIENAGE JURISDICTION | 579 |
| III. | <i>MATIMAK TRADING CO. V. KHALILY AND D.A.Y.</i> | 583 |
| | A. The District Court | 583 |
| | B. The Court of Appeals | 585 |
| | 1. The Majority | 585 |
| | 2. The Dissent | 588 |
| IV. | ANALYSIS | 590 |
| | A. Deference to the Executive Branch? | 590 |
| | B. Ignoring Precedents | 591 |
| | 1. <i>Tetra Finance Ltd. v. Shaheen</i> | 591 |
| | 2. <i>Timco Engineering v. Rex & Co.</i> | 592 |
| | 3. <i>Creative Distributors, Ltd. v. Sari Niketan, Inc.</i> | 593 |
| | C. Current International Realities | 594 |
| | 1. Hong Kong–U.S. Bilateral Ties | 594 |
| | 2. U.S.–Hong Kong Policy Act of 1992 | 596 |
| | 3. “One Country, Two Systems” | 598 |
| | 4. Other British Dependent Territories | 600 |
| V. | PROPOSAL | 602 |
| VI. | CONCLUSION | 604 |

"In the waning days of the United Kingdom's sovereignty over Hong Kong, the majority's holding is a death knell for Hong Kong corporations seeking access to our federal courts under alienage jurisdiction."¹

I. INTRODUCTION

On June 27, 1997, just three days before Hong Kong would revert back to China from the United Kingdom, the United States Court of Appeals for the Second Circuit, in a split court decision, affirmed the District Court's ruling in *Matimak Trading Co. v. Khalily and D.A.Y.*, and stated that because Hong Kong is not a "foreign state," Matimak Trading Company ("Matimak"), a Hong Kong corporation, is not a "citizen or subject of a foreign state,"² and thus may not sue in federal court. Specifically, the Second Circuit held that Matimak is "stateless."³ After both a petition for rehearing and a suggestion for rehearing *en banc* were denied, Matimak petitioned the Supreme Court.⁴

Although Hong Kong has never been formally recognized by the United States as a "foreign state," there have been contradictory letters and statements from the Justice Department and the State Department regarding this issue; as a result, Hong Kong's status as a foreign state is not clear.⁵ Notably, for

¹ *Matimak Trading Co. v. Khalily and D.A.Y.*, 118 F.3d 76, 88 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 883, 139 L.Ed. 2d 871 (1998).

² *See id.* The phrase "citizen or subject of a foreign state" comes from Title 28 U.S.C. § 1332(a)(2), a statute which gives the U.S. federal courts jurisdiction over alien parties otherwise known as "alienage jurisdiction." *See infra* Part II & n.23.

³ *See id.* at 86. The court stated: "[A] stateless person—the proverbial man without a country—cannot sue a United States citizen under alienage jurisdiction." *Id.* (citing *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1092 (9th Cir. 1983); *Sadat v. Mertes*, 615 F.2d 1176, 1183 (7th Cir. 1980); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Shoemaker v. Malaxa*, 241 F.2d 129, 129 (2d Cir. 1957) (per curiam)).

⁴ *See Matimak*, 118 F.3d 76, *petition for cert. filed*, __ U.S.L.W. __ (U.S. Nov. 28, 1997) (No. 97-893).

⁵ *See Matimak v. Khalily & D.A.Y.*, 936 F. Supp. 151, 152 (S.D.N.Y. 1996) (discussing a letter from the State Department urging the court to recognize Hong Kong as a de facto foreign state for diversity purposes). *But cf. Matimak*, 936 F. Supp. at 152 (citing *Dunsky Limited v. Judy-Philippine, Inc.*, 95 Civ. 2035(KMW) (April 4, 1995) which discusses a letter from the State Department confirming that the United States does not recognize Hong Kong as a sovereign state); *Matimak*, 118 F.3d at 82 (noting that the Justice Department amicus brief states that the State Department no longer urges treatment of Hong Kong as a de facto foreign state).

the past 155 years, Hong Kong has been under the governance of Great Britain, a foreign state formally recognized by the United States.⁶

The *Matimak* decision by the Second Circuit has attracted significant international attention. The Special Administrative Region of Hong Kong⁷ and the American Chamber of Commerce in Hong Kong⁸ are tracking the case because of concern that this precedent could impact the ability of Hong Kong companies to settle disputes with United States trading partners.⁹ In addition, the government of the United Kingdom of Great Britain and Northern Ireland filed a Supreme Court brief as amicus curiae in support of *Matimak*¹⁰ because of their disagreement with the Second Circuit, and because of concern that this precedent could negatively affect all British Dependent Territories.¹¹

A "foreign state" is one formally recognized by the Executive Branch of the United States. See 13B C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3604, at 391 (2d ed. 1984). See also *infra* note 46 and accompanying text. The Executive Branch of the United States includes the Department of Justice ("Justice Department") and the Department of State ("State Department"). See also BLACK'S LAW DICTIONARY 864, 1408 (6th ed. 1990).

⁶ See *Matimak*, 118 F.3d at 85.

⁷ The Special Administrative Region of Hong Kong is the name given to Hong Kong after July 1, 1997. This was established by the 1984 Joint Declaration between Great Britain and China. See IAN DOBINSON & DEREK ROEBUCK, *INTRODUCTION TO LAW IN THE HONG KONG SAR* 1 (1996).

⁸ The American Chamber of Commerce in Hong Kong was established in 1969 to develop commerce between the U.S., Hong Kong, and the Asia-Pacific regions. See *American Chamber of Commerce in Hong Kong Mission Statement* (visited Sept. 24, 1998) <http://www.amcham.org.hk/About_Amcham>.

⁹ See Mark Sharp, *U.S. Court Rules Hong Kong Firms Stateless; Move Raises Concern Over Right To Sue As Matimak Trading Loses Appeal*, *South China Morning Post*, Oct. 19, 1997, available in LEXIS, Asiapc Library, Curnws File. The *South China Morning Post* reported that the SAR Government is tracking the case and is deeply concerned about the impact the case could have on the future ability of Hong Kong companies to settle disputes with U.S. trading partners. The American Chamber of Commerce is also looking into the matter. See *id.*

¹⁰ See Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner at *4, *Matimak* (No. 97-893), available in LEXIS, Genfed Library, Briefs File.

¹¹ Currently the British Dependent Territories include: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Sovereign Base Areas in Cyprus, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and dependencies, South Georgia and South Sandwich Islands, the Turks and Caicos Islands, and the Channel Islands and the Isle of Man. See Brief of the Government of the United Kingdom, *supra* note 10, at *6 n.5.

Despite this international attention and concern¹² over the Second Circuit's decision, the Supreme Court denied *certiorari*.¹³

Essentially, the Supreme Court's denial of *certiorari* solidifies the Second Circuit's ruling and restricts Hong Kong corporations in disputes with American parties to settle the disputes in state court, a forum known for being potentially "biased" against foreigners and ill-equipped to handle international law and matters.¹⁴ This limitation could potentially inhibit trade between Hong Kong and the United States because fear of future disputes, without a fair forum to hear and decide those disputes, could discourage Hong Kong companies from doing business with U.S. companies.

Before *Matimak*, U.S. federal courts were divided on this issue of jurisdiction, and did not agree on the correct approach to take when deciding if jurisdiction exists when an entity from an "unrecognized"¹⁵ foreign state, such as Hong Kong, is in-

¹² See Sharp, *supra* note 9. The South China Morning Post quoted John Leonard, an international law consultant who has been studying Matimak's case, as saying:

The significance of the decision by the Second Circuit - whose influence on other federal courts in America is just below the Supreme Court - is that Hong Kong corporations (even, ironically, those formed as local subsidiaries by US multinationals doing business in Hong Kong) cannot bring law suits in federal courts throughout America, but would have to do so in the state courts. . . .

Id.

¹³ See *Matimak*, 118 S.Ct. at 883 (petition for *certiorari* denied).

¹⁴ See *infra* note 27 and accompanying text. See also Marian Nash Leich, *Federal Diversity Jurisdiction*, 77 AM. J. INT'L L. 135, 135-36 (January 1983) (quoting the American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 108 (1969) [hereinafter cited as ALI Study]). The ALI Study states:

Whether the state courts in fact generally render full, fair, and speedy justice to alien litigants is largely beside the point. It is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the assurance that he can have his cases tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it.

Id.

¹⁵ If a foreign state is unrecognized, it means that the Executive Branch of the United States has not formally recognized the state as an independent sovereign, either through the exchanging of ambassadors or through an explicit statement of recognition. See *infra* note 25 and accompanying text. See also *infra* note 46 and accompanying text.

volved in a civil suit with an entity from the U.S. In light of the U.S.-Hong Kong Policy Act of 1992 (the "Act"),¹⁶ and in light of the fact that Hong Kong is the United States' twelfth-largest trading partner, with direct U.S. financial investment of almost \$12 billion,¹⁷ it seems hypertechnical to conclude that a Hong Kong corporation is not a "citizen or subject of a foreign state" because Hong Kong has not been formally recognized by the Executive Branch of the United States.¹⁸

This article will first examine the history and theory behind alienage jurisdiction, which gives our federal courts jurisdiction over foreign parties. Second, *Matimak* will be critically analyzed in light of other federal court precedents, which held that Hong Kong corporations could sue in federal court under alienage jurisdiction. Third, Hong Kong and its significant trade relations with the U.S. will be considered, along with the U.S.-Hong Kong Policy Act of 1992¹⁹ and the Sino-British Joint Declaration of 1984²⁰ and their effect on Hong Kong's reversion back to China. The article concludes with a proposal that would allow Hong Kong companies unquestionable access to U.S. federal courts, without the need for formal recognition of Hong Kong by the Executive Branch.

II. ALIENAGE JURISDICTION

Federal judicial power extends to "all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or

¹⁶ 22 U.S.C. §§ 5701-32 (1994). The U.S. Hong Kong Policy Act of 1992 was enacted by Congress in anticipation of Hong Kong's reversion to China on July 1, 1997. It manifests Hong Kong's relationship with the U.S., and makes clear that the U.S. desires U.S.-Hong Kong relations to remain the same after the reversion. *See id.*

¹⁷ *See Matimak*, 118 F.3d at 81 (citing Letter from Jim Hergen, Assistant Legal Advisor for East Asian and Pacific Affairs, United States Department of State, to Marshall T. Potashner Attorney for Matimak, of 6/21/96 at 3). This amount has increased, since *Matimak* was filed, to approximately \$14 billion. *See Hong Kong Head Sees Asia as the Economic Giant*, XINHUA NEWS AGENCY, Sept. 11, 1997, available in LEXIS, Asiapc Library, Curnws File.

¹⁸ Hong Kong has never been formally recognized by the United States. *See Matimak*, 118 F.3d at 80.

¹⁹ *See supra* note 16.

²⁰ *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366, 1371 [hereinafter the "Sino-British Joint Declaration"].

Subjects.”²¹ The judicial power over suits between aliens and U.S. citizens has been in force since 1789²² and is referred to as “alienage jurisdiction,” codified by sections 1332(a)(2), (3), and (4) of Title 28 of the United States Code.²³ Neither the Constitution nor section 1332 defines “foreign state” for diversity jurisdiction purposes.²⁴ Courts have generally held that a foreign state is one that has been formally recognized by the Executive Branch of the United States.²⁵ When determining alienage jurisdiction, courts also frequently rely on letters and briefs from the Justice Department and the State Department to determine the status of certain parties to a case.²⁶

²¹ U.S. CONST. art. III, § 2, cl. 1.

²² See ERWIN CHEMERINSKI, *FEDERAL JURISDICTION* § 5.3.2, at 274 (2d ed. 1994).

²³ See *id.* Diversity jurisdiction, of which alienage jurisdiction is a part, is codified by Title 28 U.S.C. § 1332 which states:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

citizens of different states;

citizens of a State and citizens or subjects of a foreign state;

citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States. . . .

28 U.S.C. § 1332 (1994).

²⁴ See *Matimak*, 118 F.3d at 79. Title 28 U.S.C. § 1603(a) defines “foreign state” as one including a political subdivision of a foreign state or agency or instrumentality of a foreign state. See 28 U.S.C. § 1603(a) (1994). The application of this definition to § 1332(a)(2) has been disputed and will be discussed later in this note. See *infra* Part V.

²⁵ See WRIGHT, MILLER, & COOPER, *supra* note 5, § 3604, at 391. See also *Iran Handicraft and Carpet Export Center v. Marjan International Corp.*, 655 F. Supp. 1275 (S.D.N.Y. 1987), *aff'd*, 868 F.2d 1267 (2d Cir. 1988) where the court explained:

Because the Constitution empowers only the President to ‘receive Ambassadors and other public Ministers,’ the courts have deferred to the executive branch when determining what entities shall be considered foreign states. The recognition of foreign states and of foreign governments, therefore, is wholly a prerogative of the executive branch. Thus, it is outside the competence of the judiciary to pass judgment upon executive branch decisions regarding recognition.

Id. at 1277 (citations omitted).

²⁶ See *Calderone v. Naviera Vacuba S/A*, 325 F.2d 76, 77 (2d Cir. 1963), *modified on other grounds*, 328 F.2d 578 (2d Cir. 1964) (relying on a statement from the Department of Justice urging the court to allow Cuban corporations access to federal court); *Chang v. Northwestern Mem'l Hosp.*, 506 F. Supp. 975, 978 (N.D. Ill.

The primary reason for alienage jurisdiction is to provide a neutral forum.²⁷ The framers of the Constitution thought that the federal courts could provide the proper forum for foreign parties and protect them from potential bias and prejudice in the state courts.²⁸ Alexander Hamilton, one of the framers, stated that "the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."²⁹ The fear of state court bias and prejudice led to another fear:

1980) (relying on a letter from the State Department confirming that Taiwanese citizens could sue in federal court in holding that Taiwan is a foreign state for purposes of alienage jurisdiction).

²⁷ See *The Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) where Chief Justice Marshall wrote:

However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen. . . .

Id. at 87.

See also Leich, *supra* note 14, at 135. Ms. Leich, a legal adviser for the Department of State, cites a letter from Powell A. Moore, the Department of State's Assistant Secretary for Congressional Relations, to Congressman Kastenmeier, dated August 9, 1982 which states:

The Federal courts have exercised jurisdiction in cases involving aliens since the first Judiciary Act in 1789. The Department of State welcomes the continuation of Federal Jurisdiction in these cases. The United States is responsible under international law to provide aliens fair and impartial justice and access to the United States court system. In some cases treaties provide specific standards of access to the judicial process, but even without a treaty, an alien is entitled to certain internationally recognized minimum standards of justice. Under international law, moreover, the Federal government is responsible for any denial of justice by a State court, even though the Federal government has no direct authority over those tribunals. Thus, while the Department has great confidence in the competence, integrity and impartiality of the State court systems, the availability of civil jurisdiction in Federal courts under a single nationwide system of rules tends to provide a useful reassurance to foreign governments and their citizens.

Id.

²⁸ See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 519 (Merrill Jensen ed., 1976). See also WRIGHT, MILLER, & COOPER, *supra* note 5, § 3604, at 383; *supra* note 27 and accompanying text. For a modern analysis disputing that bias exists in American courts see Kevin M. Clermont & Theodore Eisenberg, *Commentary: Xenophilia in American Courts*, 109 Harv. L. Rev. 1120 (1996).

²⁹ THE FEDERALIST NO. 80 at 536 (Alexander Hamilton) (J. E. Cooke ed., 1961). See also Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving*

that if federal jurisdiction was not allowed for foreign parties, possible entanglements with their sovereigns could result.³⁰ "Providing a neutral federal forum avoids the appearance of injustice or grounds for resentment in the relations of the United States with other nations."³¹ With these thoughts in mind, the First Congress enacted the Judiciary Act of 1789, which allowed federal jurisdiction over civil actions involving foreign parties.³²

It has been argued that the framers of the Judiciary Act of 1789 were unfamiliar with the idea of statelessness, and thus intended that alienage jurisdiction extend to all cases involving a U.S. citizen and any non-U.S. citizen.³³ Specifically, the original language and legislative history of the Judiciary Act only used the terms "foreigner" and "alien," and permitted suit in federal court for any civil action where the amount in controversy was more than \$500, and "where an alien is a party."³⁴ From this, it appears that the framers intended that *all* foreigners or aliens be allowed to sue in American federal courts regardless of their status, as long as they were not U.S. citizens.³⁵ This conclusion was reached in 1833 by Chief Justice Story when he reviewed the jurisdictional provisions of the Constitu-

Noncitizens, 21 YALE J. INT'L L. 1, 10-16 (1996) (discussing the rationale behind allowing federal jurisdiction when an alien is a party to a lawsuit).

³⁰ See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 888, at 633-34 (R. Rotunda and J. Nowak ed., 1987). Possible entanglements include negative commercial impacts. See Johnson, *supra* note 29, at 11-14.

³¹ *Matimak*, 118 F.3d at 88 (citing Hong Kong Deposit and Guar. Co. Ltd. v. Hibdon, 602 F. Supp. 1378, 1383 (S.D.N.Y. 1985)). See also ALI Study, *supra* note 14 and accompanying text.

³² See Johnson, *supra* note 29, at 17-20.

³³ See Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of Abu-Zeineh v. Federal Laboratories, Inc.*, 11 AM. U.J. INT'L L. & POL'Y 195, 215 (1996). See also WRIGHT, MILLER, & COOPER, *supra* note 5, § 3604, at 394 stating:

To support jurisdiction under Section 1332 of the Judicial Code, an alien must be a 'citizen or subject' of a foreign state. These words, which also appear in Article III, Section 2 of the Constitution, are designed to include any aliens regardless of the form of government in his country.

Id.

³⁴ See Biancheria, *supra* note 33, at 210-11 & n.68 (citing Pennsylvania Ratifying Convention, reprinted in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 492-93 (Jonathan Elliot ed., 2d ed. 1866)); Johnson, *supra* note 29, at 17-20.

³⁵ See generally Biancheria, *supra* note 33, at 206-15. But see Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496 (S.D.N.Y. 1955) (denying that status as a non-U.S. citizen is sufficient to invoke alienage jurisdiction).

tion and wrote: "The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States. The general answer is, any person, who is not a citizen of the United States."³⁶

III. *MATIMAK TRADING CO. v. KHALILY AND D.A.Y.*

A. *The District Court*

Plaintiff Matimak is a corporation organized under the laws of Hong Kong, with its principal place of business in Hong Kong. It filed suit for breach of contract in the United States District Court for the Southern District of New York against Albert Khalily and D.A.Y. Kids Sportswear, Inc., two New York Corporations.³⁷ Matimak invoked the court's diversity jurisdiction under 28 U.S.C. § 1332(a)(2), which provides jurisdiction over any civil action arising between "citizens of a State and citizens or subjects of a foreign state."³⁸ In an order dated June 10, 1996, District Judge Kimba M. Wood raised, *sua sponte*, the issue of whether the court lacked subject matter jurisdiction because Hong Kong is not recognized by the United States as a foreign state.³⁹

Matimak argued that the court should recognize Hong Kong as a "de facto foreign state,"⁴⁰ and specifically relied on a letter from the State Department that urged the court to recognize Hong Kong as a de facto foreign state for diversity pur-

³⁶ STORY, *supra* note 30, § 891, at 635.

³⁷ See *Matimak*, 936 F. Supp. at 151.

³⁸ See 28 U.S.C. § 1332, *supra* note 23 and accompanying text.

³⁹ See *Matimak*, 936 F. Supp. at 152.

⁴⁰ De facto recognition, as opposed to de jure recognition, is a principle, which allows jurisdiction over a party whose government or state has not been formally recognized by the Executive Branch of the United States. See *Chang*, 506 F. Supp. at 978 n.3. In *Chang*, the district court permitted suit under alienage jurisdiction between a Taiwanese national and a U.S. hospital despite the lack of formal recognition of Taiwan as a foreign state by the U.S. The court based its decision on de facto rather than de jure recognition of Taiwan, and found that the significant trade relations, and the cultural and other contacts with Taiwan on a nongovernmental level, were factors to be considered when deciding de facto recognition. See *id.*

See also *Tetra Finance Ltd. v. Shaheen*, 584 F. Supp. 847 (S.D.N.Y. 1984), to be discussed *infra* Part IV(B)(1) (finding de facto recognition for Hong Kong). The test for de facto recognition involves whether the Executive Branch regards the entity as an independent sovereign. See *Matimak*, 118 F.3d at 80 (citing *Iran Handicraft*, 655 F. Supp. at 1278). See also *infra* note 46 and accompanying text.

poses.⁴¹ As previously noted, the Executive Branch includes the State Department, and courts have relied on letters and briefs from both the State Department and Justice Department.⁴² Judge Wood acknowledged that "it is not the role of the judiciary to recognize foreign states, but rather that is a function of the [E]xecutive [B]ranch."⁴³ Despite this acknowledgment, and despite the letter from the State Department in support of recognizing Hong Kong as a de facto foreign state, Judge Wood rejected Matimak's argument. She stated: "Although there are strong commercial ties between Hong Kong and the United States, the establishment of such ties does not constitute recognition of Hong Kong as a de facto foreign state by our government."⁴⁴ Without any explanation, Judge Wood appeared to rely on a previous letter written by the State Department in April 1995,⁴⁵ which stated that the United States does not recognize Hong Kong as a sovereign state,⁴⁶ and ignored the more recent letter from the State Department that Matimak relied on, which urged recognition of Hong Kong as a de facto foreign state.⁴⁷

Judge Wood then distinguished cases relied upon by Matimak,⁴⁸ and stressed the importance of the principle that the

⁴¹ See *Matimak*, 936 F. Supp. at 152 (citing letter from the State Department written by Assistant Legal Adviser Jim Hergen). This letter, stating that Hong Kong should be treated as a de facto foreign state, was written to Marshall T. Potashner, the attorney for Matimak on June 21, 1996. See *Matimak*, 118 F.3d at 81-82.

⁴² See *supra* note 5 and accompanying text.

⁴³ *Matimak*, 936 F. Supp. at 152.

⁴⁴ *Id.*

⁴⁵ See *id.* (citing letter from State Department also written by Hergen in the case of *Dunsky Limited v. Judy-Phillipine, Inc.*, 95 Civ. 2035(KMW), dated April 4, 1995).

⁴⁶ When recognizing a "foreign state," either de jure or de facto, the Executive Branch of the United States often determines whether the state is a free and independent sovereign. This is what is meant by the term "sovereign state," and is consistent with the definition of "state" in international law, which requires that a certain "state" have a defined territory and population under the control of a government, and is able to enter into foreign relations with other countries. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). See also *Windert Watch Co. v. Remex Electronics Ltd.*, 468 F. Supp. 1242, 1244 (S.D.N.Y. 1979) (stating that a "foreign state" is a "political entity that is recognized by the United States as a free and independent sovereign.").

⁴⁷ See *supra* note 41 and accompanying text.

⁴⁸ See *Matimak*, 936 F. Supp. at 152-53.

judiciary has no power to recognize foreign states.⁴⁹ Interestingly, Judge Wood also noted that after Hong Kong reverts to Chinese sovereignty on July 1, 1997, it may be possible that "Hong Kong companies will be considered to be citizens of China for the purposes of diversity jurisdiction."⁵⁰ Judge Wood also pointed out that prior cases involving other British Dependent Territories⁵¹ that have allowed diversity jurisdiction were based on policy arguments, arguments that Judge Wood found to be unpersuasive given the importance and need for deference to the Executive Branch when determining who could bring suit in federal courts. As a result, Judge Wood dismissed the case in its entirety without prejudice to refile in state court.⁵²

B. *The Court of Appeals*

1. *The Majority*

Matimak appealed to the United States Court of Appeals for the Second Circuit which reviewed, *de novo*, the order of the district court.⁵³ Circuit Judge McLaughlin, writing for the majority, affirmed the district court's ruling and held that Hong Kong may not be regarded as a "foreign state," and that consequently, Matimak is not a "citizen or subject of a foreign state."⁵⁴ Judge McLaughlin began his analysis by looking at the history of alienage jurisdiction.⁵⁵ To counter Matimak's argument that Hong Kong should be recognized as a *de facto* foreign state, Judge McLaughlin analyzed *Murarka v. Bachrach Brothers, Inc.*,⁵⁶ a case heavily relied upon by Matimak.

⁴⁹ See *id.* at 153.

⁵⁰ *Id.* at 152.

⁵¹ See *id.* at 153 (citing *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731 (2d Cir. 1983); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991)).

⁵² See *id.*

⁵³ See *Matimak*, 118 F.3d at 76.

⁵⁴ See *id.* at 86.

⁵⁵ See *id.* at 79. Judge McLaughlin noted that "[t]his is not the first time we have had to navigate what we have earlier described as a 'shoal strewn area of the law.'" *Id.* This is in reference to Article III, section 2, clause 1 of the Constitution and to 28 U.S.C. § 1332(a)(2). See *id.* Judge McLaughlin also describes the two rationales underlying alienage jurisdiction: to avoid entanglements with other sovereigns, and to provide protection from bias in state court. See *Matimak*, 118 F.3d at 82-83.

⁵⁶ 215 F.2d 547 (2d Cir. 1954).

In *Murarka*, an Indian partnership sued a New York corporation in New York federal court. The Second Circuit ruled that there was alienage jurisdiction despite the fact that the complaint was filed before the United States had formally recognized India as a foreign state. The court noted that India was in the process of severing ties with Great Britain.⁵⁷ Despite the similarity of *Murarka* to *Matimak*'s situation, Judge McLaughlin dismissed the analogy as "inapt."⁵⁸ He stated: "India, which had been a colony of Great Britain, was about to become an independent sovereign nation. Not so for Hong Kong, which is about to be absorbed into China. Hong Kong is merely changing fealty."⁵⁹

Like the district court, Judge McLaughlin placed heavy emphasis on the need for deference to the Executive Branch in deciding what a foreign state is for alienage jurisdiction. He wrote:

. . . [T]he de facto test depends heavily on whether the Executive Branch regards the entity as an 'independent sovereign nation.'⁶⁰ 'Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislature and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.'⁶¹

Judge McLaughlin then pointed out that at the time *Matimak* instituted suit, Hong Kong was a British Dependent Territory, ruled by a governor appointed by the United Kingdom.⁶² He noted that Hong Kong was fully autonomous with regard to economic and trade matters, but was dependent on the United Kingdom with regard to defense and foreign affairs, and would still be dependent on China for defense and foreign affairs after the reversion on July 1, 1997.⁶³ In addition, Judge McLaughlin

⁵⁷ See *id.* at 552.

⁵⁸ See *Matimak*, 118 F.3d at 80.

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting *Iran Handicraft*, 655 F. Supp. at 1278).

⁶¹ *Id.* (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948); *United States ex rel. D'Esquiva v. Uhl*, 137 F.2d 903, 906 (2d Cir. 1943)).

⁶² See *id.* at 81-82.

⁶³ See *Matimak*, 118 F.3d at 81-82 (citing the United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-32 (West Supp. 1996)). The Act provides that "Hong

pointed out that the Justice Department, who filed an amicus brief for this appeal, stated that "[t]he State Department no longer urges treatment of Hong Kong as a de facto foreign state and withdraws any reliance on this contention."⁶⁴ As a result, Judge McLaughlin concluded that Hong Kong is not regarded by the United States as an independent sovereign entity, and thus could not invoke alienage jurisdiction.⁶⁵

Interestingly, the Justice Department in its amicus brief, although withdrawing de facto recognition of Hong Kong, stated nevertheless that because Matimak is a Hong Kong corporation governed by a Hong Kong law modeled from a specific British law, it should be considered a subject of the United Kingdom for alienage jurisdiction purposes.⁶⁶ Despite, however, this direct statement from the Justice Department, Judge McLaughlin disagreed and declined to follow their direction. He said: "Hong Kong corporations . . . are no more 'subjects' than 'citizens'⁶⁷ . . . [and][t]he fact that the Hong Kong . . . [law] may be 'ultimately traceable' to the British Crown is too attenuated a connection."⁶⁸

Judge McLaughlin briefly mentioned other cases that have found jurisdiction over Hong Kong parties, but dismissed all of them.⁶⁹ He stated that these other district courts have allowed

Kong will continue to enjoy a high degree of autonomy on all matters other than defense and foreign affairs." U.S.-Hong Kong Policy Act of 1992, *supra* note 16, § 5701(1)(B).

⁶⁴ *Matimak*, 118 F.3d at 82. In response to this "unexplained change in stance" by the State Department, Judge McLaughlin did not do any further inquiry and, without explanation, decided that he didn't have to resolve this issue. He stated: "Although we need not resolve this issue here, we note that the State Department's unexplained change in stance following the district court's opinion might under different circumstances require further inquiry into its ulterior motives." *Id.*

⁶⁵ *See id.*

⁶⁶ *See id.* at 86. Matimak is governed by the Hong Kong Companies Ordinance of 1985 which was patterned from the British Companies Act of 1948. *See id.* at 86, 90. As a "subject" of the United Kingdom, a foreign state recognized by the U.S., Matimak would have had access to federal court. *See* 28 U.S.C. § 1332(a)(2), *supra* note 23.

⁶⁷ *Matimak*, 118 F.3d at 86 (citing 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.75 (3d ed. 1996)).

⁶⁸ *Id.*

⁶⁹ *See id.* at 84 (citing *Timco Engineering, Inc. v. Rex & Co.*, 603 F. Supp. 925 (E.D. Pa. 1985) (holding that the presence of a Hong Kong corporation as a plaintiff in a suit against several U.S. corporations does not deprive the court of jurisdic-

Hong Kong diversity jurisdiction "cursorily and without benefit of briefing from the parties . . . without any analysis . . . or without considering the stance of the Executive Branch" ⁷⁰ Judge McLaughlin then relied on *Windert Watch Co. v. Remex Electronics Ltd.*, ⁷¹ which held that Hong Kong was not a "foreign state" under section 1332(a)(2). ⁷² Ultimately, Judge McLaughlin decided that Matimak is "stateless." ⁷³ He wrote: "[A] stateless person—the proverbial man without a country—cannot sue a United States citizen under alienage jurisdiction." ⁷⁴ As a result, he affirmed the district court's ruling and concluded that the suit was properly dismissed for lack of subject matter jurisdiction. ⁷⁵

2. *The Dissent*

In a stinging dissent, Circuit Judge Altimari stated: "[T]he majority's holding is a death knell for Hong Kong corporations seeking access to our federal courts under alienage jurisdiction." ⁷⁶ He focused on the history of alienage jurisdiction and statelessness and determined that "[a] stateless corporation is an oxymoron . . . a corporation cannot be created without the imprimatur of the state." ⁷⁷ He then focused on the United

tion), to be discussed *infra*, Part IV(B)(1); *Refco, Inc. v. Troika Inv. Ltd.*, 702 F. Supp. 684 (N.D. Ill. 1988) (holding that a Hong Kong corporation is a "citizen or subject of a foreign state" under 22 U.S.C. § 1332(a)(2)); *Creative Distributors, Ltd. v. Sari Niketan, Inc.*, No. 89 C 3614, 1989 U.S. Dist. LEXIS 10436, at *2 (N.D. Ill. Aug. 1, 1989) (holding that a Hong Kong corporation may sue in federal court because of the significant trade and commercial relations between the U.S. and Hong Kong), to be discussed *infra*, Part IV(B)(3)).

⁷⁰ *Id.*

⁷¹ 468 F. Supp. 1242.

⁷² *See id.* at 1245. In *Windert*, the defendants were Hong Kong corporations who moved to dismiss for lack of subject matter jurisdiction. The court agreed with the defendants and dismissed the suit after finding that Hong Kong was not a foreign state, but rather a colony of Great Britain. The court relied on the fact that the United States had never granted formal recognition to Hong Kong as an independent state. *See id.*

⁷³ *See Matimak*, 118 F.3d at 86.

⁷⁴ *Id.* (citing *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1092 (9th Cir. 1983); *Sadat v. Mertes*, 615 F.2d 1176, 1183 (7th Cir. 1980); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Shoemaker v. Malaxa*, 241 F.2d 129, 129 (2d Cir. 1957) (per curiam)).

⁷⁵ *See id.* at 88.

⁷⁶ *Id.* (Altimari, J., dissenting).

⁷⁷ *Id.* at 89 (Altimari, J., dissenting).

States' economic relationship with Hong Kong and on how influential Hong Kong is in the international community.⁷⁸ He also relied on *Calderone v. Naviera Vacuba S/A*,⁷⁹ in which the Second Circuit deferred to the Executive Branch in determining alienage jurisdiction, and found that because the Department of Justice had spoken on the issue, the court was bound to follow their direction.

Like *Calderone*, Judge Altimari argued that because the Executive Branch had clearly spoken in *Matimak's* case, the majority should have followed their direction.⁸⁰ He stated: "In this case, the Department of State and the Department of Justice unequivocally made their wishes known—they withdrew support of de facto recognition of Hong Kong and urged this Court to recognize Hong Kong as a 'citizen or subject' of the United Kingdom."⁸¹

Judge Altimari recognized Hong Kong as a unique force, critical to international policies and global economic expansion, and concluded that access to U.S. federal courts is justified and should be allowed.⁸² He stated:

There are adequate constitutional, statutory and prudential grounds to open our federal courts to *Matimak* by: (1) recognizing Hong Kong as a 'foreign state' for the limited purpose of alienage diversity jurisdiction; (2) recognizing Hong Kong as a political subdivision of a foreign state; or (3) recognizing Hong Kong's peo-

⁷⁸ See *Matimak*, 118 F.3d at 90 (Altimari, J., dissenting).

⁷⁹ 325 F.2d 76. In *Calderone*, the court allowed a suit between a Cuban corporation and an American company because the Justice Department had directly spoken on the issue. The court stated:

Considerations of both international relations and judicial administration lead us to conclude that the onus is on the Department of State, or some other department of the Executive Branch, to bring to the attention of the courts its decision that permitting nationalized Cuban corporations to sue is contrary to the national interest. Since silence on the question may be highly desirable, it would not be wise for the courts unnecessarily to force the Government's hand. However, in this case we need not merely rely on the maintenance of the status quo, because the Executive Branch has made its wishes known [T]he Department of Justice has urged that nationalized Cuban corporations have access to our courts

Id. at 77.

⁸⁰ See *Matimak*, 118 F.3d at 91 (citing *Calderone*, 325 F.2d at 77) (Altimari, J., dissenting).

⁸¹ *Id.*

⁸² See *id.* at 92 (Altimari, J., dissenting).

ple and entities as 'citizens or subjects' of the United Kingdom today and after July 1, 1997, of the People's Republic of China.⁸³

IV. ANALYSIS

A. *Deference to the Executive Branch?*

The Justice Department, as amicus in *Matimak*, explicitly stated in its brief to the court that it wanted *Matimak* to be treated as a "subject of [the] United Kingdom."⁸⁴ This would have allowed *Matimak* access to the Second Circuit under alienage jurisdiction.⁸⁵ Despite the majority's acknowledgment of this explicit statement, and despite the majority's own urging of deference to the Executive Branch through a lengthy discussion in its opinion,⁸⁶ the majority abruptly disagreed with the Justice Department and declined to follow their request.

The majority viewed the statement by the Justice Department, not as an explicit statement or request by the Executive Branch as to their desire to allow a Hong Kong corporation access to federal court, but instead, as an argument capable of being refuted.⁸⁷ This is not only contrary to the majority's legal analysis, but is contrary to other precedents where courts have deferred to statements made by the Executive Branch in letters and briefs, which ultimately decided for the court the question as to whether alienage jurisdiction was satisfied.⁸⁸ Thus, the majority's decision in *Matimak* was not a result of deference to the Executive Branch. Instead, the decision could be regarded as one that is disrespectful of the Executive Branch.

⁸³ *Id.*

⁸⁴ *Id.* at 86.

⁸⁵ See 28 U.S.C. § 1332(a)(2), *supra* note 23.

⁸⁶ See *Matimak*, 118 F.3d at 81-83.

⁸⁷ See *id.* at 86.

⁸⁸ See *Iran Handicraft*, 655 F. Supp. at 1280 n.4 (relying on State Department's letter in deciding that the court had jurisdiction over an Iranian corporation); *Transportes Aereos de Angola v. Ronair, Inc.*, 544 F. Supp. 858, 861 (D. Del. 1982) (relying on letter from State Department in holding that court had jurisdiction over an Angolan corporation).

B. *Ignoring Precedents*

Besides declining to follow explicit statements from the Justice Department, the majority also seemed to ignore precedents,⁸⁹ even within its own circuit.

1. *Tetra Finance Ltd. v. Shaheen*⁹⁰

In *Tetra Finance*, Tetra Finance Limited and Hong Kong Deposit and Guaranty Company Limited were both plaintiffs, incorporated under the laws of Hong Kong and involved in liquidation proceedings in the Hong Kong courts. They brought suit in the United States District Court for the Southern District of New York for breach of fiduciary duty and to recover in excess of \$35 million in loans made to the defendants, two U.S. citizens.⁹¹ The defendants relied on *Windert*, and tried to have the case dismissed for lack of subject matter jurisdiction pursuant to section 1332(a)(2) of Title 28 of the U.S. Code.⁹²

With regard to the issue in *Windert*, which was whether a Hong Kong corporation was precluded from jurisdiction in federal court because Hong Kong was not a foreign state, District Judge Werker stated:

I do not think that, if I had to decide the issue presented in *Windert*, I would necessarily find that a Hong Kong corporation is precluded from suing or being sued in federal court. It would seem hypertechnical to preclude Hong Kong corporations from asserting claims in our courts simply because Hong Kong has not been formally recognized by the United States as a foreign sovereign in its own right. Indeed, federal courts previously have enforced the judgments of Hong Kong courts and have applied the laws of Hong Kong in appropriate situations.⁹³

⁸⁹ Besides the precedents involving Hong Kong companies discussed in the text, there are other cases involving companies from other British Dependent Territories, not formally recognized by the U.S., where the courts have found jurisdiction. See *Netherlands Shipmortgage*, 717 F.2d at 735 (holding that the court had jurisdiction over a Bermuda corporation); *Wilson*, 916 F.2d at 1243 (holding that the court had jurisdiction over a Cayman Islands corporation); *Cedec Trading Ltd. v. United American Coal Sales, Inc.*, 566 F. Supp. 722, 724 (S.D.N.Y. 1983) (holding that the court had jurisdiction over a Channel Islands corporation).

⁹⁰ 584 F. Supp. 847.

⁹¹ See *id.* at 848.

⁹² See *id.*

⁹³ *Id.* (citations omitted).

He then noted the significant economic and commercial ties between the United States and Hong Kong,⁹⁴ and also noted that the *Windert* decision was expressly rejected by other jurisdictions.⁹⁵

Because the claims of Tetra Finance and Hong Kong Deposit were assigned to court-appointed liquidators who were both citizens of the United Kingdom, Judge Werker did not have to decide the issue in *Windert* and denied the defendant's motion to dismiss. Nevertheless, his view on the issue of Hong Kong was clear—Hong Kong corporations should be allowed access to our federal courts.

2. *Timco Engineering v. Rex & Co.*⁹⁶

In *Timco Engineering*, a U.S. corporation and a Hong Kong corporation sued several U.S. corporations, including one Hong Kong corporation, for various claims in the United States District Court for the Eastern District of Pennsylvania.⁹⁷ With respect to some of the claims, the court decided that diversity jurisdiction was satisfied.⁹⁸ The court noted that it is not certain whether Hong Kong is a foreign state, and mentioned the *Windert* case as one case that ruled Hong Kong is not a foreign state, but then noted that *Windert* "does not . . . represent an unchallenged view of Hong Kong's status."⁹⁹ The court then mentioned the *Tetra Finance* case and stated: "I find the reasoning of the *Tetra* . . . court persuasive, and I will hold that . . . the presence of a Hong Kong citizen as a plaintiff in a suit be-

⁹⁴ See *id.* Judge Werker wrote that "[t]he commercial and cultural realities of the modern world dictate that diversity jurisdiction should be granted to certain governmental entities that have not been formally recognized." *Tetra Finance*, 584 F. Supp. at 848 (citing *Chang*, 506 F. Supp. at 978 n.3).

⁹⁵ See *id.* (citing *Great China Trading Co. v. Cimex, U.S.A., Inc.*, No. CV-80-4221-MML (C.D.Cal., March 17, 1982)). Besides the *Tetra Finance* court's rejection of *Windert*, many other courts have criticized and declined to follow *Windert*. See e.g., *Timco Engineering*, 603 F. Supp. at 930, discussed *infra* Part IV(B)(2); *Creative Distributors*, 1989 U.S. Dist. LEXIS 10436, at *4-5, discussed *infra* Part IV(B)(3); *Iran Handicraft*, 655 F. Supp. at 1279-81; *Wilson*, 916 F.2d at 1243; *Cedec Trading*, 566 F. Supp. at 724 n.2.

⁹⁶ 603 F. Supp. 925.

⁹⁷ See *id.*

⁹⁸ See *id.* at 929.

⁹⁹ *Id.* at 930 n.8.

tween otherwise diverse United States citizens does not deprive this court of subject matter jurisdiction.”¹⁰⁰

3. Creative Distributors, Ltd., v. Sari Niketan, Inc.¹⁰¹

Creative Distributors, Ltd. is a Hong Kong corporation incorporated pursuant to the laws of Hong Kong with its principal place of business in Hong Kong. They initiated suit in the United States District Court for the Northern District of Illinois against Sari Niketan, Inc., an Illinois corporation. In concluding that diversity jurisdiction did exist, the court quoted from *Chang v. Northwestern Memorial Hospital*,¹⁰² and focused on the trade and commercial relations between the U.S. and Hong Kong, and the need for flexibility in foreign affairs.¹⁰³ In its analysis, the court also discussed both *Tetra Finance* and *Windert* and declined to follow the reasoning in *Windert*. Specifically the court stated:

We are not persuaded by the Court's reasoning in *Windert*. Rather, we choose to rely on the Court's reasoning in *Tetra Finance* and *Chang*. The United States trades and invests extensively with Hong Kong, our courts have enforced Hong Kong judgments, and our courts have applied Hong Kong law in appropriate cases. Furthermore, as the court stated in *Tetra Finance*, courts have in fact allowed the United Kingdom colonies of Bermuda and Caymen [sic] Islands to sue in federal court Based

¹⁰⁰ *Id.*

¹⁰¹ 1989 U.S. Dist. LEXIS 10436.

¹⁰² 506 F. Supp. 975.

¹⁰³ See *Creative Distributors*, 1989 U.S. Dist. LEXIS 10436, at *2. The court stated:

The United States may recognize a political entity as a foreign state by either formal or de facto recognition Although formal recognition may only be conferred by the United States President, de facto recognition may be conferred in numerous ways. For example, courts have held that an exchange of ambassadors . . . or significant trade relations or cultural contacts . . . with another “state” are sufficient to warrant de facto recognition of a foreign state.

Id. (citations omitted). The court then quoted from *Chang*:

There must be flexibility in foreign affairs as we approach the 21st century, so that the United States and the citizens may maintain ‘commercial, cultural, and other relations’ with another nation and its citizens even in the absence of official diplomatic relations Allowing only foreign nationals of countries ‘formally recognized’ by the United States to sue in our federal courts would impair that flexibility.

Id. (citation omitted) (citing *Chang*, 506 F. Supp. at 977 n.2).

upon these facts, it appears that Hong Kong has been recognized, de facto, by the United States and its court system.¹⁰⁴

C. *Current International Realities*

Even more significant than ignoring the preceding precedents, the majority's decision also ignored important U.S. relations with Hong Kong. Commercial trade between Hong Kong and the United States is at an all time record high.¹⁰⁵ This fact, along with the significant amount of money that the U.S. currently has invested in Hong Kong,¹⁰⁶ should have been enough to convince the majority in *Matimak* to allow any Hong Kong company with a dispute against a U.S. company access to federal court. Many disputes are likely to arise from the volume of business transactions being conducted between the United States and Hong Kong. The United States would not want to hinder and discourage that business by unfairly closing the doors of its federal courts. Moreover, the majority's decision stands as precedent, allowing not only the possibility of a threat to U.S.-Hong Kong business relations, but also a threat to foreign relations between the U.S. and the United Kingdom,¹⁰⁷ and the U.S. and China.¹⁰⁸

1. *Hong Kong-U.S. Bilateral Ties*

Hong Kong has long been recognized as a world force in international trade. They are the United States' twelfth-largest

¹⁰⁴ *Creative Distributors*, 1989 U.S. LEXIS 10436, at *5 (citing *Netherlands Shipmortgage*, 717 F.2d 731; *Lehman v. Humphrey Caymen, Ltd.*, 713 F.2d 339 (8th Cir. 1983)).

¹⁰⁵ See Herman Pan & Lilian Wu, *Taiwan's Exports To U.S. Booming*, CENTRAL NEWS AGENCY, Sept. 19, 1997, available in LEXIS, Asiapc Library, Curnws File. See generally *Economic & Trade Information on Hong Kong* (last modified Sept. 4, 1998) <<http://www.tdc.org.hk/main/economic.htm>> (tracking current international trade with Hong Kong).

¹⁰⁶ Approximately \$14 billion. See *Hong Kong Head Sees Asia as the Economic Giant*, XINHUA NEWS AGENCY, Sept. 11, 1997, available in LEXIS, Asiapc Library, Curnws File.

¹⁰⁷ The United Kingdom has implied in a Supreme Court brief that the *Matimak* decision threatens the possibility of foreign entanglements between the United Kingdom and the U.S. See Brief of the Government of the United Kingdom, *supra* note 10, at *8.

¹⁰⁸ See *infra* Part IV(C)(1) (discussing China's dependency on Hong Kong to handle its trade; if U.S. relations with Hong Kong are threatened, U.S. relations with China will also be threatened).

trading partner, with bilateral trade between the U.S. and Hong Kong reaching \$14.05 billion in the first seven months of 1997.¹⁰⁹ In addition, direct U.S. financial investment in Hong Kong totals almost the same amount as bilateral trade, \$14 billion.¹¹⁰ Thirty-seven thousand Americans live in Hong Kong, the U.S. maintains a consulate-general there, and eleven hundred U.S. companies operate there.¹¹¹ In the United States, Hong Kong has established and maintains the Hong Kong Economic & Trade Office, the Office of the Hong Kong Trade Development Council, and the Hong Kong Tourist Association.¹¹² Hong Kong is also a contracting party to the General Agreement of Tariffs and Trade, and is granted "most favored nation" status¹¹³ by the United States.¹¹⁴

As significant as U.S. trade relations with Hong Kong are, Hong Kong also handles one-half of China's exports.¹¹⁵ Approximately sixty percent of U.S. trade with China passes through Hong Kong, making Hong Kong an important conduit for U.S. trade with China.¹¹⁶ Furthermore, since retaining sovereignty over Hong Kong, China has become the fourth largest trading partner of the U.S., surpassing Great Britain and Germany.¹¹⁷ In the first seven months of 1997, bilateral trade between the

¹⁰⁹ See Pan & Wu, *supra* note 105. Through November 1996, Hong Kong's trade with the U.S. exceeded \$23 billion. See *Matimak*, 118 F.3d at 91 (Altimari, J., dissenting) (citing Department of State, 1996 Country Report On Economic Policy and Trade Practices).

¹¹⁰ See *supra* note 106.

¹¹¹ See Barbara Hackman Franklin, *China Today: Evil Empire or Unprecedented Opportunity*, VITAL SPEECHES OF THE DAY, Aug. 1, 1997, available in LEXIS, Asiapc Library, Curnws File.

¹¹² See U.S.-Hong Kong Policy Act of 1992, *supra* note 16, § 5711(4).

¹¹³ "Most favored nation" status is granted by the U.S. to its trading partners, prescribing equality of international treatment in foreign trade. The primary effect is to lower import tariffs or duties.

¹¹⁴ See U.S.-Hong Kong Policy Act of 1992, *supra* note 16, §§ 5712(3), 5713(4). Hong Kong is also a member of the World Trade Organization, the International Monetary Fund, and numerous other prominent world organizations. See RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES 191-94 (1997) (listing the various international organizations in which Hong Kong is a member).

¹¹⁵ See *Economic & Trade Information on Hong Kong: Economic Relations with the Chinese Mainland* (last modified Sept. 4, 1998) <<http://www.tdc.org.hk/main/economic.htm>>.

¹¹⁶ See Lee Siew Hua, *US Assured Democracy Will Grow in HK*, THE STRAITS TIMES, Sept. 11, 1997, available in LEXIS, Asiapc Library, Curnws File.

¹¹⁷ See Pan & Wu, *supra* note 105.

U.S. and China reached \$39.69 billion, setting a new record.¹¹⁸ This is significant because what affects Hong Kong's trade with the U.S. will also affect China, a country formally recognized as a foreign state by the United States.¹¹⁹ With China now overseeing the foreign relations of Hong Kong,¹²⁰ it would not be in the United States' best interest to close the doors of its federal courts to Hong Kong companies. China's trade is significantly dependent on Hong Kong's trade with the United States, thus any impediment to business and trade relations between the U.S. and Hong Kong would ultimately affect United States' relations with China.

2. *U.S.-Hong Kong Policy Act of 1992*

In anticipation of Hong Kong's reversion to China on July 1, 1997, the United States-Hong Kong Policy Act was passed in 1992.¹²¹ The Act calls for relations between the United States and Hong Kong to remain the same after the reversion is completed. Specifically, the Act notes the important role that Hong Kong plays in today's world economy, and the strong economic and cultural ties with the United States that "give the United States a strong interest in the continued vitality, prosperity, and stability of Hong Kong."¹²² The Act also states that the U.S. will treat Hong Kong as a fully autonomous territory with regard to economic and trade matters,¹²³ but not on matters dealing with defense and foreign affairs.¹²⁴ This implies that the foreign affairs of Hong Kong were to be governed by Great Britain before the reversion, and will be governed by the People's Republic of China after the reversion.¹²⁵

Interestingly, section 5713(1) of the Act states that "[t]he United States should seek to maintain and expand economic and trade relations with Hong Kong and should continue to

¹¹⁸ See *id.*

¹¹⁹ See *Republic of China v. Merchants' Fire Assur. Corp.*, 30 F.2d 278, 279 (9th Cir. 1929) (finding recognition by the Executive Department of the National Government of the Republic of China).

¹²⁰ See U.S.-Hong Kong Policy Act of 1992, *supra* note 16, § 5701(1)(B).

¹²¹ See *id.* §§ 5701-5732.

¹²² *Id.* § 5701(4).

¹²³ See *id.* § 5713(3).

¹²⁴ See *id.* § 5701(1)(B).

¹²⁵ See U.S.-Hong Kong Policy Act of 1992, *supra* note 16, § 5701(1)(A)-(B).

treat Hong Kong as a separate territory in economic and trade matters, such as import quotas and certificates of origin.”¹²⁶ The Act’s specificity with regard to what is meant by “economic and trade matters” weakens the majority’s argument in *Matimak* that Hong Kong is to be fully autonomous from the United Kingdom and China with respect to *all* economic and trade matters. Surely, matters that deal with import quotas and certificates of origin are very different from matters involving contract disputes, like that in *Matimak*. It makes sense that Hong Kong would be fully autonomous with regard to specific trade matters like import quotas and certificates of origin because those factors are unique to Hong Kong. However, with regard to disputes between Hong Kong companies and U.S. companies, because of the origin and purpose of alienage jurisdiction, it would make more sense that, although a dispute may arise because of international trade, the actual process to resolve the dispute and its affect on foreign trade relations should be governed by the foreign affairs branch of Britain (prior to reversion) and China (after the reversion).

The Act also specifies that the resumption of China’s sovereignty over Hong Kong would “not affect treatment of Hong Kong residents who apply for visas to visit or reside permanently in the United States, so long as such treatment is consistent with the Immigration and Nationality Act.”¹²⁷ Section 1101 of the Immigration and Nationality Act is one statute where Congress has defined “foreign state.” It states: “The term ‘foreign state’ includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.”¹²⁸ This language could be interpreted in a couple of ways. First, “outlying possessions of a foreign state” could mean Hong Kong would be considered an outlying possession of Great Britain before the reversion, and of China after the reversion. Thus, Hong Kong would fall under this first part of the Immigration Act’s definition of foreign state. Second, if Hong Kong is re-

¹²⁶ *Id.* § 5713(1).

¹²⁷ *See id.* § 5711(6).

¹²⁸ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(14) (1997). The jurisdiction of the federal courts extends to actions under the immigration laws of the U.S. and proceedings to naturalize aliens. *See* 8 U.S.C. § 1421 (1997).

garded as a "self-governing dominion or territory under mandate or trusteeship" of Great Britain before the reversion, and of China after the reversion, it would again fall under the definition of foreign state. Either way, it seems clear that the Immigration Act, written by the U.S. legislature, and ratified by the Executive Branch, intends to define Hong Kong as a foreign state.¹²⁹

3. *"One Country, Two Systems"*

At the end of the Opium War and through the Treaty of Nanking, China ceded Hong Kong to Great Britain in 1842.¹³⁰ Since that time, Hong Kong remained under British rule and governance. In 1982, negotiations between Prime Minister Margaret Thatcher of Britain, and Chinese leader Deng Xiaoping of China, began to address the expiration of leases of land in the New Territories that would expire in 1997.¹³¹ As a result, the Sino-British Joint Declaration (the "Declaration") was signed in 1984.¹³² The Declaration embodies Deng's "one country, two systems" philosophy, whereby Hong Kong is allowed to maintain most of its current economic and social system in force before the reversion, although it will become once again part of China after the reversion.¹³³

¹²⁹ Congress recognizes Hong Kong as a foreign state for per-country numerical limitations under section 202 of the Immigration and Naturalization Act. See *Matimak*, 118 F.3d at 90 (Altamari, J., dissenting) (citing H.R. Rep. No. 101-723(I), at 196 (1990), reprinted in 1990 U.S.S.C.A.N. 6710).

¹³⁰ See Franklin, *supra* note 111. See also DOBINSON & ROEBUCK, *supra* note 7, at 120. Besides the Treaty of Nanking which ceded Hong Kong Island to Britain in perpetuity, there were two other treaties during the nineteenth century regarding other parts of Hong Kong. The southern part of Kowloon peninsula and Stonecutters Island were ceded in perpetuity to Britain in 1860 by the Convention of Peking, and the New Territories (92 percent of the total territory) were leased to Britain in 1898 for 99 years under the Convention of 1898. It was this third treaty in 1898 that brought about the decision by the United Kingdom to negotiate for Hong Kong's return to China in 1997. See Sino-British Joint Declaration, *supra* note 20, at 1367.

¹³¹ See *supra* note 130 and accompanying text.

¹³² See Sino-British Joint Declaration, *supra* note 20, at 1367.

¹³³ See *id.* at 1371. Part 3(2) of the Declaration states:

The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.

By the terms of the Declaration, China resumed sovereignty over Hong Kong on July 1, 1997, and Hong Kong is now known as the Hong Kong Special Administrative Region ("HKSAR"),¹³⁴ subject to the Basic Law of the HKSAR of the People's Republic of China.¹³⁵ Under the Basic Law, the laws previously in force in Hong Kong before the reversion, will be in effect after the reversion.¹³⁶

At the time that *Matimak* was decided, *Matimak* was incorporated under the laws of Hong Kong in force before the reversion, while Hong Kong was still under Great Britain's governance. The British Nationality Act of 1981 defines who British Citizenship is conferred upon.¹³⁷ Hong Kong was considered a "British Dependent Territory," ruled by a governor appointed by the United Kingdom.¹³⁸ In matters of defense and foreign affairs, Hong Kong remained dependent on the United Kingdom.¹³⁹ Yet, as far as corporations were concerned, the British Nationality Act applied only to natural persons and not to corporations.¹⁴⁰ Specifically, the British Companies Act of 1948 states: "[T]he privileges of British nationality are not conferred on corporations formed under the laws of Hong Kong."¹⁴¹ Thus, Great Britain enacted the Hong Kong Companies Ordinance of 1984, modeled after the British Companies Act, to govern Hong Kong corporations.¹⁴² Under the Hong Kong Companies Ordinance, a Hong Kong corporation like *Matimak* is considered a citizen of Hong Kong, and not a citizen of Great

Id. Part 3(5) of the Declaration states: "The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style . . ." *Id.* at 1372.

¹³⁴ See DOBINSON & ROEBUCK, *supra* note 7, at 120. The HKSAR is to be governed by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China [hereinafter "the Basic Law"]. The Basic Law was enacted by the National People's Congress of China to prescribe the system to be practiced in the HKSAR to ensure the basic policies of the Declaration. *See id.*

¹³⁵ *See id.* *See also* Basic Law, Apr. 4, 1990, 29 I.L.M. 1511, 1512 (Article 1 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China states that Hong Kong is an 'inalienable part of the People's Republic of China').

¹³⁶ *See* Basic Law, *supra* note 135, at 1521.

¹³⁷ *See* British Nationality Act, ch. 61, § 38(1), sched. 6 (1981).

¹³⁸ *See Matimak*, 118 F.3d at 81.

¹³⁹ *See id.*

¹⁴⁰ *See Windert*, 468 F. Supp. at 1246 (citing British Companies Act 1948 § 406).

¹⁴¹ *Id.*

¹⁴² *See Matimak*, 118 F.3d at 90 (Altimari, J., dissenting).

Britain.¹⁴³ Therefore, since the Basic Law states that the laws in force in Hong Kong prior to the reversion will be in effect after the reversion,¹⁴⁴ the Hong Kong Companies Ordinance is still in effect and Hong Kong corporations remain citizens of Hong Kong.

Despite this narrow interpretation of law, both the Declaration and the Basic Law now governing Hong Kong embody Deng's broad "one country, two systems" philosophy. Hong Kong corporations may be technically citizens of Hong Kong, but Hong Kong is nevertheless now a part of China. Only one country exists.¹⁴⁵ The majority in *Matimak* was surely aware of this philosophy since it has been discussed extensively since 1984, and is even specifically mentioned in the U.S.-Hong Kong Policy Act of 1992.¹⁴⁶ However, the majority in *Matimak*, just three days before the reversion, refused to consider that Hong Kong and China were soon to be "one country," and based their decision only on the technical interpretation that Matimak was only a citizen of Hong Kong.¹⁴⁷

4. *Other British Dependent Territories*

With the Second Circuit's decision in *Matimak* left standing, other British Dependent Territories¹⁴⁸ will have a more difficult time trying to invoke alienage jurisdiction in U.S. federal courts. Substantial business is conducted with the U.S. by corporations in the British Caribbean Dependent Territories and Bermuda.¹⁴⁹ As of May 1997, there were 563 banks incorporated in the Cayman Islands, 377 insurance companies and 33,792 business companies.¹⁵⁰ In Bermuda, there were 1,400 insurance companies and 6,824 business companies.¹⁵¹ In the

¹⁴³ See *id.*

¹⁴⁴ See Basic Law, *supra* note 135, at 1521.

¹⁴⁵ The Declaration states that Hong Kong shall use the name "Hong Kong, China" when developing and maintaining relations with other states or organizations. See Sino-British Joint Declaration, *supra* note 20, pt. 3(10), at 1372.

¹⁴⁶ See U.S.-Hong Kong Policy Act of 1992, *supra* note 16, § 5701(1)(C).

¹⁴⁷ See *Matimak*, 118 F.3d at 86. The majority stated: "Matimak was incorporated under . . . the Companies Ordinance of 1984 of Hong Kong, and is entitled to the protection of Hong Kong law only." *Id.*

¹⁴⁸ See *supra* note 11 and accompanying text.

¹⁴⁹ See Brief of the Government of the United Kingdom, *supra* note 10, at *8.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

British Virgin Islands, there were 130,000 incorporated businesses, and in the Turks and Caicos Islands, there were 11,000 business companies and 1,911 insurance companies.¹⁵²

The Government of the United Kingdom of Great Britain and Northern Ireland (the "Government") filed a brief as *amicus curiae* in support of Matimak's petition to the Supreme Court.¹⁵³ The Government thought the Second Circuit's decision was a serious matter that could have grave consequences, and criticized the decision as being "a needlessly narrow and technical interpretation of the United States Code."¹⁵⁴ They stated:

The British Government has a substantial interest in expressing to the Court its views with respect to this proceeding [T]he question of whether corporations organized under the laws of the British Dependent Territories may have access to the U.S. federal courts pursuant to alienage jurisdiction remains an important one for the British Government. There are thousands of corporations organized under the laws of those territories which would be denied access to the U.S. federal courts under the view of the alienage jurisdiction adopted by the court below. The United States and the United Kingdom are major trading partners of one another and have a close working relationship on both commercial and foreign policy matters [I]t would not be in the interest of that relationship for the corporations of the British Dependent Territories to be excluded from the United States federal courts.¹⁵⁵

The Government urged that companies incorporated under Hong Kong law operate under the sovereignty of the United Kingdom.¹⁵⁶ Therefore, Matimak, at the time of its suit, should

¹⁵² *See id.*

¹⁵³ *See id.* at *4.

¹⁵⁴ Brief of the Government of the United Kingdom, *supra* note 10, at *5.

¹⁵⁵ *Id.* at *3.

¹⁵⁶ *See id.* at *5. The Government criticized the majority in *Matimak* by stating:

The majority in the court below acknowledged that a foreign state is entitled to define who are its citizens or subjects. Nonetheless, its analysis of the relation between the United Kingdom and the corporations organized under the laws of the British Dependent Territories was not sound It appears to the British Government to be illogical and unfair to deem corporations organized under the laws of the Dependent Territories to be 'stateless,' as the court below has done, and hence as excluded from the benefits of the alienage jurisdiction of the U.S. federal courts.

have been regarded as a British company, and not as a stateless entity.¹⁵⁷ In support, the Government stated:

The United Kingdom's sovereignty over its Dependent Territories (which until June 30, 1997 included Hong Kong) as a matter of international law, together with the strong constitutional relationship between the United Kingdom and its Dependent Territories, lead to the conclusion that the corporations of those territories should be regarded as 'subjects' of the United Kingdom for the purposes of U.S. alienage jurisdiction.¹⁵⁸

As one of the deciding factors for holding *Matimak* to be "stateless," the majority in *Matimak* had stated that "there . . . [was] no danger of foreign entanglements, as there . . . [was] no sovereign with whom the United States could be [sic] become entangled."¹⁵⁹ In response, the Government stated: "[T]his assumption . . . [is] incorrect . . . [as] evidenced by this brief The United Kingdom is keenly concerned that the citizens and corporations of its Dependent Territories be able to bring and defend suits in neutral foreign fora concerning their global commerce."¹⁶⁰

V. PROPOSAL

Now that Hong Kong is clearly under the sovereignty of China, the U.S. federal courts should allow Hong Kong companies unquestionable access to sue or be sued under alienage jurisdiction. It is important to avoid characterizing any entity of Hong Kong as "stateless."¹⁶¹ To do so, could result in possible resentment by China, thus affecting U.S. relations with China. Therefore, to satisfy alienage jurisdiction, and to avoid future "entanglements" with China, any Hong Kong company should be considered a "subject" of China.

Id. at *7 (citation omitted).

¹⁵⁷ See *id.*

¹⁵⁸ Brief of the Government of the United Kingdom, *supra* note 10, at *5.

¹⁵⁹ *Matimak*, 118 F.3d at 87.

¹⁶⁰ Brief of the Government of the United Kingdom, *supra* note 10, at *8.

¹⁶¹ When determining whether parties to a civil action have alienage jurisdiction, the federal courts should try whenever possible to find that alien parties have nationality and are not stateless. See *Biancheria*, *supra* note 33, at 199-203.

A “[s]ubject’ includes those owing their allegiance to a sovereign monarch.”¹⁶² As the majority in *Matimak* decided, Hong Kong is not an independent sovereign, and thus cannot be a “foreign state.” That is so, not because they are stateless, but because they owe their allegiance to some other sovereignty—the United Kingdom before the reversion, and China since the reversion. Hong Kong, therefore, is now a subject of China, and because Hong Kong’s corporations or companies will likewise ultimately owe their allegiance to China, they too should be considered “subjects” of China.

Furthermore, as Deng’s “one country, two systems” philosophy made clear, Hong Kong is undeniably a part of China,¹⁶³ and the foreign affairs of Hong Kong are now under the complete control of China. Like the Government of the United Kingdom argued in its brief to the Supreme Court, that *Matimak* should have been considered a subject of the United Kingdom, the government of China will also likely argue that any company of Hong Kong should now be considered a subject of China.¹⁶⁴

Perhaps in the future, Hong Kong may be considered a “political subdivision” of China, thereby providing another way to satisfy alienage jurisdiction. Title 28 U.S.C. § 1332(a)(4) allows diversity jurisdiction in any civil action between “a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State”¹⁶⁵ Section 1603(a) provides: “A ‘foreign state’ . . . includes a political subdivision of a foreign state”¹⁶⁶ This definition of “foreign state” in section 1603(a)

¹⁶² WRIGHT, MILLER, & COOPER, *supra* note 5, § 3604, at 394. “‘Citizen’ applies to those from countries in which sovereignty is thought to belong to the collective body of the people.” *Id.* See also *United States v. Wong Kim Ark*, 169 U.S. 649, 663-64 (1898) (stating that the term “citizen” is analogous to the term “subject,” and the change of phrase results from a change of government).

¹⁶³ The majority in *Matimak* stated: “Hong Kong . . . is about to be absorbed into China . . . [and] is merely changing fealty.” *Matimak*, 118 F.3d at 80.

¹⁶⁴ See *Wong Kim Ark*, 169 U.S. at 668 (stating “it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.”).

¹⁶⁵ 28 U.S.C. § 1332(a)(4) (1994).

¹⁶⁶ *Id.* § 1603(a). A “political subdivision” is defined as “[a] division of the state made by proper authorities . . . for [the] purpose of carrying out a portion of those functions of state which by long usage and inherent necessities of government have always been regarded as public.” BLACKS’, *supra* note 5, at 1159.

would apply to section 1332(a)(2),¹⁶⁷ and thus jurisdiction would be satisfied when a "citizen or subject of a political subdivision" is involved in a civil dispute with a "citizen of a State."¹⁶⁸ Therefore, if Hong Kong is considered to be a "political subdivision," all citizens or subjects of Hong Kong would be covered by alienage jurisdiction under section 1332(a)(2).

VI. CONCLUSION

The Supreme Court has never addressed the issue of Hong Kong and alienage jurisdiction, and has refused to do so in *Matimak*, leaving the task to the lower federal courts. The federal courts must keep in mind that Hong Kong, China, and the United Kingdom are all important actors in the international arena with whom the United States cannot afford to jeopardize foreign and economic relations. The decision in *Matimak*, therefore, is not the end of the future of these important international relations.

When addressing this issue of alienage jurisdiction in subsequent cases, whether involving Hong Kong companies or companies of any current British Dependent Territory, courts should adhere to sound, common sense, policy and precedents, and remain flexible enough to accommodate the interdependencies and dynamics of the international business world. The United States, like Hong Kong, China, and the United Kingdom, cannot function at its most efficient and advantageous economic level without relying on others for goods and services. With this interdependence in mind, and because important foreign and economic relations are at risk, there should be no question of alienage jurisdiction over any case involving a dispute

¹⁶⁷ Generally, the terms used within the same statute should get the same meaning. See *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). But see *Windert*, 468 F. Supp. at 1246 n.3 (disputing that § 1332(a)(2) includes § 1603(a) definition).

¹⁶⁸ Title 28 U.S.C. § 1332(a)(2) provides for alienage jurisdiction when a civil action is between a "citizen of a State and citizens or subjects of a foreign state" *Id.* See also *supra* note 23.

between U.S. party and a Hong Kong company or any British Dependent Territory company.

Teresa M. Mozina†

† 1999 J.D. Candidate, Pace University School of Law; Articles Editor, 1998-99 Pace International Law Review Editorial Board. The author would like to thank her husband, Christopher Mozina, and her parents, Robert and Laura McKeague for their love, support and guidance.