ACCESS DENIED: A CASE COMMENT ON MA TIMAK TRADING CO V. KHALILY

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I. INTRODUCTION

On June 22, 1997, the United States Court of Appeals for the Second Circuit issued a decision that may have dramatically altered the relationship between the United States and Hong Kong. In Matimak Trading Co. v. Khalily, the Court of Appeals affirmed a decision of the Southern District of New York dismissing a breach of contract claim by a Hong Kong corporation for lack of subject matter jurisdiction. The Court of Appeals agreed with the opinion of the District Court which found that, pursuant to 28 U.S.C. § 1332(a)(2) ("§ 1332"), a Hong Kong corporation cannot invoke alienage jurisdiction against two New York corporations. In a 2–1 decision, the Court of Appeals concluded that, according to principles of international law, Hong Kong was stateless. Therefore, Matimak Trading Co. could not be a citizen or subject of a foreign state which is required to invoke alienage jurisdiction. The Court, in its formalistic analysis, deferred to the power of the executive branch to officially recognize foreign states, evaluated the rationales underlying alienage jurisdiction and the intent of the framers of § 1332, and examined the relationship between Hong Kong and the United Kingdom. Judge Altimari’s dissenting opinion stated that the failure to recognize Hong Kong as a foreign state was contrary to the purposes of alienage jurisdiction. The dissent analyzed the

1. Matimak Trading Co. v. Khalily, 118 F.3d 76 (2d Cir. 1997).
3. Id. at 151.
4. Id. at 152; see Matimak Trading Co., 118 F.3d at 82.
5. Matimak Trading Co., 118 F.3d 76.
6. Id. at 86.
7. Id. at 79–83.
8. Id. at 86–87.
9. Id. at 85–86.
10. Id. at 88.
intent of the framers in granting alienage jurisdiction to the federal courts in the Constitution and the current position of Hong Kong in the international community. Judge Altimari recognized the importance of Hong Kong as an autonomous force, especially in the world economy. He concluded that, based upon the Constitution, statutes, and policy, adequate grounds existed for granting alienage jurisdiction to Matimak Trading Company.

This comment argues that the majority in the Court of Appeals for the Second Circuit erred in denying alienage jurisdiction to Matimak Trading Company. The purpose of the constitutional grant of alienage jurisdiction was to provide a neutral forum for resolving disputes between United States citizens and foreign citizens without antagonizing foreign nations. Since the denial of alienage jurisdiction leaves Hong Kong corporations without an adequate forum in which to resolve disputes with American trading partners, the Court's holding is contrary to the purposes of alienage jurisdiction under § 1332. Additionally, several other reasons exist which justify a grant of alienage jurisdiction. First, granting such jurisdiction would have been appropriate because it would have recognized Hong Kong as sovereign with respect to alienage jurisdiction only, based upon its commercial relationship with the United States. Second, it would have been proper because of Hong Kong's colonial relationship with the sovereign United Kingdom or as part of China after July 1, 1997. The majority in the Court of Appeals failed to recognize the important political and economic consequences for Hong Kong corporations that were created by denying alienage jurisdiction. Matimak Trading Co. v. Khalily places Hong Kong corporations on unequal footing in their trade dealings with American corporations. One consequence of this is the perception of

11. Id. at 89–92.
12. Id. at 88, 90–91.
13. Id. at 90, 92.
15. Id. at 88–89; see Johnson, supra note 14, at 45–46, 48 (implying that state courts are not adequate to adjudicate claims made by foreign businesses against United States citizens).
17. Id. at 92.
18. Id.
19. Id. at 88–92.
20. Id. at 88.
unfair treatment by Hong Kong corporations.\textsuperscript{21} Such corporations could retaliate against American corporations or become hesitant in trade dealings, resulting in a loss of trade for the United States.\textsuperscript{22} \textit{Matimak Trading Co. v. Khalily} left little hope for any change in the position of Hong Kong corporations.\textsuperscript{23} The Court relied on portions of the U.S.–Hong Kong Policy Act of 1992\textsuperscript{24} which states that United States relations with Hong Kong will remain the same following its return to China on July 1, 1997.\textsuperscript{25} The Court interpreted these sections to support the notion that Hong Kong would continue to remain stateless after its return to Chinese rule.\textsuperscript{26} It is this author's opinion that this interpretation of the Policy Act only magnifies the Court's unfair treatment of Hong Kong.

II. THE FACTS

Under § 1332(a)(2), federal courts have jurisdiction over any civil action that arises between "citizens of a state and citizens or subjects of a foreign state."\textsuperscript{27} Matimak Trading Co. Ltd., a corporation formed under the laws of Hong Kong with its principal place of business in Wanchai, Hong Kong,\textsuperscript{28} sued Albert Khalily and D.A.Y. Kids Sportswear Inc. in the Southern District of New York under § 1332(a)(2).\textsuperscript{29} The dispute was originally brought for a breach of contract.\textsuperscript{30} However, before the district court reached the merits of the case, the Judge raised the issue of subject matter jurisdiction \textit{sua sponte}.\textsuperscript{31}

In its submission to the District Court, Matimak Trading Co. ("Matimak") argued that the Court should grant alienage jurisdiction based upon recognition of Hong Kong as a de facto foreign state.\textsuperscript{32} Matimak relied primarily upon precedent in which other states were granted alienage jurisdiction in the absence of formal recognition by the executive branch as

\begin{footnotesize}
21. See generally Johnson, supra note 14, at 48–49.
22. Id. at 49.
23. Matimak Trading Co., 118 F.3d at 81.
25. Matimak Trading Co., 118 F.3d at 81.
26. Id. at 81–82
29. Id.
30. Matimak Trading Co., 118 F.3d at 78.
32. Id.
\end{footnotesize}
sovereign states. Matimak also relied on a letter from the State Department which urged the Court to recognize Hong Kong as a de facto foreign state because of Hong Kong’s trade relationship with the United States. The District Court rejected these arguments and based its opinion on deference to the executive branch of government. The Court determined that it was the duty of the executive branch, not the role of the court, to recognize a foreign state. However, even though the Court attributed the role of recognizing foreign states to the executive branch, it refused to accept the letter by the State Department as evidence of de facto recognition by the executive branch. Instead, the Court attempted to support its decision by relying on a different letter, submitted by the State Department in another case, providing that the United States did not recognize Hong Kong as sovereign. However, the Court does not indicate whether the second letter it relied on was to be used for the purposes of determining alienage jurisdiction in the other case. Significantly, the letter submitted by Matimak requested the Court to recognize de facto sovereignty of Hong Kong only for the purpose of granting alienage jurisdiction to Hong Kong corporations. In evaluating the policy considerations that were asserted in the letter submitted on Matimak’s behalf, the Court found that the strong economical ties between the United States and Hong Kong were insufficient to establish de facto recognition by the United States government.

In finding a lack of subject matter jurisdiction, the Court reviewed and considered precedent in which other states were granted alienage jurisdiction even though not formally recognized by the executive branch. The Court found the precedent unpersuasive or irrelevant because the case holdings were supported by policy considerations that the Court was unwilling to accept. Even if policy arguments were accepted in prior cases, the District Court rejected them to avoid a judicial, rather than

33. Id. at 152–53.
34. Matimak Trading Co., 118 F.3d at 81.
35. Id. at 82–87.
37. Id.
38. Id.
40. Id. at 81.
42. Matimak Trading Co., 118 F.3d at 84–86.
executive, grant of recognition as a de facto sovereign state to Hong Kong. The Court distinguished Matimak Trading Co. v. Khalily from Murarka v. Bachrack Bros. to demonstrate that a formal recognition of Hong Kong's sovereignty, unlike India's, was not imminent because the United States had not taken substantial steps toward recognizing Hong Kong as an integrated part of China. In Murarka, the Second Circuit recognized India as a de facto sovereign state solely for purposes of alienage jurisdiction shortly before it was formally recognized by the United States. The District Court stated that since Hong Kong had not been incorporated into China when the suit was commenced, the Court could not use it as a basis for granting Hong Kong corporations alienage jurisdiction.

When Matimak Trading Co. v. Khalily reached the United States Court of Appeals for the Second Circuit, the Court posed three primary questions to be answered. First, whether Hong Kong was a foreign state so that Matimak was a "citizen or subject of a foreign state." Second, whether Matimak was a citizen or subject of the United Kingdom as a result of Hong Kong's colonial status at the time the suit was brought. Third, whether all non-citizens of the United States may invoke alienage jurisdiction against United States citizens. The Court resolved each of these questions in the negative, reasoning: (1) Hong Kong was not recognized as a sovereign state; (2) Hong Kong was not considered fully integrated into the United Kingdom; and (3) a non-citizen of the United States who is stateless, like the citizens of Hong Kong, cannot invoke alienage jurisdiction. In resolving the first issue, the Court analyzed generally accepted definitions of a state according to precedent and notions of international law, principles of de facto recognition, and the rationales underlying alienage jurisdiction. The Court of Appeals deferred to the executive branch in

44. Id.
45. Id.; see also Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954).
47. Murarka, 251 F.2d at 552, see also Matimak Trading Co., 936 F. Supp. at 152.
49. Matimak Trading Co., 118 F.3d at 76, 79.
51. Matimak Trading Co., 118 F.3d at 79.
52. Id. at 79.
53. Id. at 82, 86-87.
54. Id. at 79-80.
55. Id. at 80-82.
56. Id. at 82-83.
determining who was a foreign state. With respect to resolving the second issue, the Court sought to determine whether the sovereignty of the United Kingdom was applicable to Hong Kong. This was done by examining the British laws governing Hong Kong. Finally, in resolving the third issue, the Court examined the intent of the framers of the Constitution in granting alienage jurisdiction. The Court concluded that the framers' assumption that every non-citizen of the United States is a citizen of a foreign state is no longer valid because of international law notions of statelessness.

III. THE PRECEDENT

A. Statutory Origins


Federal courts are granted the power to hear and decide cases involving aliens under Article III, § 2 of the United States Constitution and § 1332. Although slightly different, the essential purpose of the two grants of alienage jurisdiction is to give United States courts the power to settle disputes between citizens of the United States and citizens of foreign

57. Id. at 79, 81-83.
58. Id. at 85-86.
59. Id.
60. Id. at 86-88.
61. Id. at 87.
62. U.S. CONST. art. III, § 2 which provides that:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies between two or more States; between a State and Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.
63. 28 U.S.C. § 1332(a)(2) (1994). This states that “(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—(2) citizens of a State and citizens or subjects of a foreign state.”
states. In his dissent, Judge Altimari indicates that the purpose of alienage jurisdiction must be analyzed in order to determine its proper application. The majority analyzed the framers intent in reaction to Judge Altimari's analysis of the intent of the framers. However, the majority reached a very different conclusion. Although there is considerable debate over the proper application of alienage jurisdiction, several purposes have been identified.

First, alienage jurisdiction was intended to provide a neutral forum for adjudicating disputes between citizens of the United States and citizens of foreign nations. An important consideration of the framers was to create a neutral forum free from bias in order to avoid conflicts with foreign nations. The prevailing notion, which still exists today, is that state courts are more prone to bias. Scholars have noted that as a result of this bias, foreign corporations receive a greater amount of unfair treatment in our nation's state courts. Additionally, foreign corporations find it difficult to litigate trade disputes when required to adjudicate their claims in state courts because they must contend with the different procedural rules in each of the fifty states.


67. Id. at 82-83.

68. Id. at 88-89 (relying on Hong Kong Deposit and Guar. Co. Ltd. v. Hibdon, 602 F. Supp. 1378 (S.D.N.Y. 1985), Judge Altimari determined that the purposes of alienage jurisdiction were to provide a neutral forum, avoid entanglements with foreign nations, and avoid the appearance of injustice in United States relations with foreign nations. Id. at 88).

69. Id. at 83, 89.

70. See generally Johnson, supra note 14, at 6, 26-27; Biancheria, supra note 65, at 207-08; Hong Kong Deposit and Guar. Co. Ltd., 602 F. Supp. at 1383.


72. Matimak Trading Co., 118 F.3d at 87-88; Hong Kong Deposit and Guar. Co. Ltd., 602 F. Supp. at 1383; Johnson, supra note 14, at 26-27, 33, 49; Biancheria, supra note 65, at 207-08.

73. See Johnson, supra note 14, at 6, 46, 48.

74. See id. at 46.

75. See id. at 48.

76. See id.
The foreign policy implications of disputes with foreign citizens were a second purpose for conferring alienage jurisdiction on the federal courts.\textsuperscript{77} The framers were concerned that cases involving non-citizens of the United States would have consequences that affect the entire nation.\textsuperscript{78} Therefore, it was important to provide a national forum for adjudicating claims involving foreign citizens.\textsuperscript{79} This was especially true of cases involving international commerce.\textsuperscript{80} The framers thought that a national, rather than state, forum for resolving commercial disputes would foster international commerce, which was a critical component in the development of a young nation.\textsuperscript{81} Even though the primary concern was resolving trade disputes with British companies after the American Revolution, the principle holds true today.\textsuperscript{82} It is not a secret that modern society is growing ever more interdependent, particularly in the area of international trade.\textsuperscript{83} The realities of economic and political interdependence mean that the United States cannot act without first considering the implications for the rest of the world.\textsuperscript{84} This is what the Second Circuit failed to do when it denied alienage jurisdiction to Matimak.\textsuperscript{85}

The Court analyzed the intent of the framers in granting alienage jurisdiction in order to interpret who is included under the term “citizen or subject of a foreign state”\textsuperscript{86} and to justify deference to the executive branch.\textsuperscript{87} First, the Court’s interpretation dismissed the intent of the framers by stating that the framers did not contemplate statelessness.\textsuperscript{88} Therefore, their intent does not apply in modern society.\textsuperscript{89} The Court also rejected the dissent’s argument that the framers intended every non-citizen of the United States to be a citizen or subject of a foreign state for purposes of alienage jurisdiction.\textsuperscript{90} Instead, the Court relied on the notion of

\textsuperscript{77} See id. at 11 (relying on THE FEDERALIST NO. 80 (Alexander Hamilton)).
\textsuperscript{78} Id. at 11.
\textsuperscript{79} Id.
\textsuperscript{80} See id. at 13.
\textsuperscript{81} Id.
\textsuperscript{82} See id. at 13, 48–49.
\textsuperscript{83} See id. at 48–49; Matimak Trading Co. v. Khalily, 118 F.3d 76, 88 (2d Cir. 1997).
\textsuperscript{84} See Johnson, supra note 14, at 48–49; Matimak Trading Co., 118 F.3d at 88.
\textsuperscript{85} Matimak Trading Co., 118 F.3d at 79–88.
\textsuperscript{86} Id. at 86–88.
\textsuperscript{87} Id. at 83.
\textsuperscript{88} Id. at 87.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 86–89.
statelessness derived from international law.\textsuperscript{91} Second, while agreeing that access to a neutral forum avoids entanglements with foreign nations which is a central purpose of alienage jurisdiction, the Court nonetheless employed the notion of statelessness to justify a policy of deference to the executive branch.\textsuperscript{92} The Court reasoned that if the executive branch does not formally recognize a foreign entity as sovereign, there is no state to become entangled with.\textsuperscript{93} This analysis ignores the fact that Hong Kong is a foreign entity despite its lack of sovereignty, and that a denial of access to the federal courts creates conflict not only with Hong Kong but also the United Kingdom and China.\textsuperscript{94} Hong Kong has the power to retaliate against the United States.\textsuperscript{95} The Court was correct in relying on international law notions because they are important sources of law which assist in resolving international disputes. However, the Court should not have given these notions precedence over the United States Constitution.\textsuperscript{96}


As a result of the Sino–British Joint Declaration which provided for the transfer of Hong Kong from the United Kingdom to China on July 1, 1997, Congress enacted the U.S.–Hong Kong Policy Act of 1992 ("Policy Act") to govern future United States relations with Hong Kong.\textsuperscript{97} The Court of Appeals interpreted this Policy Act as supportive of its notion that the United States would not recognize Hong Kong as sovereign.\textsuperscript{98} The Court reasoned that the Policy Act called for relations between the United States and Hong Kong to remain the same after July 1997, and therefore, Hong Kong would still not be recognized as a fully autonomous state.\textsuperscript{99}
Several sections of the Policy Act recognize Hong Kong as fully autonomous from both the United Kingdom and China. The Policy Act itself recognizes the important status of Hong Kong as an international financial and economic center. It indicates that the United States will continue to treat Hong Kong as its own distinct legal entity in all areas where Hong Kong is granted autonomy by China. The only areas where China retains full control over Hong Kong is in foreign and defense affairs. The Policy Act simply clarifies the relationship between the United States and Hong Kong and it should, at least, be regarded as some proof that the United States recognizes Hong Kong as either autonomous or part of a sovereign state.

B. Policy Basis

1. Defining a State

The definition of a foreign state for purposes of alienage jurisdiction is not found in either the constitutional grant of alienage jurisdiction contained in Article III or in § 1332(a)(2). Consequently, the Court of Appeals analyzed the principles established in this Court and general principles of international law in order to determine what constitutes a state for purposes of alienage jurisdiction. First, the Second Circuit relied on precedent which defined a “state” as a foreign entity that the executive branch has formally recognized as a state. Second, the Court looked at

100. See 22 U.S.C. § 5712(3) (1994) which provides that “The United States should respect Hong Kong’s status as a separate customs territory”; 22 U.S.C. § 5713(3) (1994) stating that “The United States should continue to recognize Hong Kong as a territory which is fully autonomous from the United Kingdom and, after June 30, 1997, should treat Hong Kong as a territory fully autonomous from the peoples Republic of China with respect to economic and trade matters”; 22 U.S.C. § 5722(a) (1994) which allows the President to suspend the laws of the United States with respect to Hong Kong if the President “determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States.”


102. Matimak Trading Co., 118 F.3d at 84 n.2.


104. Matimak Trading Co., 118 F.3d at 90.

105. Id. at 79.

106. Id. at 79–80.

107. Id. at 79 (quoting from Iran Handicraft Carpet Export Ctr. v. Marjan Int’l Corp.,
interpretations of what a state is in international law.\textsuperscript{108} The Restatement (Third) of the Foreign Relations Law, § 201, defines a state as one that has a defined territory and under the control of its own government.\textsuperscript{109} While the Court in \textit{Matimak Trading Co. v. Khalily} relies primarily on deference to the executive branch to reject Matimak's claims, the Court used this definition to find that Hong Kong did not qualify as a state.\textsuperscript{110}

2. Separation of Powers

The United States Constitution separates the powers of the federal government among three branches: the Executive, Legislature, and the Judiciary.\textsuperscript{111} Each branch of government has carefully proscribed duties and powers that should not be infringed upon unless specifically provided for in the Constitution.\textsuperscript{112} Historically, the Judiciary has recognized the power of the executive branch to recognize foreign states.\textsuperscript{113} The courts use two reasons to justify their deference to the executive branch.\textsuperscript{114} First, Article II of the Constitution grants the President the power to appoint and receive ambassadors.\textsuperscript{115} The Courts have inferred that these powers, combined with the President's role in international relations, result in the power of the executive branch to recognize foreign states.\textsuperscript{116} Second, as the Court in \textit{Matimak} agrees, the Judiciary does not have the competency to judge executive decisions on recognition.\textsuperscript{117} However, this policy only applies to formal recognition of a foreign entity as a state.\textsuperscript{118} The Court in

\begin{itemize}
\item 655 F. Supp. 1275 (S.D.N.Y.), \textit{aff'd}. 868 F.2d 1267 (2d Cir. 1988)).
\item 108. \textit{Id.} at 80.
\item 109. \textsc{Restatement (Third) of The Foreign Relations Law Of The United States} § 201 (1987).
\item 110. \textit{Matimak Trading Co.}, 118 F.3d at 80.
\item 111. \textsc{U.S. Const.} art. I, § 1; art. II, § 1; art. III, § 1.
\item 112. \textsc{U.S. Const.} art. I, II, III.
\item 113. \textit{Matimak Trading Co.}, 118 F.3d at 80; \textit{Iran Handicraft Carpet Export Ctr. v. Marjan Int'l Corp.}, 655 F. Supp. 1275 (S.D.N.Y.), \textit{aff'd}. 868 F.2d 1267 (2d Cir. 1988);
\item \textit{See also} Edwin L. Fountain, \textit{Note, Out From the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts}, 29 \textsc{Va. J. Int'l L.} 473, 483 (1989).
\item 114. \textit{Matimak Trading Co.}, 118 F.3d at 82; Fountain, \textit{supra} note 113, at 483.
\item 115. \textsc{U.S. Const.} art. II, § 2; Fountain, \textit{supra} note 113, at 483.
\item 116. Fountain, \textit{supra} note 113, at 483.
\item 117. \textit{Matimak Trading Co.}, 118 F.3d at 80; \textit{Iran Handicraft Carpet Export Ctr.}, 655 F. Supp. at 1276.
\item 118. \textit{Matimak Trading Co.}, 118 F.3d at 81–82, 85–87.
\end{itemize}
Matimak Trading Co. v. Khalily extended this doctrine when it applied it to reject the claims that (1) Hong Kong should be given de facto recognition as a foreign state, or (2) Hong Kong should be recognized as part of the United Kingdom.119

3. The Role of Economics

In Matimak Trading Co. v. Khalily, the dissent made several policy arguments in support of de facto recognition of Hong Kong as sovereign for the limited purposes of alienage jurisdiction. These were based upon Hong Kong’s economic status in the world market.120 However, the Court did not give much weight to the economic relationship between the United States and Hong Kong in its analysis.121 Instead, the Court deferred to the executive branch and relied on the U.S.–Hong Kong Policy Act of 1992 to justify a perfunctory analysis of United States recognition of Hong Kong as an autonomous economic entity.122 Only Judge Altimari, in his dissent, recognized the full implications of the Court’s opinion and the damage to Hong Kong corporations.123

From the beginning of British Rule, Hong Kong has been recognized as an important trading center.124 Today, Hong Kong has emerged as an important economic and financial center, especially with regard to American trade.125 As a result of its trade and economic powers, the United States recognizes Hong Kong as an autonomous foreign state with respect to the making of treaties and international agreements.126 The U.S.–Hong Kong Policy Act of 1992 was enacted to insure that Hong Kong’s return to China on July 1, 1997 would not change this relationship.127 While the Matimak Court dismissed the arguments for recognition based on economics, the dissent realized that Hong Kong plays a critical role in

119. Id.
120. Id. at 79–88.
121. Id. at 79–80.
122. Id. at 81–82.
123. Id. at 88–90.
126. Matimak Trading Co., 118 F.3d at 90. The dissent recognizes that Hong Kong is a member of GATT, given most favored nation status by the United States, and a founding member of the World Trade Organization among other things which should support recognition for the purpose of alienage jurisdiction. Id.
127. Jensen, supra note 103, at 172.
international policies and global economic expansion. This reason alone should have alerted the Court that it needed to consider the serious implications which a denial of alienage jurisdiction has in the scheme of international relations.

IV. CASE ANALYSIS

A. Opinion of the Court

1. Precedent

The Court began its analysis with an attempt to define a state. The Matimak Court adopted the general rule articulated in *Iran Handicraft and Carpet Export Center v. Marjan International Corp.*, which defines a foreign state as one that is recognized by the executive branch of government. The Court of Appeals was able to avoid any significant inspection of executive actions that would indicate a recognition of Hong Kong as a sovereign, or part of a sovereign state by relying on this principle of deference to the executive branch. The Court’s deference to the executive branch of government was supported and reinforced by certain sections of the recently enacted U.S.–Hong Kong Policy Act of 1992 as an indication of executive intent to not recognize Hong Kong as sovereign. However, while the Court treats the Policy Act as evidence of executive intent, it is a product of the legislature. Therefore, the Court is in actuality deferring to Congress, and, in the Court’s analysis, Congress has no power to recognize foreign states.

All parties in *Matimak Trading Co. v. Khalily* agreed that there had been no formal recognition of Hong Kong as a sovereign state. Therefore, when the district court raised the issue of jurisdiction, Matimak

129. *Id.* at 79–82.
130. *Id.* at 79–80; *see also* *Iran Handicraft Carpet Export Ctr. v. Marjan Int’l Corp.*, 655 F. Supp. 1275 (S.D.N.Y.), aff’d. 868 F.2d 1267 (2d Cir. 1988).
131. *Matimak Trading Co.*, 118 F.3d at 79.
132. *Id.* at 91.
134. *Matimak Trading Co.* 118 F.3d at 81–82.
135. *Id.* at 82.
136. *Id.*
137. *Id.* at 80.
argued that Hong Kong should be granted de facto recognition as a foreign state so that Hong Kong citizens may invoke alienage jurisdiction. The Court interpreted de facto recognition to require acts that evidenced impending recognition by the executive branch as a fully sovereign state. The Court reasoned that since Hong Kong was not going to become an independent state as India did when *Muraka v. Bachrack Bros.* was decided, but merely be returned to China, Hong Kong did not fall within the rule and could not be recognized as a de facto foreign state. Matimak's argument was rejected because of the Court's continued deference to the power of the executive branch to recognize foreign states. The Court determined that recognition, whether formal or de facto, was a political question and, therefore, it was outside the realm of judicial power. As the Court correctly assumes, recognition is a political tool of national governments. However, this analysis is usually applied to formal recognition rather than de facto recognition.

The Court also dismissed the argument that Hong Kong was part of the United Kingdom. First, the Court reasoned that the United Kingdom had the right to determine who are its citizens. Therefore, since it had not conferred citizenship on its dependent territories, the sovereignty of the United Kingdom did not extend to the residents of Hong Kong. A second reason for rejecting this argument was because Matimak was incorporated under the Hong Kong Companies Ordinance of 1984, rather than the British Companies Act of 1948, therefore, its connection to the British crown was too attenuated to justify a finding of British citizenship.

138. *Id.*
139. *Id.*
141. *Matimak Trading Co.* 118 F.3d at 80.
142. *Id.* at 80.
143. *Id.*
144. Fountain, supra note 113, at 479.
145. *Id.* at 480.
146. *Matimak Trading Co.*, 118 F.3d at 85–86.
147. *Id.*
148. *Id.*
149. *Id.* at 86 (rejecting the Justice Department's argument that even though Hong Kong corporations were governed by the Hong Kong Companies Act of 1948, because the ultimate authority over the plaintiff is the British Crown, Matimak Trading Co. should be treated as a subject of the sovereign United Kingdom for the purposes of alienage jurisdiction under 28 U.S.C. § 1332(a)(2)).
Matimak is not the first Hong Kong corporation to confront the issue of alienage jurisdiction. In *Weindart Watch Co. v. Remex Electronics Ltd.*, it was determined that Hong Kong was not a foreign state because the executive branch considered Hong Kong a colony of the United Kingdom. Therefore, the *Weindart* Court refused to grant Weindart Watch Co. alienage jurisdiction. However, contrary precedent exists. In *Tetra Finance (HK) Ltd. v. Shaeen*, the District Court found that it could hear claims brought by two Hong Kong corporations despite the fact that Hong Kong was not formally recognized as a foreign state under alienage jurisdiction according to § 1332(a)(2). Here, while alienage jurisdiction was sustained because of one party’s British citizenship, the Court stated that it was extremely technical to preclude a Hong Kong corporation from asserting claims in federal court simply because it lacks formal recognition by the United States government. Therefore, the Court stated that it would have granted alienage jurisdiction even if neither party had British citizenship. The Court in *Tetra Finance* relied on the fact that the United States was the largest investor and trading partner in Hong Kong to reinforce the point that the commercial realities of modern society dictate that alienage jurisdiction should be granted to foreign entities even if they have not been formally recognized. This is the approach that the Second Circuit should have followed in analyzing alienage jurisdiction instead of relying on extremely formalistic notions of deference and international law that have no practical application in modern society.

2. Policy Considerations

In a single paragraph of its opinion, the Court in *Matimak Trading Co. v. Khalily* declared that Hong Kong was stateless, and that a stateless


152. *Id.* at 1246.


154. *Id.*

155. *Id.* at 848.

156. *Id.*

157. *Id.*

158. *Id.*

corporation could not invoke alienage jurisdiction to sue a United States citizen.\textsuperscript{160} The Court of Appeals advocated an abstract policy of statelessness which it derived from principles of international law, but the Court never enumerated the criteria used to define statelessness.\textsuperscript{161} Since the Second Circuit refused to grant Hong Kong citizens alienage jurisdiction by recognizing Hong Kong as sovereign, or as part of a sovereign state such as the United Kingdom or China, it concluded that Hong Kong and its citizens must be stateless.\textsuperscript{162} This conclusion is obscure because, in the interest of fairness, a corporation which has the right to enter into agreements with United States citizens should have the right to sue for a breach of those agreements in our federal courts.

The closest definition that can be found for the term "statelessness" is that a stateless person is one who does not have the citizenship of any state or is a citizen of a foreign entity that is not formally recognized by the United States government.\textsuperscript{163} Statelessness is not considered a desirable policy, especially in terms of individuals, because it places stateless persons in an inferior position.\textsuperscript{164} There are several reasons for this result.\textsuperscript{165} First, it creates problems, both domestically and internationally, when the citizens expect the privileges and responsibilities of full citizenship status but cannot receive them.\textsuperscript{166} In Matimak's situation, the company had been treated as a full citizen in all of its business affairs and had thus expected that treatment.\textsuperscript{167} However, as a result of the Court's decision, Matimak was denied the benefits of its treatment as a full citizen when it was not allowed to sue trading partners for a breach of contract.\textsuperscript{168} Second, statelessness reduces the social value of the citizens.\textsuperscript{169} This reason could cause Matimak to now be viewed as having less bargaining power in its trade relationships since it is deprived of the power to enforce its international trade

\begin{enumerate}
\item[160.] \textit{Id.} at 86.  
\item[161.] \textit{Id.}  
\item[162.] \textit{Id.}  
\item[163.] Biancheria, \textit{supra} note 65, at 197 n.3.  
\item[164.] \textit{Id.} at 200.  
\item[165.] \textit{Id.}  
\item[166.] \textit{Id.} (relying on Cathryn Seckler-Hudson, \textit{Statelessness: With Special Reference to the United States} 253 (1934)).  
\item[167.] Matimak Trading Co. v. Khalily, 118 F.3d 76, 90 (2d Cir. 1997) (Altimari, J., Dissenting).  
\item[168.] \textit{Id.} at 78--88.  
\item[169.] Biancheria, \textit{supra} note 65, at 200. 
\end{enumerate}
agreements.\textsuperscript{170} In this situation, American trading partners are allowed to force their will on Matimak since the consequences will be limited.\textsuperscript{171} This author does not believe that the Second Circuit intended to place Hong Kong corporations in an inferior position when it deemed Hong Kong stateless. Rather, it is one consequence that the Court neglected to consider when it chose the policy of statelessness over granting alienage jurisdiction to Hong Kong citizens.

\textbf{B. The Dissent}

1. Precedent

Judge Altimari's dissent takes the position that a failure to recognize Hong Kong as a foreign state or its citizens as citizens or subjects of the United Kingdom is contrary to the purposes of alienage jurisdiction.\textsuperscript{172} Judge Altimari argues that the Court's decision in \textit{Matimak Trading Co. v. Khalily} risks antagonizing two important world forces, the United Kingdom and China.\textsuperscript{173} This is exactly what the framers sought to avoid when they granted alienage jurisdiction to the federal courts.\textsuperscript{174} Judge Altimari used this basis to make a strong argument for recognition of Hong Kong as part of the United Kingdom and for the Court to grant Matimak alienage jurisdiction as a result.\textsuperscript{175} This opinion is supported by examples from cases in which other British dependent territories were granted alienage jurisdiction because the Court found that the sovereignty of the United Kingdom was applicable to the territory.\textsuperscript{176} The dissent relied upon two primary cases recognizing Bermuda and the Channel Islands as part of the United Kingdom.\textsuperscript{177} In both \textit{Netherlands Shipmortgage Corp. Ltd. v. Madias} and \textit{Cedec Trading Co. Ltd. v. United American Coal Sales, Inc.},

\begin{itemize}
\item \textsuperscript{170} \textit{Id.}; \textit{Matimak Trading Co.}, 118 F.3d at 88.
\item \textsuperscript{171} \textit{Matimak Trading Co.}, 118 F.3d at 88.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Id. at 91-92.}
\item \textsuperscript{176} \textit{Id. at 91 (quoting Netherlands Shipmortgage Corp. Ltd. v. Madias, 717 F.2d 731 (2d Cir. 1983); Cedec Trading Ltd. v. United Am. Coal Sales, Inc., 556 F. Supp. 722 (S.D.N.Y. 1983)). The dissent recognizes that there are many additional cases addressing the issue of recognizing British Dependent territories as part of the United Kingdom for the purposes of granting them alienage jurisdiction. Id.}
\item \textsuperscript{177} \textit{Id.}
\end{itemize}
the Courts recognized that British dependent territories were part of the United Kingdom even though they were not fully integrated.\textsuperscript{178}

This precedent, combined with the participation of the United Kingdom and Hong Kong as a unitary force in international conferences and treaties, provides an adequate basis for granting Hong Kong citizens alienage jurisdiction as part of the United Kingdom.\textsuperscript{179} Further support for this argument is found in the very nature of the colonial relationship that existed between the United Kingdom and Hong Kong at the time the suit was commenced.\textsuperscript{180} While Hong Kong had its own colonial government that made laws and handled problems pertinent to the needs of Hong Kong citizens, the ultimate authority rested with the Queen of England.\textsuperscript{181} This stems from her former power to appoint the Governor of Hong Kong and approve all laws enacted through the colonial government.\textsuperscript{182} Some commentators considered the United Kingdom's legal authority over Hong Kong as limited and, therefore, not a full right of sovereignty.\textsuperscript{183} However, proponents of this theory find that the only limit is that the United Kingdom had to relinquish its sovereignty over Hong Kong on July 1, 1997.\textsuperscript{184} Up to that point, the Queen of England had complete authority to exert the sovereignty of the United Kingdom over Hong Kong.\textsuperscript{185}

The dissent also argues that even if the Court was unwilling to accept the idea that Hong Kong is part of the United Kingdom, it should grant alienage jurisdiction based upon recognition of Hong Kong as a de facto state.\textsuperscript{186} This argument is based upon two theories.\textsuperscript{187} One theory relies on the fact that the United States recognizes Hong Kong as autonomous with

\textsuperscript{178} Id.
\textsuperscript{179} Id. at 91–92 (utilizing Hong Kong's participation in the International Telecommunications Union and International Labor Organization as examples where Hong Kong is internationally recognized as part of the United Kingdom).
\textsuperscript{180} Id. at 91.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Jensen, supra note 103, at 169 (relying on a theory articulated by MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 156 (1987)).
\textsuperscript{184} Id.
\textsuperscript{185} Id.; Matimak Trading Co. 118 F.3d at 90 (supporting the proposition that since the United Kingdom and China speak of a transfer of sovereignty over Hong Kong, the implication is that each nation intends to exert its sovereignty over the citizens of Hong Kong which provides a basis for granting alienage jurisdiction to Matimak Trading Co.).
\textsuperscript{186} Matimak Trading Co., 118 F.3d at 90.
\textsuperscript{187} Id. at 89–90.
regard to trade matters.\textsuperscript{188} The other premise is that the United States should not rely on another states' definition of who is a citizen of a sovereign nation.\textsuperscript{189} Some scholars have articulated interpretations of de facto recognition that are not as narrowly defined as the one applied by the \textit{Matimak} Court.\textsuperscript{190} One broader interpretation is to recognize states that are not sovereign but whose citizens are sufficiently independent of the sovereign.\textsuperscript{191} This definition could easily include Hong Kong and therefore allow Matimak to maintain its suit in federal court.\textsuperscript{192} The United States clearly recognized Hong Kong as sufficiently independent of its colonial government.\textsuperscript{193} The United States has declared that, after July 1, 1997, it will continue to view Hong Kong as sufficiently independent of the Chinese government.\textsuperscript{194} Both of these factors provide an adequate basis for the court to grant Matimak alienage jurisdiction.\textsuperscript{195} It is unjust for the United States to recognize foreign entities as autonomous in some respects and then deny them access to the Courts because they do not enjoy full autonomy. At the very least, these foreign entities should be recognized as part of the sovereign nation that has control over them.\textsuperscript{196} The \textit{Matimak} decision subjects Hong Kong to very inconsistent treatment by the United States because Hong Kong is considered as sufficiently autonomous by one branch of the United States government but not another.\textsuperscript{197}

2. Policy Considerations

The dissent attacks the Court's notion of statelessness.\textsuperscript{198} Judge Altimari adopts the Court's premise that statelessness was not contemplated by the framers\textsuperscript{199} but reaches the opposite conclusion.\textsuperscript{200} He argues that because of this very reason, the framers intended that every foreign citizen

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{188} \textit{Id.} at 90–91.
\item \textsuperscript{189} \textit{Id.} at 89–91.
\item \textsuperscript{190} \textit{See, e.g.}, Fountain, \textit{supra} note 113, at 480.
\item \textsuperscript{191} Biancheria, \textit{supra} note 65, at 227.
\item \textsuperscript{192} \textit{Id.} at 228 n.179.
\item \textsuperscript{193} \textit{Matimak Trading Co.}, 118 F.3d at 81–82; 22 U.S.C. §§ 5701-5732 (1994).
\item \textsuperscript{194} 22 U.S.C. § 5701 (1994).
\item \textsuperscript{195} \textit{Matimak Trading Co.}, 118 F.3d at 88–92.
\item \textsuperscript{196} \textit{Id.} at 89–91.
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} \textit{Id.} at 89.
\item \textsuperscript{199} \textit{Id.} at 87–89.
\item \textsuperscript{200} \textit{Id.}
\end{itemize}
\end{footnotesize}
should be allowed to invoke alienage jurisdiction. When citizens are determined to be stateless, many argue that the drafters thought they had included all people who were not American citizens under the grant of alienage jurisdiction. Under this view, Matimak would have to be granted alienage jurisdiction whether or not they were a sovereign state or integrated into a sovereign nation. The only limits that were placed on the grant of alienage jurisdiction were effected by the modern courts who manipulated the notion of statelessness to exclude certain persons from using our nation’s courts. To further its attack on the Court’s reliance upon the notion of statelessness, the dissent termed a stateless corporation an “oxymoron” because a corporation, unlike a natural person, must be created by a state. Therefore, whether Matimak Trading Co. is viewed as being a corporation of Hong Kong or of the United Kingdom, it was created by a state and should be recognized as such, rather than being classified as stateless.

The dissent continued to refute the majority opinion, especially its adherence to the policy of deference to the executive branch. This was done by finding that the executive branch had evidenced its intent to allow Hong Kong citizens to sue in federal courts through the letter submitted by the State Department on Matimak’s behalf. Furthermore, the dissent recognized that although political and economic considerations are outside the realm of the Judiciary, the strong economic link between the United States and Hong Kong played a role in deciding the issue of alienage jurisdiction. The dissent correctly pointed out that the majority completely disregarded the widespread recognition of Hong Kong as a limited autonomous force in order to justify a denial of alienage jurisdiction. Judge Altimari found that based upon the facts, all the

201. Id. at 89 (indicating that this would allow citizens of Hong Kong to sue American citizens by invoking alienage jurisdiction).
203. Matimak Trading Co., 118 F.3d at 89.
204. Biancheria, supra note 65, at 206.
205. Matimak Trading Co., 118 F.3d at 89.
206. Id.
207. Id.
208. Id. at 91.
209. Id.
210. Id.
211. Id. at 90 (relying on the fact that Hong Kong is a founding member of the World Trade Organization, a member of many multilateral economic organizations and supports
surrounding factors, and the Executive branch's intent to extend access to
the federal courts to Hong Kong citizens, Matimak's claim should not have
been dismissed.\textsuperscript{212}

\textbf{C. Future Implications}

1. Damage to Hong Kong

Hong Kong has received unfair treatment by the United States
judiciary.\textsuperscript{213} Hong Kong's important status in the world economy\textsuperscript{214} allows
it to enter into agreements and contracts with sovereign nations and their
citizens.\textsuperscript{215} However, as a result of Matimak Trading Co. v. Khalily, Hong
Kong citizens, whether individuals or corporations, are unable to obtain an
adequate remedy in the United States.\textsuperscript{216} This results in inherent unfairness.
As the twelfth largest trading partner of the United States,\textsuperscript{217} Hong Kong
now faces great uncertainty in its dealings with the United States.\textsuperscript{218} The
Court in Matimak states that Hong Kong corporations may still sue in state
courts.\textsuperscript{219} However, it has already been noted that a federal forum is far
superior than the state forum.\textsuperscript{220} This is because the federal courts are
perceived as: (1) less susceptible to democratic influences and bias against
foreigners, (2) more prepared to decide cases involving foreign relations
issues, and (3) facilitating the use of the Courts by foreigners by providing
a uniform system of procedure.\textsuperscript{221} In addition, the notion that a narrow
interpretation of alienage jurisdiction may result in adverse trade
consequences in today's global economy applies here.\textsuperscript{222} As a result of
Matimak, Hong Kong now lacks any adequate legal remedy in the United

\begin{itemize}
\item \textsuperscript{212}Id. at 90.
\item \textsuperscript{213}Id. at 92 (stating that access to our federal courts is justified without exceeding judicial authority).
\item \textsuperscript{214}Id. at 81–82, 90.
\item \textsuperscript{215}Id. at 90; see generally Jensen, supra note 103.
\item \textsuperscript{216}Matimak Trading Co., 118 F.3d at 78–88.
\item \textsuperscript{217}Id. at 81.
\item \textsuperscript{218}See Johnson, supra note 14, at 48.
\item \textsuperscript{219}Matimak Trading Co., 118 F.3d at 88.
\item \textsuperscript{220}See generally Johnson, supra note 14.
\item \textsuperscript{221}Id. at 6–15.
\item \textsuperscript{222}Id. at 48–49.
\end{itemize}
States, which is an impediment to open trade dealings between Hong Kong and United States corporations.\textsuperscript{223}

2. Potential for Change

The dissent in \textit{Matimak Trading Co. v. Khalily} labeled the Court's decision a "death knell for Hong Kong corporations seeking access to our federal courts under alienage jurisdiction."\textsuperscript{224} The majority implied that Hong Kong corporations will continue to be denied access to federal courts after its return to China on July 1, 1997.\textsuperscript{225} The reason for this is that the Court does not believe that Hong Kong can be considered part of China if it is not fully integrated, just as it did not consider Hong Kong to be included under the sovereignty of the United Kingdom.\textsuperscript{226} However, the Court ignores the fact that China will have the ultimate sovereign authority over Hong Kong after the handover.\textsuperscript{227} The dissent notes that after the reversion of Hong Kong to Chinese rule, the citizenship of Hong Kong will be determined by Chinese law.\textsuperscript{228} This demonstrates that Hong Kong corporations are citizens of a sovereign and should be granted alienage jurisdiction after July 1, 1997, if not before.\textsuperscript{229}

\textbf{V. CONCLUSION}

The Court employed an overly formalistic analysis in order to reject claims by a Hong Kong corporation that it should be granted alienage jurisdiction.\textsuperscript{230} Therefore, the Court disregarded the intent of the constitutional framers in order to adhere to vague notions of international law that the Court never clearly defined.\textsuperscript{231} The power to hear cases arising between citizens of the United States and citizens or subjects of foreign states was granted to federal courts to avoid the perception of unfair treatment of foreigners in the United States judicial system.\textsuperscript{232} This

\begin{thebibliography}{99}
\bibitem{223} \textit{Matimak Trading Co.}, 118 F.3d at 88.
\bibitem{224} \textit{Id.} at 88.
\bibitem{225} \textit{Id.} at 82.
\bibitem{226} \textit{Id.}
\bibitem{227} Jensen, \textit{supra} note 103, at 170–71.
\bibitem{228} \textit{Matimak Trading Co.}, 118 F.3d at 90.
\bibitem{229} \textit{Id.}
\bibitem{230} \textit{See generally Matimak Trading Co.}, 118 F.3d 76.
\bibitem{231} \textit{Id.} at 89–90.
\bibitem{232} \textit{Id.} at 87–88; Hong Kong Deposit and Guar. Co. Ltd. v. Hibdon, 602 F. Supp.
\end{thebibliography}
principle was not given credit by the Second Circuit. The Court actually created the perception of unfairness when it denied Hong Kong citizens access to our federal courts. Hong Kong is now at a disadvantage in its trade dealings with American corporations.\textsuperscript{233} This opinion creates exactly the sort of entanglement that the framers of the Constitution sought to avoid.\textsuperscript{234} Furthermore, since the Court relied on the policy of statelessness, it should have considered the implications and the damage that adherence to this policy would create for all citizens of Hong Kong, especially Matimak Trading Company.

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\textsuperscript{233.} \textit{Matimak Trading Co.}, 118 F.3d at 88.
\textsuperscript{234.} \textit{Id.} at 87-88; \textit{Hong Kong Deposit and Guar. Co. Ltd.}, 602 F. Supp. at 1383; Johnson, \textit{supra} note 14, at 26-27, 33, 49; Biancheria, \textit{supra} note 65, at 207-08.
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