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Civil Procedure: The Recognition of Hong Kong as a Foreign State for Purposes of Diversity (Matimak Trading Co. v. Khalily, 936 F. Supp. 151 (S.D.N.Y. 1996))

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COMMENTS

CIVIL PROCEDURE: THE RECOGNITION OF HONG KONG AS A FOREIGN STATE FOR PURPOSES OF DIVERSITY

Matimak Trading Co. v. Khalily
936 F. Supp. 151 (1996)

*Peter Lam****

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I. FACTS

The plaintiff was a corporation organized under the laws of Hong Kong with its principal place of business in Wanchai, Hong Kong.¹ The defendant was a corporation organized under the laws of New York with its principal place of business in New York.² The plaintiff brought a civil suit against the defendant in the U.S. District Court for the Southern District of New York.³ A default judgment was entered against the defendant.⁴ The district

* *Editor's Note:* This comment was selected as the best comment for Spring 1997.

** This comment is dedicated to my parents and my family. I would like to thank Professor Pedro A. Malavet and William A. Pinto, Jr. for their help and David M. Gonzalez and Gregory C. Harrell for their moral support and encouragement.

1. *Matimak Trading Co. v. Khalily*, 936 F. Supp. 151, 152 (S.D.N.Y. 1996).

2. Search of LEXIS, Corp Library, Allsos file. (visited May 3, 1997) (searching for defendant Khalily's principal place of business).

3. *Matimak*, 936 F. Supp. at 151.

court judge requested both parties to submit arguments concerning whether the court had subject matter jurisdiction because Hong Kong was not recognized by the United States government as a foreign state.⁵ The court found plaintiff's policy arguments that the court should recognize Hong Kong as a de facto foreign state for diversity purposes⁶ unpersuasive.⁷ Therefore, the court vacated the default judgment against the defendant, dismissed the case without prejudice for refileing in state court, and HELD that Hong Kong was not a recognized foreign state for diversity purposes.⁸

II. HISTORY

The power of a federal court to adjudicate controversies between citizens of a state and citizens or subjects of a foreign state is expressly conferred by the U.S. Constitution.⁹ Federal courts are given the power to exercise jurisdiction over a foreign citizen in international matters where the national interest is paramount.¹⁰ However, for a federal court to have subject matter jurisdiction over this type of civil suit, the court must first have alienage diversity.¹¹ Specifically, the court must establish that the foreign entity in the suit has been recognized as a foreign state by the United States.¹²

4. *Id.* at 152. The court gave no reason for the entry of default judgment. *Id.*

5. *Id.*

6. 28 U.S.C. § 1332(a) (1994) (providing that "[t]he 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 a State and citizens or subjects of a foreign state").

7. *Matimak*, 936 F. Supp. at 152 (stating that "[t]hese policy arguments are unavailing because it is not the role of the judiciary to recognize foreign states, but rather that is a function of the executive branch").

8. *Id.* at 152-53.

9. U.S. CONST. art. III, § 2, cl. 1.

10. *See Sadat v. Mertes*, 615 F.2d 1176, 1182 (7th Cir. 1980). The court stated:

The dominant considerations which prompted the provision for such jurisdiction appear to have been:

(1) Failure on the part of the individual states to give protection to foreigners under treaties; [and]

(2) Apprehension of entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level.

Id. (quoting *Blair Holdings Corp. v. Rubenstein*, 133 F. Supp. 496, 500 (S.D.N.Y. 1955)) (citations omitted); *see Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242 (7th Cir. 1990).

11. *See* 28 U.S.C. § 1332(a)(2) (presuming that a court must first have alienage jurisdiction). The court stated: "[A]n alien domiciled in one of the United States is afforded access to the federal courts under 28 U.S.C. § 1332(a)(2) even when he sues an American citizen residing in the same state." *Sadat*, 615 F.2d at 1183 (citing *C. H. Nichols Lumber Co. v. Franson*, 203 U.S. 278 (1906)).

12. *Matimak*, 936 F. Supp. at 152 (citing *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir.), *cert. denied*, 311 U.S. 670 (1940)).

Procedurally, there are two ways in which a foreign entity can be recognized as a foreign state. One is through a formal recognition by the President of the United States,¹³ and the other is through a de facto recognition by the courts.¹⁴

A. *Windert Watch Co. v. Remex Electronics Ltd.*:
Hong Kong Is Not a Foreign State

*Windert Watch Co. v. Remex Electronics Ltd.*¹⁵ was the first case in the Southern District of New York that declared Hong Kong was not a foreign state.¹⁶ In *Windert*, the plaintiff, a California corporation which distributed wristwatches, sued two Hong Kong corporations and a British corporation for lost profits and punitive damages.¹⁷ The Hong Kong corporations moved to dismiss the claim for lack of subject matter jurisdiction.¹⁸ The Hong Kong corporations argued that the court lacked diversity jurisdiction because Hong Kong was not a foreign state within the meaning of the diversity statute.¹⁹ The court agreed.²⁰

The court noted that the United States had not given Hong Kong either formal or de facto recognition as a foreign state because Hong Kong was a Crown Colony of the United Kingdom.²¹ Unlike the exchange of ambassa-

13. See, e.g., *Land Oberoesterreich*, 109 F.2d at 637 (holding that a foreign state must first be recognized by the U.S. government, after which "its subjects and its citizens, including its corporations, may be suitors in our [federal] courts"); see also *Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987) (citing *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955)) (restating that the power to recognize a foreign state is conferred to the executive branch by Article II of the U.S. Constitution and that "it is outside the competence of the judiciary to pass judgement upon executive branch decisions regarding recognition").

14. See, e.g., *Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954). In *Murarka*, the court stated that although the United States had not formally recognized India as an independent nation at the time of the suit, the steps the United States had taken to recognize the Interim Government of India by exchanging ambassadors between the countries amounted at least to de facto recognition, if not more. *Id.* It stated: "Unless form rather than substance is to govern, we think that in every substantial sense by the time this complaint was filed India had become an independent international entity and was so recognized by the United States." *Id.*; see also *Chang v. Northwestern Mem'l Hosp.*, 506 F. Supp. 975, 978 n.3 (N.D.Ill. 1980) (finding that "it seems clear that something less than formal recognition of a state by the United States government will suffice to satisfy the foreign diversity jurisdiction requirement. . . . [D]e facto recognition may be based on significant trade relations, cultural and/or other contacts with a nation on a nongovernmental level").

15. 468 F. Supp. 1242 (S.D.N.Y. 1979).

16. *Id.* at 1246.

17. *Id.* at 1243-44.

18. *Id.*

19. *Id.* at 1244 ([D]iversity is lacking because they [we]re citizens of Hong Kong. . . . An alien corporation is a citizen of the entity under the laws of which it is incorporated.").

20. *Id.* at 1246.

21. *Id.* at 1245.

dors with India in 1947,²² the United States had no direct diplomatic dealings with Hong Kong because Hong Kong was a British colony.²³ Furthermore, the court indicated that the State Department also confirmed that the United States did not recognize Hong Kong as an independent state but rather as a British colony.²⁴

The court also rejected the plaintiff's argument that Hong Kong was a political subdivision²⁵ of the United Kingdom.²⁶ The court observed that the Parliament Titles Act of 1927 did not include Hong Kong as part of the United Kingdom, rather the Act states that only England, Scotland, Wales and Northern Ireland make up the United Kingdom. Therefore, Hong Kong was not a political subdivision of the United Kingdom.²⁷ Moreover, under section 406 of the 1948 Companies Act, corporations formed under the laws of Hong Kong do not receive privileges of British nationality.²⁸ Since the Hong Kong corporations were not citizens of a foreign state, the court dismissed the plaintiff's claim for lack of jurisdiction.²⁹

B. *Tetra Finance (HK) Ltd. v. Shaheen:*
Hong Kong Is a Foreign State

In 1984, five years after the *Windert* decision, the same district court in *Tetra Finance (HK) Ltd. v. Shaheen*³⁰ stated in dictum that it would recognize Hong Kong as a foreign state for diversity purposes.³¹ Unlike the plaintiff in *Windert*, which was a U.S. corporation, the plaintiffs in *Tetra* were Hong Kong corporations.³² Represented by their liquidators, who were U.K. citizens, the plaintiffs sued the defendants for \$35 million in loans allegedly made to the defendants and for breach of their fiduciary duties to the plaintiffs.³³ Relying on *Windert*, the defendants moved to dismiss for lack of subject matter jurisdiction pursuant to the theory that Hong Kong was

22. See *Murarka*, 215 F.2d at 552.

23. *Windert*, 468 F. Supp. at 1245.

24. *Id.*

25. 28 U.S.C. § 1603(a) (defining "[a] 'foreign state' . . . [as] includ[ing] a political subdivision of a foreign state or an agency or instrumentality of a foreign state").

26. *Windert*, 468 F. Supp. at 1245.

27. *Id.*

28. *Id.* at 1246 (citing Companies Act 1948 § 406). Natural persons, however, who are citizens of British colonies are considered to be subjects of the Crown. *Id.* (citing British Nationality Act 1948 § 1).

29. *Id.*

30. 584 F. Supp. 847 (S.D.N.Y. 1984).

31. *Id.* at 848.

32. *Id.*

33. *Id.* The liquidators were appointed by the court in Hong Kong. *Id.*

not recognized as a foreign state.³⁴

Although the court denied the motion because the liquidators' citizenships could be used to determine diversity in the case,³⁵ the court nevertheless, in dictum, rejected the defendants' argument that Hong Kong was not a foreign state.³⁶ The court pointed out that federal courts in the past have applied laws of Hong Kong in appropriate situations.³⁷ The court noted that the United States was Hong Kong's largest foreign investor and trading partner.³⁸ The relationship between the two political states should compel the court to recognize Hong Kong as a de facto foreign state.³⁹ Furthermore, the court stated that for diversity purposes, other courts have recognized other British colonies as foreign states.⁴⁰ For these reasons, the court noted that it would be "hypertechical" to prevent Hong Kong corporations from seeking redress in the federal courts simply because Hong Kong had not been formally recognized as a foreign state by the United States.⁴¹

34. *Id.* The defendants moved to dismiss pursuant to FED. R. CIV. P. 12(b)(1) and 28 U.S.C. § 1332 (a)(2). *Id.*

35. *Tetra*, 584 F. Supp. at 849; see FED. R. CIV. P. 17(a) (providing that "[a] party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is bought").

36. *Tetra*, 584 F. Supp. at 848.

37. *Id.*; see also *Windsor Indus., Inc. v. EACA Int'l Ltd.*, 548 F. Supp. 635, 641 (E.D.N.Y. 1982) (holding that the applicable law to the action was Hong Kong law). The *Windsor* court stated in the beginning of its opinion that its "jurisdiction [wa]s grounded upon the parties' diverse citizenship." *Id.* at 636. In other words, diversity was not even an issue because the court recognized Hong Kong as a foreign state from the outset.

38. *Tetra*, 584 F. Supp. at 848; see *American Consulate General Hong Kong*, <<http://www.usia.gov/abtusia/posts/HK1/wwwhmain.html>> (visited Oct. 16, 1997) and *Trade & Industry*, <<http://www.info.gov.hk/hkbi/6/stop6-1.htm>> (visited May 9, 1997) (this address is still current as of Oct. 16, 1997, but the data has been updated). Although the United States is no longer Hong Kong's largest foreign investor as it was in 1984 when *Tetra* was decided, it is still one of the top investors. In 1996, the United States was Hong Kong's second largest trading partner (after China), with US\$54 billion, up 14.2% over 1995. *Id.*

39. *Tetra*, 584 F. Supp. at 848 (stating 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"); see *Chang V. Northwestern Mem'l Hosp.*, 506 F. Supp. 975, 978 n.3 (N.D.Ill. 1980).

40. *Tetra*, 584 F. Supp. at 848; see, e.g., *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983) (finding that diversity existed without question, and the requirements of diversity jurisdiction were satisfied instead of questioning the foreign state status of Bermuda); see also *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990) (affirming lower court's decision that subject matter jurisdiction under 28 U.S.C. § 1332 was present because courts have recognized diversity where the corporations are from the British territories of Bermuda and the Cayman Islands).

41. *Tetra*, 584 F. Supp. at 848 (stating that "[i]t would seem hypertechical 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").

The *Tetra* decision reflected the trend of that period in which many federal courts had discarded the rigid standard of formal recognition and adopted the more *lax de facto* standard.⁴² In cases of other jurisdictions in which Hong Kong corporations also were the plaintiffs, the courts rejected the rigid formal recognition standard and adopted *Tetra's* reasoning to find diversity jurisdiction.⁴³ This trend, which lasted for about sixteen years, would be interrupted by the decision of the instant case.⁴⁴

III. INSTANT CASE

In the instant case, the district court found that Hong Kong was not a foreign state, formal or *de facto*.⁴⁵ Since the court did not have diversity jurisdiction, it dismissed the case and vacated the default judgment against the defendant.⁴⁶ The instant court's decision essentially dismissed *Tetra's* reasoning that Hong Kong should be recognized as a *de facto* foreign state.⁴⁷

By dismissing the case, the instant court adhered to the rule that only the executive branch may recognize a foreign state.⁴⁸ The court relied on a letter from the State Department that stated that the United States does not recognize Hong Kong as a sovereign state.⁴⁹ The court then rejected the *de facto* recognition arguments because they were unpersuasive policy arguments, and because the court did not have the power to recognize foreign

42. See, e.g., *Chang*, 506 F. Supp. at 978 n.3.

43. See, e.g., *Timco Eng'g, Inc. v. Rex & Co.*, 603 F. Supp. 925, 930 n.8 (E.D.Pa. 1985) (holding that "the presence of a Hong Kong citizen as a plaintiff in a suit between otherwise diverse United States citizens [did] not deprive th[e] court of subject matter jurisdiction"); see also *Creative Distrib., Ltd. v. Sari Niketan, Inc.*, No. 89-C-3614, 1989 WL 105210, at *2 (N.D.Ill. Sept. 1, 1989) (denying defendant's motion to dismiss for lack of diversity jurisdiction because based on the reasons stated in *Tetra* and *Chang*, Hong Kong appeared to have been recognized *de facto* by the "United States and its court system").

44. See *Matimak Trading Co. v. Khalily*, 936 F. Supp. at 152-53; see also *Chang*, 506 F. Supp. at 978 n.3 (finding "such [*de facto*] recognition here based on significant trade relations, cultural and/or other contacts," thereby establishing the commercial and cultural criteria for recognition of a *de facto* foreign state, which was used for the next sixteen years).

45. *Matimak*, 936 F. Supp. at 152.

46. *Id.* at 152-53.

47. *Id.* at 153 & n.2.

48. *Id.* at 152; see, e.g., *Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1281 (stating that the "[r]ecognition of foreign governments . . . remain[ed] essentially a political act, which the executive branch alone is empowered to undertake"). *Id.* However, if a foreign state has been recognized by the United States, a subsequent nonrecognition of its government, such as the Khomeini regime in Iran, would not result in the nonrecognition of the nation as a foreign state. *Id.*

49. *Matimak*, 936 F. Supp. at 152. The letter to the court in a previous case, dated April 4, 1995 was from the State Department Assistant Legal Adviser Jim Hergen and confirmed that the United States does not recognize Hong Kong as a sovereign state. *Id.*

states.⁵⁰

The instant court explained that unlike India in 1954, when the Second Circuit Court of Appeals recognized the country as a de facto foreign state, Hong Kong was not substantially a foreign state.⁵¹ The court pointed out that at the time of the filing of the complaint, Hong Kong would not revert back to China for another one and a half years.⁵² Accordingly, “the United States ha[d] not yet taken substantial steps to recognize Hong Kong as a fully incorporated part of China.”⁵³

With regard to the cases in which the courts recognized other British territories as foreign states, the instant court dismissed the significance of those cases because subject matter jurisdiction had not been raised as an issue,⁵⁴ and because courts do not have the power to recognize foreign states.⁵⁵ Accordingly, the instant court found the fact that other district courts have applied Hong Kong laws and enforced Hong Kong judgments irrelevant because those courts did not expressly consider whether Hong Kong should be recognized as a de facto foreign state.⁵⁶ Holding that the judiciary branch has no power to recognize foreign states, the instant court vacated the default judgment against the defendant and dismissed the entire case without prejudice for refile in state court.⁵⁷

IV. ANALYSIS OF THE INSTANT CASE

A. *Effect on the Southern District of New York*

On its face, the decision of the instant case impacts de facto recognition by narrowing the number of ways by which a foreign entity can be recognized as a foreign state.⁵⁸ Since *Tetra*'s contribution was only dictum, the rejection of *Tetra*'s reasoning by the instant court merely reaffirms the

50. *Id.* at 152-53.

51. *Id.*

52. *Id.* at 153.

53. *Id.*

54. *Id.* at 152-53; *see, e.g.*, *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983).

55. *Matimak*, 936 F. Supp. at 153.

56. *Id.* at 153 n.3 (citing *Tetra*, 584 F. Supp. at 847).

57. *Id.* at 153.

58. This trend of de facto recognition due to commercial and cultural ties began with the *Chang* decision in 1980. *See Chang*, 506 F. Supp. at 975. *But cf. Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954) (implicitly holding that foreign state recognition could be inferred from political acts by the executive branch, such as an exchange of ambassadors). The court in the instant case interprets that de facto recognition can only be inferred from political acts by the executive branch. *Matimak*, 936 F. Supp. at 152. Since economic and cultural factors are not political in the sense that they are not within the realm of the President's power, they are irrelevant.

district court's position, which previously had been established by the *Windert* decision.⁵⁹ Unlike *Tetra*, which allowed the factors of commercial and cultural ties to be considered, the instant decision limits the factors to political recognitions.⁶⁰ By adhering to the rule that only the executive branch may recognize foreign states, the instant court also declares that district courts have no power to recognize de facto foreign states, which had been the practice of the federal district courts throughout the sixteen-year trend.⁶¹

Like *Windert*, the instant court relied on the State Department to confirm that the United States did not recognize Hong Kong as a foreign state.⁶² While this policy is contrary to the trend of unaided de facto recognition through commercial and cultural ties,⁶³ it nevertheless enables courts to avoid potential conflicts with the executive branch in the matters of international policy.⁶⁴ Clearly, one of the reasons behind the instant decision was to avoid such conflicts since matters of international affairs rest with the executive branch of the government.⁶⁵ On the other hand, given the improvements in communication technology and the growth in global economics, the United States might benefit from a flexible foreign affairs policy where foreign entities seek redress in the federal courts despite a lack

59. See *Windert*, 468 F. Supp. at 1246.

60. See *Matimak*, 936 F. Supp. at 152 (stating that "[a]lthough there are strong commercial ties between Hong Kong and the United States, . . . [they] do not constitute recognition of Hong Kong as a de facto foreign state by our government").

61. *Id.*; see, e.g., *Timco Eng'g, Inc. v. Rex & Co.*, 603 F. Supp. 925, 930 n.8 (E.D. Pa. 1985); *Windsor Indus., Inc. v. EACA Int'l Ltd.*, 548 F. Supp. 635, 641 (E.D.N.Y. 1982); *Creative Distrib., Ltd. v. Sari Niketan, Inc.*, No. 89-C-3614, 1989 WL 105210, at *2 (N.D. Ill. Sept. 1, 1989). For a discussion, see *supra* note 37 for a discussion of applying Hong Kong law.

62. *Matimak*, 936 F. Supp. at 152; see *supra* note 49 and accompanying text.

63. See *Timco*, 603 F. Supp. at 930 n.8; *Chang*, 506 F. Supp. at 975; *Creative Distrib.*, 1989 WL 105210, at *2.

64. See *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir. 1940); *Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987).

65. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors."); see also U.S. CONST. art. II, § 3 ("[The President] shall receive Ambassadors . . ."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, . . . must be exercise in subordination to the applicable provisions of the Constitution.

Id.

of formal recognition as foreign states.⁶⁶ In light of potential conflicts with the executive branch in matters of foreign policy, the federal courts would need to reconcile the de facto recognitions with the policies of the current administration.⁶⁷

Nevertheless, the impact of the instant decision may be minimal since the Second Circuit Court of Appeals has never spoken on whether Hong Kong should be recognized as a de facto foreign state.⁶⁸ Thus, the Southern District of New York could reverse the instant decision and readopt *Tetra*'s reasoning in a similar subsequent case.⁶⁹ Furthermore, Hong Kong reverted to China on July 1, 1997, as had been indicated by the instant court.⁷⁰ Since China is a formally recognized foreign state, the reversion allows Hong Kong corporations to be considered as citizens of a foreign state, and thus the federal courts will have diversity jurisdiction.⁷¹ As a result, the impact, if any, of this instant decision on the Southern District of New York will last less than a year.⁷²

B. *Effect on Other Jurisdictions*

The impact of the instant decision on other jurisdictions probably will be minimal because the decision would be only persuasive authority.⁷³ During the sixteen-year period, the courts that recognized Hong Kong as a de facto foreign state explicitly rejected the rigid formal recognition established by *Windert*, which the instant court has implicitly followed.⁷⁴ The adoption of

66. See *Chang*, 506 F. Supp. at 977 n.2 (observing that "[t]here 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.") (citation omitted).

67. See *id.* at 977-78. For example, the *Chang* court looked to the *1948 Treaty of Friendship, Commerce and Navigation*, the *Presidential Memorandum of December 30, 1978*, and *The Taiwanese Relations Act of 1979*, for guidance in deciding whether citizens of Taiwan had standing to sue in the U.S. courts. *Id.*

68. See JOHN W. HARDWICKE, *BUSINESS LAW* 5 (1992). The principle of stare decisis would bind all of the lower courts to the holding of the highest court in the same jurisdiction. *Id.*

69. *Id.* This possibility of reversing decisions within a district is demonstrated by the changes in the decisions from *Windert* to *Tetra* to the instant case because the issue of whether Hong Kong was recognized as a foreign state never had been decided by a higher court.

70. *Matimak*, 936 F. Supp. at 152.

71. *Id.*

72. *Id.* at 151. The opinion was given on August 21, 1996.

73. See HENNEY HEGLAND, *INTRODUCTION TO THE STUDY AND PRACTICE OF LAW* 40-41 (1995). Since the instant decision is not controlling authority for these jurisdictions under stare decisis, it is only persuasive authority.

74. See cases cited *supra* note 61.

Tetra's reasoning by these jurisdictions shows that they believe that the twenty-first century warrants a flexible foreign affairs policy.⁷⁵ A policy under which foreign entities, who although they have not been formally recognized as foreign states, still may be able to seek redress in the federal court system.⁷⁶ Furthermore, in some jurisdictions, the issue of foreign state recognition probably is not raised because of apparent commercial and cultural ties.⁷⁷ For these reasons, the impact of the instant decision on other jurisdictions appears to be minimal.

C. *Significance of the Instant Case Beyond the Facts*

The issue of whether Hong Kong should be recognized as a foreign state is no longer relevant since it reverted to China on July 1, 1997.⁷⁸ Nonetheless, in reading beyond the facts of the instant case, the larger issue is whether the federal courts have the power to recognize de facto foreign states.⁷⁹ Although some federal district courts believe that they have the power to recognize de facto foreign states,⁸⁰ at least one does not.⁸¹ The dichotomy of opinions by the districts courts shows that there is a need for a decisive ruling on this particular issue by the U.S. Supreme Court.⁸²

In today's world of multilateral trade and investment, efficiency in transactions is critical. Parties should have the opportunity for quick and fair dispute resolutions. Perhaps international arbitration would be the most appropriate solution. On the other hand, U.S. courts also should have the opportunity to control the volume of their cases. When the courts deny parties the opportunity to seek redress, they are effectively setting up obstructions against mutually beneficial business dealings.

75. See *supra* note 66 for a discussion of commercial and cultural factors.

76. See *supra* note 66 for a discussion of commercial and cultural factors.

77. See, e.g., *Windsor*, 548 F. Supp. at 641 (implying that recognition of Hong Kong as a foreign state was not an issue because the court's jurisdiction was grounded upon the parties' diverse citizenships); see also *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983) (also stating implicitly that the status of Bermuda as a foreign state was not an issue since diversity jurisdiction existed).

78. *Matimak*, 936 F. Supp. at 152.

79. *Id.*

80. Both *Chang* and *Creative* were decided in the Northern District of Illinois, which is in the 7th Circuit. *Timco* was decided in the Eastern District of Pennsylvania, which is in the 3rd Circuit. And *Windsor* was decided in the Eastern District of New York, which is in the 2nd Circuit.

81. *Matimak*, 936 F. Supp. at 153.

82. The Supreme Court has jurisdiction over cases and controversies that arise under the U.S. Constitution and federal laws of the United States between two or more states. U.S. CONST. art. III, § 2, cl. 1. There are no appellate opinions from the Courts of Appeals that clearly hold that district courts either could or could not recognize de facto foreign states. Therefore, without "conflicts" among the circuits, it seems improbable that the Supreme Court will decide on this particular issue anytime soon.

In addition, it does not appear that the courts that recognized Hong Kong as a de facto foreign state were usurping the executive branch's powers. They were merely retaining their flexibility in deciding who deserves the opportunity to seek redress. Until there is a Supreme Court ruling on this issue, plaintiffs from nonrecognized foreign nations can only make their decisions to sue based on the prevailing law within the particular federal circuit or within the district if there has been no ruling by that federal circuit.⁸³

Even if courts do not have the power to recognize de facto foreign states, it should be noted that a plaintiff corporation whose country is not a recognized foreign state may still be able to circumvent the diversity problem. As was shown in *Tetra*, a plaintiff corporation could obtain a court-appointed party whose country is a recognized state to represent the corporation.⁸⁴ Moreover, as is shown in the instant case, a plaintiff would not be completely without opportunity to seek redress if the district court dismisses the case without prejudice for refile in the state court.⁸⁵

V. CONCLUSION

The impact of the instant decision will probably be minimal. The decision has no binding effect on the Southern District of New York or any other federal district courts.⁸⁶ Moreover, since Hong Kong reverted to China on July 1, 1997 and is no longer a British colony, it is now recognized as a foreign state for diversity purposes.⁸⁷ Thus, even if the decision had been binding, its effect would have been only temporary. Hong Kong corporations now have standing to sue or be sued in federal courts throughout the United States. However, the larger issue of whether federal district courts have the power to recognize de facto foreign states continues to be uncertain.

83. HARDWICKE, *supra* note 68, at 5.

84. See *Tetra*, 584 F. Supp. at 849; see also *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 829-30 (1969). The Court in *Kramer* held that although the assignment of claim by a Panamanian corporation to a Texas lawyer was valid as a matter of Texas law, the assignment would not create diversity jurisdiction because the assignment was " 'improperly or collusively made' " under the meaning of 28 U.S.C. § 1359 and accepting this " 'manufactur[ing]' [of] federal jurisdiction" would hinder the purpose of § 1359) (citing *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336 (1895); *Little v. Giles*, 118 U.S. 596, 602 (1886)). *But see* 28 U.S.C. § 1359 (prohibiting the improper assignment of parties to invoke subject matter jurisdiction). Therefore, as shown in *Tetra*, while FED. R. CIV. P. 17(a) allows a corporation plaintiff from a nonrecognized foreign state to assign its claim to a representing party from a recognized foreign state in a civil suit, the representing party must have a legal interest in the plaintiff's case in order for the assignment to be valid so as to invoke diversity.

85. *Matimak*, 936 F. Supp. at 153.

86. *Id.*

87. See *id.* at 152.

