



United States Department of State

Washington, D.C. 20520

June 21, 1996

Mr. Marshall T. Potashner
Wilson, Elser, Moskowitz, Edelman & Dicker
150 East 42nd Street
New York, N.Y. 10017

Re: Matimak Trading Co. Ltd. v. Albert Khalily d/b/a
Unitex Mills Inc. and D.A.Y. Sportswear Inc., No. 95
Civ. 6541 (KMW) (S.D.N.Y.)

Dear Mr. Potashner:

Thank you for having brought to our attention Judge Wood's order of June 10 in the above-captioned proceedings, which I find deeply troubling on both legal and policy grounds. I trust that you will find the following information to be of assistance. Please feel free to share my views with opposing counsel and Judge Wood.

In our opinion, Judge Wood's conclusion that federal courts lack diversity jurisdiction over cases brought by Hong Kong corporations because Hong Kong is not a foreign state within the meaning of Article III of the Constitution could, if maintained, have a potentially serious adverse impact upon the conduct of the foreign and economic policies of the United States.

This conclusion is contrary to the current trend of federal precedent, as we understand it -- a trend which we believe clearly to reflect the sound and better view. In Wilson v. Humphreys (Cayman) Ltd., for example, the Seventh Circuit notes that "[T]his type of jurisdiction 'was intended to provide the federal courts with a form of protective jurisdiction over matters implicating international relations where the national interest was paramount.'" Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239 (7th Cir. 1990), quoting Sadat v. Mertes, 615 F.2d 1176, 1182 (7th Cir. 1980). The Court found that not only the policies underlying this constitutional jurisdiction but also the weight of authority supports a finding of jurisdiction for the Cayman Islands and other British Dependent Territories, specifically including Hong Kong.

Manifestly, matters involving Hong Kong corporations implicate international relations just as much as matters

involving United Kingdom or Swiss Corporations. Indeed, as discussed below, the situation with respect to Hong Kong is arguably of even greater concern. As noted in Tetra Finance (HK) Ltd. v. Shaheen, "[i]t 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." Tetra Finance (HK) Ltd. v. Shaheen, 584 F. Supp. 847 (S.D.N.Y. 1984), at 848. Indeed, it can be argued that the requirements for diversity jurisdiction are satisfied even on a "hypertechnical view." Article III provides for diversity jurisdiction not only for citizens of foreign States, but also for "foreign subjects." This reference to "subjects," as distinct from citizens, is not superfluous or redundant. In 1787, even more than today, there were numerous colonial subjects who were not necessarily citizens of their respective foreign States. The object and purpose of Article III also support a broader reading. Cf., Van der Schelling v. U.S. News and World Report, Inc., 213 F.Supp 756, 761 (E.D. Pa. 1963) ("...if federal jurisdiction had been couched solely in terms of 'citizenship,' there may have resulted an arbitrary denial of federal access to many foreigners only because of the nature of the government under which they happened to live").

The legal status of Hong Kong in particular is uniquely complex and delicate, both internationally and as a matter of the domestic law of the United States -- a fact that is underscored by Congress' enactment of special legislation regarding Hong Kong, i.e., the United States-Hong Kong Policy Act of 1992, 22 U.S.C. §5701 et seq.. It is ineluctably clear from this legislation that Congress both considers that there currently exist strong bilateral ties between the U.S. and Hong Kong with respect to commercial matters, and wishes such ties to continue post-reversion. See, e.g., 22 U.S.C §5711(2), which expressly manifests Congress' intent that "[t]he United States should actively seek to...expand direct bilateral ties and agreements with Hong Kong in economic, trade, financial...and other appropriate areas." See also §5713, which emphasizes Congress' intent that the U.S. "maintain" and "continue" a direct U.S.-Hong Kong bilateral relationship.

Thus, if necessary, Hong Kong should in our view be treated in the courts of the United States as a de facto "foreign state" for diversity purposes. As noted below, the United States currently and routinely deals with Hong Kong with respect to a broad array of commercial matters on a bilateral basis, totally independent of the United Kingdom. Subsequent to Hong Kong's reversion to the People's Republic of China on July 1, 1997, the bilateral nature of the United States-Hong

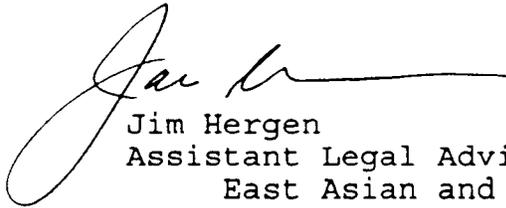
Kong relationship will grow even stronger in areas -- particularly those related to trade and commerce -- in which Hong Kong will exercise a "high degree of autonomy" under the 1984 Sino-British Joint Declaration on the Question of Hong Kong, and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, conveniently reprinted at 23 I.L.M. 1366(1984) and 29 I.L.M. 1511 (1990) respectively. In these commercial areas, Hong Kong effectively acts -- and will continue post-reversion to act -- in the same manner as a separate state entity; it would be anomalous, indeed, if our courts were not to recognize this reality for purposes of diversity jurisdiction.

Nor is this the first time that the Department of State has had occasion to bring the Executive's views on this subject to the attention of United States courts. See, e.g., Tetra Finance (HK) Ltd. v. Shaheen, supra. In that case, the court notes the receipt of a letter from one of my predecessors in office, Mr. Patrick Norton, a copy of which I attach hereto for your information. Id., at 848. In short, we agree with Judge Werker's conclusion in Tetra and his statement 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." Id. With Hong Kong's reversion to Chinese sovereignty now looming, it is vastly more imperative today than it was in 1984 for our courts to recognize Hong Kong's commercial autonomy. Cf., 22 U.S.C. §§ 5721(a), 5722.

Furthermore, the strong commercial relationship between the U.S. and Hong Kong to which Mr. Norton adverted in his February 8, 1984, letter has grown considerably since that time. For example, Hong Kong is now the 12th largest trading partner of the United States, with direct U.S. financial investment in Hong Kong having expanded to almost \$12 billion by 1994. 1995 U.S. and Asia Statistical Handbook, p. 42 (The Heritage Foundation; Asian Studies Center). Moreover, as you will see from the attached pages from the January 1, 1995 edition of Treaties in Force (the official Department of State compilation of international agreements currently in force for the United States), the United States maintains agreements directly with Hong Kong on a purely bilateral basis in a number of important areas. And, significantly, the United States is currently negotiating several new agreements directly with the Hong Kong Government in such fields as aviation, extradition, prisoner exchange, mutual legal assistance, and bilateral investment. Finally, it is the case that Hong Kong will continue after reversion -- as it currently does -- to participate in a number of international organizations in its own right, including the World Trade Organization, and to enter into binding international agreements with other states, under the name, "Hong Kong, China."

For all of the foregoing reasons, I wish to take this opportunity most strongly to confirm the continuing vitality of Assistant Legal Adviser Norton's 1984 representation that the Department of State believes "it would be consistent with the foreign policy interests of the United States and the commercial interests of its nationals that courts in the United States be available to resolve private commercial claims between United States and Hong Kong nationals and business enterprises."

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Hergen", with a long horizontal flourish extending to the right.

Jim Hergen
Assistant Legal Adviser for
East Asian and Pacific Affairs

Attachments: As stated.