For Publication

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. **MAYNARD HILBERT AND KINNY RECHERII,** Defendants.	**CRIMINAL CASE NO. 03-0355B** **ORDER DENYING DEFENDANTS' MOTION TO DISMISS COUNT I OF THE INFORMATION**

This matter comes before the Court on Defendants Maynard Hilbert and Kinny Recherii's ("Defendants") Motion to Dismiss Count I of the Information filed in the above-captioned case. The Commonwealth of the Northern Mariana Islands ("CNMI") was represented by Assistant Attorneys General Joseph L.G. Taijeron, Jr. and James D. Livingstone. Mr. Hilbert, who filed the motion, was represented by Vicente T. Salas, Esq. Mr. Recherii, who joined in the Motion, was represented by Public Defender Masood Karimipour. Having reviewed the briefs submitted by the parties and upon hearing the arguments of counsels, the Court enters the following decision.

BACKGROUND

The Motion to Dismiss is based on two separate grounds. The first ground is that after November 6, 1986 the CNMI lacked jurisdiction over the submerged lands of the Commonwealth and lacked the authority to enact and enforce Public Law 12-46 which is the law upon which the Information is based. Defendants contend that the authority for this argument is the Federal District Court decision in the case of *Commonwealth v. United States of America*, Civ. No. 99-0028 (D. N. Mar. I. Aug. 8, 2003) (Judgment) ("Order").[1] The second ground for the Motion to Dismiss is that

[1] On January 20, 2004, Federal District Court Chief Judge Alex R. Munson signed an order entitled, "Order Partially Staying Judgment Pursuant to Stipulation of Parties" in this same case. The partial stay of the August 8, 2003 Judgment "allowed" the Commonwealth to enforce local laws applicable to fish, wildlife, coral reef protection, public health and safety, immigration and criminal conduct in an area three miles seaward of the low-water mark of the CNMI coastlines.

Public Law 12-46 is unconstitutionally vague and infringes on the Defendants' rights to due process.

This is a case of first impression in the Superior Court and covers many areas under the general topic of Law of the Sea. Both parties have submitted lengthy points and authorities to prove their contentions. Included among the exhibits submitted are copies of *Commonwealth v. United States of America,* Civ. No. 99-0028 (D. N. Mar. I. Aug. 7, 2003) (Order Denying Commonwealth's Motion for Summary Judgment, Granting United States' Motion For Summary Judgment, and Declaring 2 N. Mar. I Code § 1101 *et. seq*., and 2 N. Mar. I Code § 1201 *et. seq.* Pre-empted by Federal Law) and the CNMI's Appellant's Brief submitted on appeal to the United States Court of Appeals for the Ninth Circuit. These documents cover many years of history between the CNMI and the United States and touch on three particular law of the sea topics.

DISCUSSION

As a preface to this decision, it is necessary to put in perspective some of the Law of the Sea issues discussed in the above-referenced documents. The first area is that of the territorial sea. The CNMI purports to have its own territorial sea extending outward to twelve miles. Although this is the international standard as set forth in the United Nations Convention on the Law of the Sea, Dec. 10, 1982, ("UNCLOS"),[2] the CNMI is not a sovereign nation and cannot control a territorial sea of its own.[3] The territorial sea involves foreign affairs and national defense. Accordingly, the federal

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[2] "[T]he United States has not ratified [UNCLOS}, but has recognized that its baseline provisions reflect customary international law." *United States v. Alaska,* 503 U.S. 569, 588 n.10, 112 S. Ct. 1606, 1617 n.10, 118 L. Ed. 2d 222, 240 n.10 (1992). Despite failure to sign or ratify the United Nations Convention on Law of the Sea, the United States has signed and ratified in one case, and signed without ratifying in another case, agreements implementing portions of UNCLOS. *See* Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, in force from Dec. 11, 2001 (ratified by the United States on Aug. 21, 1996) and Agreement Relating to the Implemention of Part XI of the Convention, in force from July 28, 1996.

[3] The territorial sea of a nation is a maritime zone extending beyond the land territory and internal waters of a nation over which a nation exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil. It is recognized in international law for national security purposes and other significant interests of nations.

On December 27 1988, by way of Presidential Proclamation, President Ronald Reagan proclaimed the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty, to be 12 nautical miles from the baselines of the United States as determined in accordance with international law. This Proclamation allowed the United States, which previously had a three-mile territorial sea, to come into conformance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea.

Within the territorial sea of the United States, ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

territorial sea is paramount to the CNMI's territorial sea under the COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1801 note, *reprinted in* CMC at B-101, *et seq.*, ("Covenant") Article I, Section 104.[4]

The second area discussed in the parties' papers and exhibits is the exclusive economic zone. Under Part V, Article 55 of UNCLOS,

> [t]he exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established [under UNCLOS,] under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

In the exclusive economic zone,

> the coastal State has[] sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

UNCLOS, Part V, Article 56(1)(a). The breadth of the exclusive economic zone is not to extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. §§ 1801, *et seq.,* granted the federal government exclusive fishery management authority within the "Exclusive Economic Zone." 16 U.S.C. §§ 1801(b)(1), 1811(a). Presidential proclamation 5030, dated March 10, 1983, established the United States' exclusive economic zone. *Proclamation* No. 5030, 7 C.F.R. Part 60, Appendix A to Subpart A (2005). *See Bateman v. Gardner,* 71 F. Supp. 595, 596 (S.D. Fla. 1989).

Under 2 CMC § 1124(a), the CNMI maintains that it has control of its own exclusive economic zone. Whether the CNMI can control its own exclusive economic zone is not as clear-cut as the issue of whether the CNMI can have its own territorial sea. The Magnuson Act did not become effective until March 1, 1977. Thus, the CNMI did not agree to be bound by this federal

[4] Article I, Section 104 provides that: "[t]he United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands." COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1801 note, *reprinted in* CMC at B-101, *et seq.,* Article I, Section 104.

law that was non-existent at the time the Covenant was approved by the U.S. Congress on July 10, 1975. The argument that the CNMI agreed to this federal law when it signed the Covenant because it agreed to the U.S. government's sovereignty over foreign affairs belies the fact that this issue was (purposely or not purposely) not addressed by the parties to the Covenant. Furthermore, it is difficult to think that for any given moment the Northern Mariana Islands had a degree of autonomy or sovereignty where it could "agree" as an equal with the United States to cede to the United States control of its exclusive economic zone.[5] It also ignores the fact that there is precedent in international law that semi-autonomous entities, such as the Federated States of Micronesia, the Republic of Palau, the Republic of the Marshall Islands, Niue and the Cook Islands are able to control their exclusive economic zones.[6]

The third area, and the most discussed by the parties, is submerged lands. Submerged lands are the lands under the continental shelf and the outer continental shelf. Over the last eighty years submerged lands have become more and more important as the technological capability to exploit oil and gas offshore, and later minerals, has grown. The history of federal/state control of submerged lands has been adequately addressed in the above-referenced sources. However, it is important to note that litigation involving submerged lands between the federal government and various state governments has had nothing to do with fishing, fishing rights or the extraction of reef fish, sea crabs and lobsters. The usual motivation for the lawsuits has been over the sizeable revenue to be realized from oil and natural gas leases on the continental shelf within a few nautical miles of the shore.

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[5] The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America is a devolution agreement. Devolution is defined as the transfer (as rights, powers, property or responsibility) to another. *See* Merriam Webster Dictionary of the Law, 1996. While it can be maintained that the Northern Mariana Islands Political Status Commission was empowered to cede control over foreign affairs (and arguably the territorial sea) while negotiating the Covenant, the Northern Mariana Islands was certainly not sovereign and was a part of the Trust Territory of the Pacific Islands at the same time. To imply that this power over foreign affairs included the exclusive economic zone that was not even discussed by representatives from both parties is stretching the imagination.

[6] The main emphasis for having exclusive economic zones (EEZ's) is conserving fish stocks and realizing revenue from distant water fishing fleets. The island entities comprising the Trust Territory of the Pacific Islands carved out 200 mile economic zones for themselves during their negotiations with the United States at approximately the same time the NMI was negotiating. At the time of the Covenant negotiations, exclusive economic zones were high on the agenda in the drafting of UNCLOS.

The islands of French Polynesia do not control their own exclusive economic zone. It is controlled by France, but French Polynesia elects members to the French Parliament. Query, whether the CNMI should offer to finally put the matter of control of the CNMI's EEZ to rest by agreeing to abandon any claim it has to it in return for a non-voting delegate to the U.S. House of Representatives.

The CMNI does not have a continental shelf and it is ironic that the subject matter of the above-referenced federal litigation involves a near- shore marina that the federal government would not normally be interested in regulating whatsoever, except for obstructions to navigation which would be supervised by the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401, *et seq.*, an act that the Northern Mariana Islands has always accepted under the Covenant.

I. DOES THE UNITED STATES GOVERNMENT HAVE SOLE JURISDICTION FOR PROMULGATING AND ENFORCING LAWS GOVERNING MARINE SANCTUARIES IN NEAR SHORE WATERS IN THE CNMI?

The Order had the effect of striking down both the Commonwealth's Marine Sovereignty Act of 1980, 2 CMC §§ 1101, *et seq.*, and the Submerged Lands Act, 2 CMC §§ 1201, *et seq.* The reasoning behind the Order is that, in the international arena, an arena affecting the United States' relationships with other sea-faring powers, jurisdiction over the territorial sea, the contiguous zone to the territorial sea and the exclusive economic zone is a matter of national concern and the federal laws addressing that area preempt and are paramount to Commonwealth laws in the same area.

Defendants argue that until the U.S. Congress passes a law specifically ceding submerged lands to the CNMI, the United States government must promulgate, regulate and enforce laws similar to PL 12-46 to protect the CNMI's near-shore resources. Until this is done, all local laws are invalid and Defendants' charges must be dismissed. Defendants would argue that if the Order's stay was lifted, plunderers of natural resources could not be charged with any crimes until appropriate federal laws were passed.

Neither the Submerged Land Act nor the Marine Sovereignty Act of 1980 purports to control fishing in a marine sanctuary within 1,000 feet of the low water mark. Neither act specifically addresses reef fishing, crab snatching or lobster gathering. Furthermore, contrary to Defendants' contention, neither the Marine Sovereignty Act of 1980 nor the Submerged Lands Act forms the basis for Commonwealth legislative authority to enact PL 12-46, an entirely local law. The legislative authority to enact a local conservation law is governed by Covenant Section 103 which guarantees that: "[t]he people of the Northern Mariana Islands will have the right of local self-

government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption". The NMI Constitution was approved by the United States of America and a legislative and executive branch were created. Public Law 12-46 was enacted into law pursuant to the requirements of the NMI Constitution. Regulating the taking of reef fish, crabs and lobsters is an internal affair and entirely a matter of local self-government.

Accordingly, this Court finds that PL 12-46 does not violate the supremacy clause of the U.S. Constitution and is not dependent on either the Commonwealth's Submerged Lands Act or Marine Sovereignty Act of 1980, regardless of whether these acts are found to be legitimate or not by the Ninth Circuit.

II. IS PUBLIC LAW 12-46 VAGUE AND INDEFINITE?

Defendants contend that PL 12-46 is vague and indefinite in that it purports to prohibit certain activities within certain designated areas and fails to adequately define or indicate the parameters of these confines. Due process of law requires that "a penal statute . . . state with reasonable clarity the act it proscribes and provide fixed standards for adjudging guilt, or it is void for vagueness." *Commonwealth v. Bergonia*, 3 N.M.I. 22, 36 (1992)

The Court finds that PL 12-46 is not vague. The proscribed acts are clearly spelled out in the law. Section 5 states clearly:

> Destruction, harassment and/or removal of plants, wildlife including birds, turtles, fish and marine species of any kind, fishing in any form, operation of jet skis, walking on exposed sections of the reef, harvesting or removal of fish, shellfish or marine life in any form is prohibited within the confines of these areas designated as a sanctuary.

Defendants' alleged conduct is clearly covered by Section 5. There is nothing vague about it. Indeed, there was a posted sign on the shore indicating that it was a marine sanctuary area.

Defendants further contend that the law is vague because the marker buoys were not installed. Marker buoys are addressed in Section 3 of the law: "Marker buoys should also be installed to indicate the seaward parameters of these sanctuaries."

The fact that marker buoys were not installed does not render the law vague and indefinite. At best, it provides a possible defense in that Defendants may contend that their catch came from an area more than 1,000 feet from the low-water mark. This would be a question of fact to be

decided by the Court at the time of trial.

CONCLUSION

Based on the foregoing going, Defendants' Motion to Dismiss on both grounds is **DENIED**. A status conference will be held on **January 25, 2005** at **9:00 a.m** in courtroom 205A to set a date for the trial of this matter.

IT IS SO ORDERED

ENTERED this 14th day of December 2004.

/s/
KENNETH L. GOVENDO, Associate Judge