in the protection of its own enterprises and investors abroad, MARAD should acknowledge the conflict between the AFA and the U.S.-Japan FCN and issue an order holding that Petitioners are exempt from the requirements of Section 202 of the AFA and the implementing provisions of Section 203 and 46 C.F.R. Part 356 with respect to the Vessels.

"B. AFA Section 213(g) Exempts Japanese Enterprises and U.S. Enterprises With Japanese Investment From the AFA's Limitations and Restrictions on Foreign Ownership, Foreign Financing and Foreign "Control" of U.S. Fishing Vessels.

"Sections 202 and 203 of the AFA and the implementing regulations published by MARAD on July 19, 2000, codified at 46 CFR Part 356, impose a host of new limitations and restrictions on foreign ownership of fishing vessels, foreign financing of fishing vessels and contractual arrangements between foreign enterprises or U.S. companies with substantial foreign ownership and U.S. fishing vessel owners. As demonstrated above, if applied to Petitioners, these new limitations and restrictions would deprive Petitioners of valuable existing ownership, mortgage, contract and other legal rights and interests in violation of the U.S.-Japan FCN. Application of the new restrictions to bar the Japanese Investors or companies in which they have invested from entering into future transactions with the Vessel Owners, particularly financing and ancillary contractual arrangements, would also violate the U.S.-Japan FCN by substantially impairing the ability of the Japanese Investors to protect their existing rights and interests and to carry on their existing lawful business activities in the United States in conformity with existing law and on an equal footing with U.S. Citizens.

"To avoid these results, Congress included a provision in the AFA to ensure that the Act would not contravene U.S. treaty obligations. Section 213(g) provides in pertinent part:

In the event that any provision of section 12102(c) or section 31322(a) of title 46, United States Code, as amended by this Act, is determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party with respect to the owner or mortgagee on October 1, 2001 of a vessel with a fishery endorsement, such provision shall not apply to that owner or mortgagee with respect to such vessel to the extent of any such inconsistency. * * *

Section 213(g) makes clear that its reach is intended to extend to every "owner" or "mortgagee" holding an ownership or mortgage interest on October 1, 2001, when Sections 202 and 203 of the AFA become effective. Section 213(g) provides explicitly that the exemption does not apply to "subsequent owners and mortgagees" who acquire their interests *after* October 1, 2001 or "to the owner [of the vessel] on October 1, 2001 if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity *after such date*," (emphasis added).

"Petitioners are "owners" and "mortgagees" who acquired their interests in the Vessels prior to October 1, 2001, and who intend to continue to hold those interests on and after October 1, 2001. The U.S.-Japan FCN is a self-executing treaty which is binding on MARAD as a matter of federal domestic law.[60] Under ordinary principles of statutory construction, the AFA and the Treaty should be construed to avoid conflict and to give effect to each. The federal courts have recognized that federal statutes should be construed in a manner to avoid conflict with international treaties. Thus, federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains."[61] Only where Congress has expressed the clear intent to depart from the obligations of a treaty will the provisions of later federal legislation be found to conflict with and supersede U.S. treaty obligations.[62] Here, it is apparent from the terms of Section 213(g) that Congress affirmatively intended to avoid conflict with international treaties such as the U.S.-Japan FCN by exempting "owners" and "mortgagees" from provisions of the AFA which would otherwise be inconsistent with U.S. treaty obligations. The inconsistency between Sections 202 and 203 of the AFA and the requirements of the U.S.-Japan FCN is demonstrated above with respect to Petitioners. Accordingly, under Section 213(g) of the Act, the provisions of Sections 202 and 203 "shall not apply" to Petitioners "to the extent of * * * such inconsistency."

"The exemption provided by Section 213(g) is not limited to existing property rights, mortgage interests or investment interests in existence on October 1, 2001, but rather applies to fully exempt an "owner" or "mortgagee" on October 1, 2001 "to the extent of the inconsistency" between the Act and the Treaty "with respect to" the vessel in which the owner or mortgagee holds an interest. Petitioners qualify as both "owners" and "mortgagees" "with respect to [the Vessels]."[63] Petitioners are, therefore, exempt from the requirements of the AFA "with respect to [the Vessels]" "to the extent of the inconsistency" between the AFA and the Treaty. As demonstrated above, the "inconsistency" between the AFA and the Treaty is three-fold: (1) The Treaty protects the Petitioners' existing direct and indirect ownership interests in the Vessels and the right of the Vessel Owners to continue to own and operate the Vessels in the U.S. fisheries under existing ownership arrangements—rights and interests which the AFA would impair, prohibit or restrict; (2) the Treaty protects the interests of the Non-Citizen Guarantors in the Bank of America preferred mortgages and other loan documents—interests which the AFA would impair, prohibit or restrict; and (3) the Treaty protects the rights of the Japanese Investors (NOMCO, NAMCO and their Japanese shareholders), the other Petitioners and the Vessel Owners to enter into future transactions between or among themselves with respect to the Vessels to protect or further their existing ownership, financial and other business interests in the Vessels—rights which the AFA would impair, prohibit or restrict. Thus, Section 213(g) exempts Petitioners entirely from the restrictions and limitations of Sections 202 and 203 of the AFA and MARAD's implementing rules with respect to the Vessels."

This concludes the analysis submitted by Petitioner for consideration.

Dated: February 16, 2001.

By Order of the Maritime Administrator.

Joel Richard,

Secretary, Maritime Administration.

[FR Doc. 01–4470 Filed 2–22–01; 8:45 am]

BILLING CODE 4910–81–P

[60] *See, e.g., Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd.*, 494 F. Supp 1263, 1266 (E.D.Pa. 1980).

[61] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 370 U.S. 10, 21 (1963).

[62] *Id. See also, Sumitomo Shoji America, Inc.* v. *Avagliano*, et al., 457 U.S.176 (1982).

[63] While the Non-Citizen Guarantors do not currently hold the mortgages on the Vessels, they have interests in those mortgages by virtue of their guaranties in favor of Bank of America. Their rights to succeed to the Bank's interest in the mortgages is impaired by the AFA and MARAD's implementing rules. These rights are protected in any event by virtue of status of the Non-Citizen Guarantors as "owners" within the meaning of Section 213(g).

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–8928]

GREAT PACIFIC—Applicability of Preferred Mortgage, Ownership and Control Requirements To Obtain a Fishery Endorsement

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a petition requesting MARAD to issue a determination that the ownership and control requirements and the preferred mortgage requirements of the American Fisheries Act of 1998 and 46 CFR Part 356 are in conflict with an international investment agreement.

SUMMARY: The Maritime Administration (MARAD, we, our, or us) is soliciting public comments on a petition from the owners and mortgagees of the vessel GREAT PACIFIC—Official No. 608458 (hereinafter the "Vessel"). The petition requests that MARAD issue a decision that the American Fisheries Act of 1998 ("AFA"), Division C, Title II, Subtitle I, Pub. L. 105–277, and our regulations at 46 CFR Part 356 (65 FR 44860 (July 19, 2000)) are in conflict with the U.S.-Japan Treaty and Protocol Regarding Friendship, Commerce and Navigation, 206 UNTS 143, TIAS 2863, 4 UST 2063 (1953) ("U.S.-Japan FCN" or "Treaty"). The petition is submitted pursuant to 46 CFR 356.53 and section 213(g) of AFA, which provide that the requirements of

the AFA and the implementing regulations will not apply to the owners or mortgagees of a U.S.-flag vessel documented with a fishery endorsement to the extent that the provisions of the AFA conflict with an existing international agreement relating to foreign investment to which the United States is a party. This notice sets forth the provisions of the international agreement that the Petitioner alleges are in conflict with the AFA and 46 CFR Part 356 and the arguments submitted by the Petitioner in support of its request. If MARAD determines that the AFA and MARAD's implementing regulations conflict with the U.S.-Japan FCN, the requirements of 46 CFR Part 356 and the AFA will not apply to the extent of the inconsistency. Accordingly, interested parties are invited to submit their views on this petition and whether there is a conflict between the U.S.-Japan FCN and the requirements of both the AFA and 46 CFR Part 356. In addition to receiving the views of interested parties, MARAD will consult with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than March 26, 2001.

ADDRESSES: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, D.C. 20590–0001. You may also send comments electronically via the Internet at http://dms.dot.gov/submit/. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal Holidays. An electronic version of this document and all documents entered into this docket are available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: John T. Marquez, Jr. of the Office of Chief Counsel at (202) 366–5320. You may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR–222, 400 Seventh St., SW., Washington, D.C., 20590–0001 or you may send e-mail to John.Marquez@marad.dot.gov.

SUPPLEMENTARY INFORMATION:

Background

The AFA was enacted in 1998 to give U.S. interests a priority in the harvest of U.S.-fishery resources by increasing the requirements for U.S. Citizen ownership, control and financing of U.S.-flag vessels documented with a fishery endorsement. MARAD was charged with promulgating implementing regulations for fishing vessels of 100 feet or greater in registered length while the Coast Guard retains responsibility for vessels under 100 feet.

Section 202 of the AFA, raises, with some exceptions, the U.S.-Citizen ownership and control standards for U.S.-flag vessels that are documented with a fishery endorsement and operating in U.S.-waters. The ownership and control standard was increased from the controlling interest standard (greater than 50%) of section 2(b) of Shipping Act, 1916 ("1916 Act"), as amended, 46 App. U.S.C. § 802(b), to the standard contained in section 2(c) of the 1916 Act, 46 App. U.S.C. § 802(c), which requires that 75 percent of the ownership and control in a vessel owning entity be vested in U.S. Citizens. In addition, section 204 of the AFA repeals the ownership grandfather "savings provision" in the Anti-Reflagging Act of 1987, Public Law 100–239, § 7(b), 101 Stat 1778 (1988), which permits foreign control of companies owning certain fishing vessels.

Section 202 of the AFA also establishes new requirements to hold a preferred mortgage on a vessel with a fishery endorsement. State or federally chartered financial institutions must now comply with the controlling interest standard of section 2(b) of the 1916 Act in order to hold a preferred mortgage on a vessel with a fishery endorsement. Entities other than state or federally chartered financial institutions must either meet the 75% ownership and control requirements of § 2(c) of the 1916 Act or utilize an approved U.S.-Citizen Mortgage Trustee that meets the 75% ownership and control requirements to hold the preferred mortgage for the benefit of the non-citizen lender.

Section 213(g) of the AFA provides that if the new ownership and control provisions or the mortgagee provisions are determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party, such provisions of the AFA shall not apply to the owner or mortgagee on October 1, 2001, with respect to the particular vessel and to the extent of the inconsistency. MARAD's regulations at 46 CFR § 356.53 set forth a process wherein owners or mortgagees may petition MARAD, with respect to a specific vessel, for a determination that the implementing regulations are in conflict with an international investment agreement. Petitions must be noticed in the **Federal Register** with a request for comments. The Chief Counsel of MARAD, in consultation with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements, will review the petitions and, absent extenuating circumstances, render a decision within 120 days of the receipt of a fully completed petition.

The Petitioners

Great Pacific Limited Partnership (the "Vessel Owner" or the "Partnership"), Wards Cove Packing Company ("Wards Cove"), Dall Head, Inc. ("DHI"), Western Alaska Fisheries, Inc. ("WAF") and Maruha Corporation ("Maruha") are owners of direct and indirect interests in the Vessel Owner and the Vessel. Alyeska Seafoods, Inc. ("Alyeska") is a seafood processor that has entered into loans and other contractual arrangements with the Partnership and its partners and that is owned in substantial part by Maruha. (Each of the above identified parties is referred to hereinafter individually as a "Petitioner" and collectively as the "Petitioners.")

Ownership, Mortgage Structure, and Contractual Arrangements for the Vessel

The Petitioner provided the following information about the ownership, mortgage structure and other contractual obligations of the Vessel:

A. Ownership Structure

Great Pacific Limited Partnership, a Washington limited partnership formed in 1991 for the purpose of acquiring and operating the GREAT PACIFIC, is the owner of the Vessel. DHI, the sole general partner of Great Pacific Limited Partnership, is a Washington corporation which has a 51% interest in the partnership. All of DHI's officers and directors are individual U.S. Citizens and 100% of the issued and outstanding capital stock of DHI is owned by Wards Cove. Wards Cove, a fish processing company which has been engaged in processing salmon and other fish and shellfish species in Alaska since 1912, is owned entirely by U.S. Citizens.

WAF, an Alaska Corporation, is the sole limited partner of Great Pacific

Limited Partnership and has a 49% interest in the partnership. WAF is wholly owned by Maruha, a Japanese corporation.

B. Mortgage Structure

The purchase of the GREAT PACIFIC by Great Pacific Limited Partnership was financed in part by unsecured loans provided by Alyeska to Wards Cove and WAF. The proceeds of these loans, together with additional equity capital provided separately by WAF and Wards Cove, were ultimately contributed as capital to Great Pacific Limited Partnership in proportion to the partners' resulting ownership interests. Great Pacific Limited Partnership used these capital contributions to purchase the GREAT PACIFIC. There are no mortgages or other security interests encumbering the GREAT PACIFIC.

Alyeska assisted in financing the acquisition of the Vessel by the Vessel Owner with the understanding that the fish harvested by the Vessel would be sold to Alyeska and in reliance on the assured revenue stream which sales to Alyeska would provide to the Vessel Owner and its partners.

C. Working Capital Financing and Other Contractual Arrangements

1. Commercial Revolving Credit Line Loan and Security Agreement

Great Pacific Limited Partnership entered into a Commercial Revolving Credit Line Loan and Security Agreement, dated February 10, 1999, with Alyeska under which Alyeska agreed to provide the Partnership an $800,000 working capital revolving line of credit. This line of credit is secured by a security interest in all accounts, contract rights and proceeds arising from the Partnership's sale of fish to Alyeska. The Petitioners state that Alyeska has no right to control the Vessel Owner or the operation, management or harvesting activities of the Vessel under the terms of the Commercial Revolving Credit Line Loan and Security Agreement.

2. Fishing Commitment Agreement

Great Pacific Limited Partnership entered into a Fishing Commitment Agreement with Alyeska, dated April 28, 2000, in which the Partnership agreed that the Vessel will harvest pollock and deliver at least 90% of its total pollock catch each year to Alyeska's processing plant at Dutch Harbor (Unalaska), Alaska. Petitioners note that the terms of the Fishing Commitment Agreement essentially mirror the contractual commitments which Alyeska has made to the other vessel owners delivering to Alyeska under the auspices of the Unalaska Fleet Cooperative. In return for the Partnership's commitment and consistent with Alyeska's arrangements with the other vessel owners who have agreed to deliver fish to its Dutch Harbor processing plant, Alyeska has agreed to pay the Partnership a substantial annual "commitment fee." The term of the Fishing Commitment Agreement is from January 1, 2000 to December 31, 2004, unless sooner terminated by either party. The Agreement is terminable by either party at any time by written notice to the other, with or without cause. The Petitioners state that the Agreement contains no provisions that convey control of the Partnership or the Vessel's operation, management or harvesting activities to Alyeska or any other Non-Citizen.

Requested Action

The Petitioners seek a determination from MARAD under section 213(g) of the Act and 46 CFR 356.53 that they are exempt from the requirements of sections 202, 203 and 204 of the AFA and 46 CFR Part 356 on the ground that the requirements of the AFA and 46 CFR Part 356, as applied to Petitioners with respect to the Vessels, conflict with U.S. obligations under U.S.-Japan FCN. The Petitioners request a determination that the restrictions placed on foreign ownership, foreign financing and foreign control of U.S.-flag vessels documented with a fishery endorsement contained in 46 CFR Part 356 and sections 202, 203 and 204 of the AFA do not apply to Petitioners with respect to:

(1) the existing ownership interests in the Vessels held, directly or indirectly, by the Vessel Owner, WAF, or Maruha;

(2) Alyeska's loans to the Partnership and to the partners of the Partnership; and

(3) the Fishing Commitment Agreement between Alyeska and the Partnership.

Petitioner's Description of the Conflict Between the FCN Treaty and Both 46 CFR Part 356 and the AFA

MARAD's regulations at 46 CFR 356.53(b)(3) require Petitioners to submit a detailed description of how the provisions of the international investment agreement or treaty and the implementing regulations are in conflict. The entire text of the FCN Treaty is available on MARAD's internet site at *http://www.marad.dot.gov*. The description submitted by the Petitioner of the conflict between the FCN Treaty and both the AFA and MARAD's implementing regulations forms the basis on which the Petitioners request that the Chief Counsel issue a ruling that 46 CFR Part 356 does not apply to Petitioners with respect to the Vessels. Petitioner's description of how the provisions of the U.S.-Japan FCN are in conflict with both the AFA and 46 CFR Part 356 is as follows:

"A. The AFA's Limitations and Restrictions on Foreign Involvement in the U.S. Fishing Industry are Inconsistent with U.S. Obligations Under the U.S.-Japan FCN.

"1. *The AFA's Limitations and Restrictions on Foreign Ownership, Foreign Financing and Foreign Control Violate Article VII.*

"(a) *The AFA's Restrictions on Foreign Ownership Impair Petitioners' Existing Ownership Interests.*

"The AFA's new restrictions on foreign investment in fishing vessels will prohibit the Partnership from employing the Vessel in the U.S. fisheries on and after October 1, 2001, because the extent of Japanese investment in the Vessel Owners exceeds the maximum permitted by the AFA.

"A vessel cannot lawfully be employed in the fisheries of the United States unless it is documented as a vessel of the United States with a fishery endorsement issued pursuant to 46 U.S.C. Chapter 121. 46 U.S.C. Chapter 121 sets out the requirements which must be met for a vessel to be eligible for documentation with a fishery endorsement, including requirements related to the citizenship of vessel owners and their investors.

"The GREAT PACIFIC is a fishing vessel, designed and constructed or rebuilt for use in the U.S. fisheries and operated in the U.S. fisheries of the North Pacific Ocean and Bering Sea. The Vessel has no other significant economic uses. The Partnership is eligible to own a vessel with a fishery endorsement under the current standards of 46 U.S.C. Chapter 121, since DHI, a U.S. Citizen, is the sole general partner of the Partnership and owns a majority interest in the Partnership.[9] The Vessel is documented as a vessel of the United States with a fishery endorsement.

"However, the Partnership will be prohibited from owning or operating the Vessel in the U.S. fisheries on and after October 1, 2001, under the new restrictions on foreign investment in fishing vessels imposed by the AFA and MARAD's implementing rules, codified at 46 CFR Part 356.[10] The ownership

[9] *See* 46 U.S.C. § 12102(a)(3) and (c)(1).

[10] 65 FR 44860 *et seq.*, July 19, 2000.

interest held in Great Pacific Limited Partnership by WAF, a Non-Citizen, is 49%. This exceeds the maximum percentage interest—25%—permitted to be held by Non-Citizens under Section 202(a) of the AFA, effective on and after October 1, 2001.[11] The AFA requires MARAD to revoke the fishery endorsement of any fishing vessel whose owner does not comply with this new requirement.[12] Accordingly, unless exempted from the AFA's new requirements, the Partnership will no longer be permitted to own and operate the GREAT PACIFIC in the U.S. fisheries as of October 1, 2001.

"(b) *The AFA's Impairment of Petitioners' Existing Ownership Interests Violates Article VII.1 and the Grandfather Provision of Article VII.2.*

"The AFA's impairment of Petitioners' existing ownership interests in the Vessel violates their right to "national treatment" under Article VII.1 and the grandfather provision of Article VII.2 of the U.S.-Japan FCN.

"The U.S.-Japan FCN was one of a series of similar Friendship, Commerce and Navigation ("FCN") Treaties entered into by the United States with various countries after World War II, based on a standard State Department treaty text. All of these treaties reflect U.S. post-war policy to encourage and protect international trade and investment. Herman Walker, Jr., the principal author of the standard FCN treaty text and one of the principal State Department negotiators during this period, has described the FCN treaties as "concerned with the protection of persons, natural and juridical, and of the property interests of such persons."[13]

"Article VII.1 of the U.S.-Japan FCN guarantees broad "national treatment" for the nationals and enterprises of the U.S. and Japan when doing business within the jurisdiction of the other country. Article XXII.1 of the U.S.-Japan FCN defines "national treatment" as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." The principle of national treatment is the central principle of all of the post-war FCN treaties. National treatment requires that each State Party must treat nationals of the other in the same way that it treats its own nationals. The treaties focus on business and investment. "The right of corporations to engage in business on a national-treatment basis may be said to constitute the heart of the treaty as an investment instrument."[14] In a case involving interpretation of the U.S.-Japan FCN, the United States Supreme Court noted that the purpose of the FCN treaties was "to assure [foreign corporations] the right to conduct business on an equal basis without suffering discrimination based on their alienage."[15] "[N]ational treatment of corporations means equal treatment with domestic corporations."[16]

"The Preamble of the U.S.-Japan FCN provides that guaranteeing nationals of each Party "national * * * treatment unconditionally" is one of the two general principles upon which the U.S.-Japan FCN was based. Use of the word "unconditionally" in this context clearly demonstrates the strength of the drafters' general intent. Accordingly, the exceptions to the principle of national treatment stated in the U.S.-Japan FCN must be narrowly construed.

"The AFA's retroactive prohibition of the ownership interest in the Partnership acquired by WAF in compliance with existing law clearly denies national treatment to WAF, Maruha and the Partnership. The AFA's new limitation on foreign ownership of fishing vessels is thus inconsistent with the most fundamental principle of the U.S.-Japan FCN.

"The first sentence of Article VII.2 of the U.S.-Japan FCN provides a limited exception to the principle of national treatment for enterprises engaged in "the exploitation of land or other natural resources." Even in that context, however, the second sentence of Article VII.2 (referred to as the "grandfather" provision of Article VII.2) prohibits application of new restrictions and limitations to Japanese nationals or enterprises which have previously "acquired interests" in enterprises owning U.S. fishing vessels or have previously engaged in the business activities now to be restricted. Article VII.2 provides in pertinent part:

> Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on * * * enterprises engaged in * * * the exploitation of land or other natural resources. *However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party.*[17]

The grandfather provision of Article VII.2 thus provides that any new limitations on national treatment placed on alien participation in the sectors covered by the first sentence of Article VII.2 shall not apply to existing enterprises engaged in business within those sectors at the time such new limitations are adopted.

"A study commissioned by the State Department of its past interpretations of the FCN treaties notes that, under the grandfather provision of Article VII.2, "protection is afforded to any privilege granted * * * prior to a change in national treatment; hence at a minimum these foreign enterprises are guaranteed the maintenance of their existing operations."[18] "[R]egulations that force divestiture of interests already acquired or established prior to promulgation of such regulation * * * raise Art. VII questions."[19] Herman Walker, Jr. stated the purpose of the Article VII.2 grandfather provision clearly: "The aim is to * * * guarantee duly established investors against subsequent discrimination. The failure to find a welcome as to entry is of much less importance than would be a failure, once having entered and invested in good faith, to be protected against subsequent harsh treatment."[20] In describing the import of the phrase

[11] *See* 46 U.S. 12102(c)(1), as amended. The AFA makes two principal changes to the existing limitation on foreign ownership of fishing vessels: (1) The required percentage of U.S. Citizen ownership is increased from "a majority" to 75%; and (2) this new test is to be applied both "at each tier of ownership and in the aggregate," whereas the existing standard is applied solely at each tier of ownership, allowing foreign interests "in the aggregate" to exceed 50%, as long as majority U.S. ownership is maintained "at each tier." *See* 46 CFR 221.3(c) (a U.S. citizen is a Person who "at each tier of ownership" satisfies the percentage U.S. ownership requirement). *Compare*, 46 USC 12102(c) and 46 CFR 67.31(c), with 46 U.S.C. 12102(c)(1), as amended by Section 202(a) of the Act, and 46 CFR 356.9. In addition, Section 204 of the AFA repeals a provision of prior law which permits 100% foreign owned corporations to own vessels, such as the GREAT PACIFIC, that were documented with a fishery endorsement and operated in the U.S. fisheries prior to July 1987.

[12] AFA Section 203(c).

[13] Herman Walker, Jr., "Modern Treaties of Friendship, Commerce and Navigation," 42 Minn. L. Rev. 805, 806 (1958) (hereinafter, "Modern Treaties").

[14] Herman Walker, Jr., "The Post-War Commercial Treaty Program of the United States," 73 Pol. Sci. Q. 57, 67 (1958).

[15] *Sumitomo Shoji America* v. *Avagliano*, 457 U.S. 176, 187–88 (1982).

[16] *Id.* at 188 n. 18.

[17] Emphasis added.

[18] Ronny E. Jones, "State Department Practices Under U.S. Treaties of Friendship, Commerce, and Navigation" (1981) (hereinafter "Jones Study") at 57. Petitioners presume that MARAD has access to the Jones Study and to the Sullivan Study referenced below. Petitioners will provide copies of these studies to MARAD on request.

[19] *Id.* at 107.

[20] Modern Treaties at 809.

"new limitations," another State Department study states,

> The net effect [of the second sentence of Article VII.2] is that, although not obligated to allow alien interests to become established in those fields of activity, *rights which have been extended in the past shall be respected and exempted from the application of new restrictions.*[21]

The second sentence of Article VII(2) is a grandfather clause intended in the interest of fairness to protect legitimately established alien enterprises against retroactive impairment."[22]

"Both State Parties placed great importance on the grandfather provision of Article VII.2 because they recognized that it would not only protect existing property rights but would entitle foreign-owned enterprises to continue to operate in the same manner as before, notwithstanding later limitations placed on the rights of foreign-owned entities to engage in such business activities. It was a "principal negotiating point" of the U.S. side to ensure that the reservations in Article VII.2 would not permit retroactive application of any new limits to companies already engaged in relevant business activities.[23]

"The U.S. negotiators therefore resisted efforts to modify the grandfather provision of Article VII.2, despite strong Japanese efforts to restrict its application. As an indication of the importance the Japanese negotiators attached to the provision, the Japanese Embassy at one point late in the negotiations indicated that the Ministry of Finance might be persuaded to withdraw "all other objections" to the draft treaty if the sentence granting grandfather rights to existing businesses were deleted.[24] Eventually, the Japanese negotiators accepted the language in Article VII.2 without any change after the U.S. agreed to the language appearing in the second sentence of Paragraph 4 of the Protocol. The U.S. State Department agreed to the Protocol language only on the understanding that it in no way undermined the prohibition against application of discriminatory laws to existing enterprises in the second sentence of Article VII.2.[25]

"As adopted, the second sentence of Article VII.2 follows the standard treaty text developed by the State Department and used as the basis for more than a dozen FCN treaties. The Sullivan Study notes the breadth of the protection this sentence affords existing companies otherwise subject to VII.2. The Sullivan Study indicates that an enterprise protected by the Article VII.2 grandfather provision is not only protected as to existing property interests or contract rights, but "is able to enjoy what may be considered normal business growth in terms of acquiring new customers and increasing the dollar volume of its business, but it cannot claim expanded privileges. * * *"[26]

"In short, the protections afforded existing investments and existing businesses by the second sentence of Article VII.2 were seen by the U.S. as a key part of the U.S.-Japan FCN and similar FCN treaties, providing substantial protections to foreign investors and businesses. The provision affords WAF and Maruha the right to continue to hold their direct and indirect investments in the Partnership and the Vessel and, more generally, to continue to transact business with the Partnership on the same basis as permitted prior to passage of the AFA. Similarly, the Article VII.2 grandfather provision guarantees the Partnership the right to own and operate the Vessel in the U.S. fisheries on equal terms with wholly domestic enterprises.

"Maruha is clearly entitled to protection as a Japanese enterprise which, at the time the AFA was adopted, was "engaged in * * * activities" within the United States which the AFA, but for Section 213(g), would prohibit, limit or restrict. WAF, Alyeska and the Partnership likewise come within the protection of the Article VII.2 grandfather provision by reason of the direct and indirect ownership interests in them held by Maruha and, in the case of Alyeska, by Marubeni. Thus, the Article VII.2 grandfather provision protects the rights of Maruha, WAF, Marubeni and Alyeska to invest in or transact business with the Partnership and protects the Partnership's right to continue to own and operate the Vessels in the U.S. fisheries.

"As noted above, the Article VII.2 grandfather provision not only protects pre-existing rights and interests acquired, directly or indirectly, by Japanese nationals prior to a discriminatory change in the law, but protects pre-existing enterprises from such changes. Accordingly, the Article VII.2 grandfather provision, together with Section 213(g) of the AFA, exempts the Petitioners from the restrictions of Sections 202, 203 and 204 of the AFA and 46 CFR Part 356, not only (a) with respect to their existing direct and indirect ownership interests in the Partnership and/or the Vessel, but also (b) with respect to existing loan, financing and other contractual arrangements related to the Vessel and (c) with respect to future dealings between or among the Petitioners related to the Vessel and deemed necessary or appropriate to protect or further the existing interests of the Petitioners in the Vessel.

"2. *The AFA's Restrictions on Foreign Financing of Fishing Vessels Violate Article VII.*

"(a) *The AFA's Restrictions on Foreign Financing of Fishing Vessels Impair Petitioners' Rights and Interests With Respect to Vessel Financing.*

"The AFA and MARAD's implementing regulations impair the existing loan, working capital financing and other contractual arrangements described above between Alyeska, WAF, Wards Cove and the Partnership by requiring that all such arrangements be reviewed and approved by MARAD prior to October 1, 2001, under the new standards imposed by the AFA and MARAD's implementing rules. Failure to obtain MARAD approval will result in disqualification of the Partnership to own and operate the Vessel in the U.S. fisheries. Application to Petitioners of the AFA's new restrictions on foreign financing and "control" of fishing vessels impairs Petitioners" rights in violation of Article VII.1.

"The AFA and MARAD's implementing rules require that the terms of all loans provided by a Non-Citizen to a fishing vessel owner must be approved by MARAD under the AFA's new "control" standards.[27] The AFA contains a new definition of impermissible Non-Citizen "control"[28] and requires transfers of "control" of fishing vessels to be "rigorously scrutinized" by MARAD under this new standard.[29] MARAD has implemented the AFA's new "control" standard by adopting a host of new restrictions and limitations on financing, contract and other business arrangements between fishing vessel owners and Non-

[21] Charles H. Sullivan, "State Department Standard Draft Treaty of Friendship, Commerce and Navigation" (undated) (hereinafter "Sullivan Study") at 149 (emphasis added).

[22] *Id.* at 148.

[23] Annex, Attachment Department of State Incoming Telegran dated March 20, 1953, p. 1.

[24] Annex, Attachment 3, Memorandum from Franik A. Waring, Counselor of U.S. Embassy for Economic Affairs (undated excerpt).

[25] Annex, Attachment 2, Department of State Incoming Telegram dated March 20, 1953, p. 1, and Attachment 4, Office Memorandum dated March 23, 1953, pp. 1–2.

[26] Sullivan Study at 150.

[27] *See* AFA Section 202(a), adding 46 U.S.C. § 12102(c)(4)(A); *see also*, 46 CFR §§ 356.15(d) and 356.21(d).

[28] AFA Section 202(a), codified at 46 U.S.C. 12102(c)(2).

[29] AFA Section 203(c)(2).

Citizens.[30] Unless MARAD reviews and approves the terms of the loan documents and contracts previously executed by the Partnership and its partners in favor of Alyeska prior to October 1, 2001 under these new standards, the Vessel will lose its fishery endorsement and the Partnership will no longer be permitted to own or operate the Vessel in the U.S. fisheries.[31] This, in turn, will destroy the value of the Vessel and destroy the ability of the Partnership to generate income to repay the loans. By imposing new conditions and restrictions on the terms of existing loan documents and contracts, including a new requirement of administrative review and approval of those documents and contracts under AFA's new "control" standards, the AFA and MARAD's implementing regulations will impair the contract rights of Petitioners under existing loan documents and contracts.

"MARAD has taken the position that loans by a Non-Citizen minority investor to the U.S. Citizen general partner of a vessel-owning limited partnership are likely to involve an impermissible degree of Non-Citizen control.[32] Presumably, MARAD would take the same position with respect to a loan provided by a parent company or other affiliate of the minority investor, such as Maruha or Alyeska, to fund a portion of the equity contribution of a U.S. Citizen general partner, such as Wards Cove or Dall Head, Inc. Thus, the MARAD is unlikely to approve Alyeska's existing loans to the Vessel Owner and its partners under MARAD's interpretation of the AFA.[33]

"Further, the AFA's restrictions on future financing transactions between Alyeska or other Non-Citizen Petitioners and the Partnership or its U.S. Citizen partners will substantially impair the rights and interests of the Non-Citizen Petitioners in violation of Article VII.1. Existing law permits a Non-Citizen to make loans to the owner of a fishing vessel, secured by a preferred mortgage on the vessel.[34] MARAD has interpreted the AFA's requirements to prohibit Non-Citizen fish processors, such as Alyeska, from holding mortgages or other security interests in fishing vessels.[35] Thus, in the case of Alyeska, the AFA's requirements will prevent Alyeska from making future secured loans to the Partnership, if that should become necessary or desirable to preserve the Partnership's ability to provide fish to Alyeska or to allow the Partnership to make repairs or improvements to the Vessel.

"The AFA's restrictions on foreign financing of fishing vessels will limit and restrict the ability of Maruha and WAF, directly or through Alyeska, to protect their existing investment in the Vessel Owner by offering future financing for major vessel repairs or improvements which may become necessary to permit the Vessel Owner to operate profitably—or at all. Since financing from a financial institution may be unavailable to the Vessel Owner, the ability of Alyeska, WAF and/or Maruha to make loans to support the Vessel's continuing operations may be the only means available to protect the Vessel Owner from insolvency. Thus, the AFA's restrictions on the ability of the Non-Citizen Petitioners to make loans to the Vessel Owner without MARAD approval or to take security in the Vessel jeopardize the existing financial and business interests of Alyeska, WAF and Maruha in the Vessel Owner and the Vessel.

"Finally, the new restrictions imposed by the AFA and MARAD's regulations on the ability of Alyeska to make loans to the Vessel Owner will disrupt Alyeska's ability to ensure a reliable supply of fish to its processing facility. Alyeska's ability to provide financing for operations and for the repair or improvement of the Vessel is a necessary means to ensure a stable supply of fish to its processing plant. A processor's agreement to provide financing to qualified U.S. vessel owners in return for the vessel owner's agreement to sell the vessel's catch exclusively to the processor is a customary means by which vessel owners finance their working capital needs and the acquisition, repair or improvement of their vessels and by which processors secure a reliable supply of fish to their plants. Such financing arrangements between vessel owners and processors, both wholly domestic and Non-Citizen processors, are common and traditional in the Alaska fishing industry. Further, the continued ability of the Vessel Owner to supply fish to Alyeska may depend on the ongoing availability of financing from Alyeska for operating funds, emergency repairs or improvements for which bank financing is not available or not available on a timely basis. Non-Citizen processors, such as Alyeska, which have invested many millions of dollars in shore-based processing plants in remote locations in Alaska, must have the ability, like their wholly domestic competitors, to secure and protect the supply of fish to their plants by financing the repair, improvement or operation of fishing vessels in return for continuing fish deliveries. Just as the Petitioners' existing ownership and loan arrangements with respect to the Vessel are protected by the Treaty, the Treaty protects the ongoing ability of the Non-Citizen Petitioners to modify and restructure existing loans and security arrangements with the Vessel Owner and Wards Cove or Dall Head and to make new loans to and enter into ancillary contractual arrangements with the Vessel Owner and its general partner to protect or further their existing business interests in the Vessel.

"(b) *The Restrictions on Foreign Financing of Fishing Vessels Imposed by the AFA and MARAD's Implementing Rules Violate Article VII.1.*

"The new restrictions on foreign financing of fishing vessels imposed by the AFA and MARAD's implementing regulations violate Article VII.1's national treatment guaranty by (1) subjecting the terms of existing and future loans provided to the Partnership by Alyeska, WAF or Maruha to a new requirement of administrative review and approval by MARAD under the new foreign "control" restrictions of the AFA and MARAD's implementing rules;[36]

[30] *See, generally,* 46 CFR 356.11, 356.13–15, 356.21–25, 356.39–45.

[31] *See* 46 CFR 356.15(d), 356.21(d).

[32] Personal communication with MARAD Office of General Counsel, January 9, 2001 (to the effect that, as a general rule, MARAD does not allow a non-citizen to provide the start up capital to the U.S. Citizen general partner of a vessel-owning limited partnership). *See also,* 46 CFR 356.11(b)(6) (provision of start up capital by Non-Citizen may imply impermissible Non-Citizen control); 356.21 (approval of standard loan documents limited to the loan documents of financial institutions); 356.23 (approval of standard loan convents limited to loans from an "unrelated Non-Citizen Lender") and 356.45(b) (approval of unsecured loans to vessal owners from Non-Citizens limited to loans from Non-Citizens "not affiliated with any party with whom the owner * * * have entered into a mortgage, long-term or exclusive sales or purchase agreement, or other similar contract").

[33] While the amount of the line of credit provided to the Vessel Owner under the Commercial Revolving Line of Credit Loan and Security Agreement is less than the annual value of the fish sold to Alyeska by the Vessel Owner, the sum of the outstanding balance on Alyeska's loan to Wards Cove and the line of credit exceeds that amount. Thus, these loans, in combination, would not be permitted under 46 CFR 356.45(a).

[34] *Compare* 46 U.S.C. 31322(a), as now in effect, *with* 46 U.S.C. 31322(a), as amended by AFA Section 202(b).

[35] 65 Fed. Reg. at 44871 c.2 (July 19, 2000) ("[A]dvancements of funds from Non-Citizen processors will not be permitted where the security for the loan is a security interest in the vessel")

[36] The requirement of MARAD review and approval clearly impairs the Petitioners' existing financing arrangements. Since MARAD has made clear that it generally will not approve loans by a Non-Citizen minority investor to fund equity contributions by a U.S. Citizen generally partner, Alyeska's loans to Wards Cove here will almost certainly result in revocation of the Vessel's fishery

Continued

and (2) prohibiting Alyeska, WAF or Maruha from making loans to the Vessel Owner or taking preferred mortgages or other security interests in the Vessel as security for existing or future loans.

"Article VII.1 extends full national treatment protection "with respect to engaging in all types of commercial, industrial, financial and other business activities." The negotiating history of the U.S.-Japan FCN leaves no doubt that loans and lending by foreign-owned lenders are entitled to full national treatment under the first sentence of Article VII.1.

"At the fourth informal meeting of the U.S. and Japanese negotiators, the Japanese negotiators argued that foreign-owned banks should be denied national treatment, as well as most-favored-nation protection. One reason given was that their loans could result in the foreign-owned bank lender controlling key industries.[37] For this and other reasons, Japan suggested rewriting Article VII.1, and among other changes deleting "financial" from the activities provided national treatment in the first sentence of the provision.

"A cable from U.S. State Department headquarters in Washington noted that the Japanese proposal, and in particular its interest in denying national treatment to bank loans, reflected an attitude that creates a "difficulty going to heart of treaty."[38] The State Department opposed any change that would delete the word *financial* from the first sentence of Article VII.1. Subsequently, the Japanese side suggested instead adding the word "lending" to the exception provided in the first sentence of Article VII.2, so the phrase would have read "banking involving depository, lending or fiduciary functions." In response, the State Department reiterated its opposition to any change that would deny foreign lenders the right to full national treatment under Article VII.1.

"A Department cable explained why the exception to national treatment provided by the first sentence of the U.S. draft of Article VII.2 was limited to only the depository and fiduciary functions of banks.[39] The cable states: "Mr. Otabe is incorrect in supposing that the U.S. reservation for banking is based on the reason he alleges. The reservation has to do with receiving and keeping custody of deposits from the public at large: that is, the safekeeping of other people's money, a function of particular trust. It does not have to do with the lending activities of a bank; and the Department does not feel that a reservation is either appropriate or necessary as to a bank's lending its own money."[40] During the second round of informal meetings, the U.S. negotiators continued to oppose adding loans to the banking functions excluded from full national treatment by the first sentence of Article VII.2, and the Japanese government eventually agreed to withdraw its proposed change.[41]

"The exception to national treatment for certain banking functions in the first sentence of Article VII.2 is the same as in the standard FCN treaty text. The Sullivan Study notes that "this reservation is stated in terms intended to circumscribe it as much as possible, thereby maximizing the extent to which the banking business remains subject to the rule [of national treatment] set forth in Article VII(1)."[42] The Sullivan Study notes that the two areas reserved, depositary and fiduciary functions, involve the custody and management of other people's money, and therefore are the most sensitive areas of banking.

"It is clear, therefore, that the reference in the first sentence of Article VII.2 to "banking involving depository or fiduciary functions" does not include the lending activities of Alyeska, its shareholders or affiliates. Both the U.S. and Japanese negotiators were in full agreement as to the meaning of this phrase. Thus, the financing activities of banks and other lenders are entitled to the full national treatment under Article VII.1.[43]

"The provisions of the AFA and MARAD's implementing rules which restrict the right of Japanese-owned entities to make loans secured by mortgages on U.S. vessels or to make such loans without prior MARAD approval of the loan terms are inconsistent with the guaranty of national treatment in Article VII.1. The rationale that such loan activities may be restricted on the grounds that they could result in a degree of control over sensitive industries was specifically considered by the U.S. negotiators and rejected as a valid reason for limiting the Treaty's protections for such lending activities. The control argument presented by Japan at that time is the same argument used to justify the restrictions of the AFA. Although the negotiating history deals largely with banking, the language of Article VII.1 extends the protections of national treatment broadly to "all types of * * * financial * * * activities." Under Article VII.1, neither State Party may restrict loans by foreign-owned entities, whether secured by vessels of their national flag or otherwise.

"The AFA and MARAD's implementing rules impose new restrictions on the ability of Alyeska, Maruha and WAF, going forward, to protect their existing financial interests in the Partnership and the Vessel by, *e.g.*, re-financing existing loans, advancing new loans for repair or improvement of the Vessel or entering into other financing or contractual arrangements with the Vessel Owner. These restrictions are inconsistent with Article VII.1 of the Treaty. Article VII.1 extends the Treaty's protection both to loans, mortgages and other financing arrangements that are now outstanding under the terms of existing financing documents and to future financing activities by Alyeska, Maruha or WAF involving the Vessel or the Vessel Owner.

Application of the AFA's new "control" standards to restrict the ability of Alyeska, its shareholders or affiliates to do business with the fishing vessel owners that supply fish to Alyeska's processing plant, as they have done in the past and on the same terms as Alyeska's U.S. Citizen competitors, would deny national treatment to Alyeska and its Japanese investors. The State Department has recognized that the exception to the requirement of national treatment that may apply with respect to the ownership of fishing vessels under the first sentence of Article VII.2 does not apply to fish processors.[44] Article VII.1 applies, and

endorsement unless those loans are exempted from the AFA's requirements. *See* AFA Section 203(e).

[37] Annex, Attachment 5, Memorandum of Conversation held March 4, 1952, pp. 2–3.

[38] Annex, Attachment 6, Dept. of State Outgrown Telegram dated March 10, 1952, p. 1. *See also* Annex, Attachment 5 at p. 3, noting that the "* * *" first paragraph of Article VII can be considered the heart of the treaty; it is the basic 'establishment' provision, prescribing the fundamental principle governing the doing of business and the making of investments, in a treaty which is, above all, a treaty of establishment."

[39] Annex, Attachment 7, Dept. of State Outgoing Telegram dated May 21, 1952, p. 3.

[40] *Id.*

[41] Annex, Attachment 8, Memorandum of Conversation concerning discussions on the draft FCN held between October 15, 1952 and March 11, 1953, p. 15.

[42] Sullivan Study at 144.

[43] To the extent that it could be argued that the first sentence of Article VII.2 might permit restrictions on foreign financing of fishing vessels, the grandfather provision of Article VII.2 would clearly protect Alyeska, as the holder of existing debt obligations of the Partnership or its partners. Since Maruha, Marubeni and Western Alaska Fisheries clearly "acquired interests" in Alyeska and the Partnership prior to enhancement of the AFA, those enterprises would be protected from discrimination in the ongoing conduct of their businesses.

[44] Annex, Attachment 9, Letter to the Chairman of the House of Representative Committee on Merchant Marine and Fisheries from Robert Lee,

it extends the protection of full and unconditional national treatment to fish processors with Japanese ownership, such as Alyeska. The discriminatory restrictions imposed under the AFA on the ability of Alyeska, to enter into future financing and other contractual arrangements with the Vessel Owners clearly violate Article VII.1.

"For these reasons, Petitioners seek a determination by MARAD that Sections 202 and 203 of the AFA and MARAD's implementing regulations do not apply to Petitioners with respect to (a) existing loans, loan documents and security agreements previously executed by the Vessel Owner in favor of Alyeska, including the vessel acquisition loans, the revolving line of credit and the Fishing Commitment Agreement; or (b) future financing, marketing or other contractual arrangements between the Non-Citizen Petitioners and the Vessel Owner with respect to the Vessel, including loans for repair, improvement or replacement of the Vessel, working capital financing and exclusive marketing agreements.

3. *Application of the AFA and MARAD's Implementing Rules to Petitioners Would Result in a "Taking" in Violation of Article VI.3.*

"The first sentence of Article VI.3 of the Treaty states that "[p]roperty of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation." This "takings" provision precludes expropriations and other measures that substantially impair a Japanese national's direct and indirect property rights. Applying the AFA's new restrictions to prohibit WAF from holding its pre-existing ownership interest in the Vessel Owner or to subject Alyeska's contractual rights under the terms of existing loans to the Vessel Owner and its partners to a new condition of MARAD review and approval—particularly, since MARAD has made clear that it will not approve such loans—would deprive WAF and Alyeska of their property in violation of Article VI.3. Similarly, applying the AFA's new restrictions to prohibit the Vessel Owner from owning and operating the Vessel in the U.S. fisheries would deprive the Vessel Owner and its Japanese investors of their property interests in the Vessel and its fishery endorsement in violation of Article VI.3.

"The term "property" in Article VI.3 includes not simply direct ownership but also a wide variety of property interests, such as those which the Non-Citizen Petitioners have in the Vessel Owners and in the Vessels. The Protocol to the U.S.-Japan FCN explicitly states that "[t]he provisions of Article VI, paragraph 3 * * * shall extend to interests held directly *or indirectly* by nationals and companies of either Party in property which is taken within the territories of the other Party." [45] As the United States delegates made clear during the negotiation of the Treaty, the phrase "interests held directly or indirectly"

> is intended to extend to every type of right or interest in property which is capable of being enjoyed as such, and upon which it is practicable to place a monetary value. These direct and indirect interests in property include not only rights of ownership, but [also] * * * lease hold interest[s], easements, contracts, franchises, and other tangible and intangible property rights.[46]

In short, "all property interests are contemplated by the provision." [47] This necessarily includes the direct and indirect ownership interests which Maruha and WAF have in the Vessel Owner and in the Vessel, as well as the rights of Alyeska, an affiliate of Maruha and WAF, under promissory notes, a loan agreement and a marketing agreement executed by the Vessel Owner.

"The concept of a taking in this context is broad and "is considered as covering, in addition to physical seizure, a wide variety of whole or partial sequestrations and other impairments of interests in or uses of property." [48] Here, the AFA's new restrictions on foreign investment and foreign financing will deprive the Vessel Owner of its fishery endorsement and prohibit the Vessel Owner from using its Vessel in the U.S. fisheries. In effect, the AFA will either deprive the Petitioners of the economic value of their interests in the Vessel by prohibiting its only productive use or force divestiture of those interests. The impairment of the Vessel Owner's property interest in its fishery endorsement and the Vessel Owner's presently existing right to use its Vessel in the U.S. fisheries; the impairment of WAF's existing ownership interest in the Vessel Owner; and the impairment of Alyeska's right to hold the debt obligations of the partners of the Vessel Owner, free from discriminatory conditions subsequently attached by law, are each a sufficient impairment of Petitioner's rights and interests as to constitute a violation of Article VI.3.

"Further, a taking is permitted under the Treaty only for a "public purpose," and it is clear that application of the AFA's ownership restrictions to the Vessel Owner so as to force a divestiture by WAF or the Vessel Owner to a private party which qualifies as a U.S. Citizen under the AFA would not satisfy the "public purpose" requirement of the U.S.-Japan FCN. Even if such a forced sale to a private party could be characterized as having a "public purpose," the AFA makes no provision for the "prompt payment of just compensation," as required by Article VI.3. The fact that the AFA and 46 CFR Part 356 fail to provide any compensation scheme—let alone "adequate provision * * * at or prior to the time of taking for the determination and payment thereof"—is another basis for concluding that the AFA's retroactive limitations on foreign ownership and foreign financing of fishing vessels are inconsistent with Article VI.3 of the U.S.-Japan FCN.

"4. *The AFA and MARAD's Implementing Rules Impair Petitioners' Legally Acquired Rights and Interests in Violation of Article V.*

"The new restrictions imposed by the AFA and MARAD's implementing rules on foreign involvement in the U.S. fishing industry are "unreasonable or discriminatory measures" that impair the legally acquired rights and interests of Petitioners in violation of Article V of the Treaty.

"Article V provides that "[n]either Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established * * * " The provision follows the standard FCN treaty language, except that the language was moved from Article VI.3 in the standard text to a new Article V and certain additional language, not relevant here, was added. According to the Sullivan Study, the provision "offers a basis in rather general terms for asserting protection against excessive governmental interference in business activities or particular activities not specifically covered by the treaty." [49] Herman Walker observed that this language is designed "to account for the possibility of injurious governmental harassments short of expropriation or

August 17, 1964, as published in the Jones Study, p. 80.

[45] Protocol, ¶ 2 (emphasis added).

[46] Annex, Attachment 10, Memorandum of Conversation dated April 15, 1952 at p. 3.

[47] *Id.*

[48] Sullivan Study at 116 (emphasis added).

[49] Sullivan Study at 115.

sequestration."[50] A State Department memorandum to Congress, discussing language very similar to Article V in another treaty, noted that the language "affords one more ground, in addition to all the other grounds set forth in the treaty, for contesting foreign actions which appear to be injurious to American interests."[51] The negotiating history confirms that Article V was intended as a general provision prohibiting discrimination against foreign-owned entities not subject to other provisions of the U.S.-Japan FCN. During the negotiations, Japan proposed adding language prohibiting the denial "of opportunities and facilities for the investment of capital." The proposal was not adopted after the U.S. opposed it on the grounds that Article VII fully addressed investment activities and that the additional language was not appropriate in Article V, which addresses issues not limited to investment.[52]

"Thus, Article V was intended as a general prohibition of discriminatory restrictions not covered by other provisions of the U.S.-Japan FCN and of restrictions that do not rise to the level of a "taking." Article V prohibits deprivations of both most-favored nation treatment and national treatment.[53] Thus, it would apply to the discriminatory prohibitions and restrictions which the AFA and MARAD's implementing regulations impose on the Non-Citizen Petitioners' existing ownership interests and other contract rights and on the Non-Citizen Petitioners' ongoing ability to protect those rights and interests by entering into future financing and other transactions with the Vessel Owner.

"The intrusive and discriminatory restrictions imposed by the AFA and MARAD's implementing rules on transactions between Non-Citizens processors, such as Alyeska, and U.S. fishing vessel owners place Non-Citizen processors at a significant competitive disadvantage. U.S. Citizen processors and other lenders are free to make loans and to enter into contracts with fishing vessel owners without restriction. U.S. Citizen processors remain free to secure a reliable supply of fish by making loans, unrestricted in amount, for fishing vessel acquisitions, conversions and improvements in return for exclusive marketing relationships while Non-Citizen processors are prohibited from making similar arrangements. MARAD has stated that Non-Citizen processors will be flatly prohibited from taking security in fishing vessels to secure loans to vessel owners.

"Under 46 CFR 356.45(a), a Non-Citizen lender is not even permitted to make an unsecured loan to a fishing vessel owner, if the amount of the loan exceeds the annual value of the vessel's catch. Under § 356.45(b), a Non-Citizen lender is not permitted to make an unsecured loan, if the lender is "affiliated with any party with whom the owner * * * has entered into a mortgage, long-term or exclusive sales or purchase agreement, or other similar contract. * * * ." On their face, these provisions severely restrict permissible future loans by Alyeska, WAF or Maruha to the Vessel Owner. Thus, loans by Alyeska, WAF or Maruha to the Vessel Owner, which may be necessary to protect their existing interests, are severely restricted under MARAD's interpretation of the AFA.

"Further, the requirement of MARAD review and approval is itself an unreasonable and discriminatory burden, particularly in the absence of coherent published standards.[54] The AFA and MARAD's rules thus impose "unreasonable or discriminatory measures" on Non-Citizen fish processors and other lenders with Japanese ownership, such as Alyeska, WAF and Maruha, impairing their legally acquired rights and interests and their ongoing ability to protect those interests in violation of Article V of the U.S.-Japan FCN.

"5. *Article XIX.6 Does Not Authorize the Provisions of the AFA and MARAD's Implementing Rules which are Otherwise in Violation of the U.S.-Japan FCN.*

"Article XIX.6 provides that notwithstanding any other provision of the Treaty, "each Party may reserve exclusive rights and privileges to its own vessels with respect to the * * * national fisheries. * * *" This provision does not authorize the discriminatory limitations on Japanese investment, financing and related contractual arrangements contained in the AFA and MARAD's implementing rules.

"Even if Article XIX.6 is interpreted as applying to fishing vessels,[55] it would be irrelevant to the issues presented here with respect to the AFA. Consistent with the Treaty text authorizing a Party to reserve exclusive rights to "its own vessels," the State Department has interpreted Article XIX.6 merely to permit the U.S. to reserve the right to catch or land fish in the U.S. national fisheries to "U.S. flag vessels."[56] The text of Article XIX.6 says nothing about and certainly does not authorize restrictions on foreign ownership or financing of U.S. flag fishing vessels or the ability of foreign-owned enterprises to do business with the owners of U.S. flag fishing vessels—restrictions that otherwise clearly violate Article VII of the Treaty.

"The historical record of the negotiations provides further evidence that Article XIX.6 was not intended to override Article VII's national treatment requirements with respect to foreign investment in or financing of U.S. flag fishing vessels or other dealings between foreign-owned enterprises and fishing vessel owners. At one point, the Japanese negotiators proposed rewriting Article XIX.6 to provide that the national treatment provisions of the Treaty would not extend to "nationals, companies and vessels of the other Party any special privileges reserved to national fisheries."[57] The State Department understood the Japanese suggestion as an attempt to obtain a blanket exception from the entire Treaty for national fisheries.[58] The U.S rejected the Japanese proposal and the language of Article XIX.6 remained unchanged.

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[50] Herman Walker, Jr., "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 Am. J. Comp. Law 229 at 236 (1956).

[51] Annex, Attachment 11, Department of State Instruction dated February 15, 1954, p. 2, (discussing the applicability of Article V of the U.S.-Japan FCN to American lawyers doing business in Japan, and citing May, 1952 memorandum to U.S. Committee on Foreign Relations).

[52] *Id. See also* Annex, Attachment 12, Department of State Division of Communications & Records Outgoing Airgram dated October 28, 1952, pp. 2–3. The latter indicates that, among other reasons, the State Department opposed the proposed Japanese language because it was concerned that the language "could be construed (but tortuously) as allowing each party latitude with respect to discharging its full obligations under Articles VII and VIII to accord national treatment to the introduction of investment capital and the initiation and development of investment enterprises.

[53] Sullivan Study at 115.

[54] By requiring review and approval of all financing transactions with Non-Citizens, MARAD in effect prohibits all transactions it has not expressly permitted. The "safe harbors" specified in the regulations are narrow indeed. For most transactions, then, Non-Citizens and vessel owners will be subjected to ad hoc decision making by MARAD on the basis of vague and indeterminate standards.

[55] Article XIX.7 defines "vessel" to exclude "fishing vessels" for purposes of Article XIX.6.

[56] Annex, Attachment 9, Letter to the Chairman of the House of Representatives Committee on Merchant Marine and Fisheries from Robert Lee, August 17, 1964. *See* fn. 44.

[57] Annex, Attachment 13, Memorandum of Conversation held April 3, 1952, at 5.

[58] *See* Annex, Attachment 14, U.S. Dept. of State, Outgoing Airgram to U.S. Embassy in Tokyo (June 12, 1952) at 1–2 (noting that a clearer way to effect the Japanese intent would be by adopting a single comprehensive exception stating that "[t]he provisions of the present Treaty shall not apply with respect to the national fisheries of either Party, or to the products of such fisheries").

The issue of Japanese investment in and other dealings with enterprises owning or operating U.S. flag fishing vessels was left to Article VII.

"Subsequent practice of the State Department confirms this reading of Article XIX.6. In 1964, the State Department reaffirmed the narrow scope of Article XIX.6 in a letter to the House Committee on Merchant Marine and Fisheries. The letter makes clear that the provision merely permits the United States to reserve the right to catch or land fish to U.S. flag vessels.[59]

"This reading of Article XIX.6 in the U.S.-Japan FCN also comports with the State Department's reading of this same language in other FCN treaties to which the U.S. is a party. The Sullivan Study explicitly states that "[t]he crucial element in Article XIX is that it relates to the treatment of vessels and to the treatment of their cargoes. It is not concerned with the treatment of the enterprises which own the vessels and the cargoes."[60] Thus, the text, negotiating history and subsequent State Department practice and understanding all explicitly confirm that Article XIX.6 is irrelevant to laws restricting foreign ownership and control of fishing vessel owners and thus does not override the other provisions of the U.S.-Japan FCN dealing with foreign investment and business activity. Article XIX.6 does not exempt the AFA's foreign ownership, financing and control restrictions from Articles V, VI.3 or VII, each of which bars application of those restrictions to Petitioners with respect to the Vessel Owner and the Vessel.

"6. *A Broad Interpretation of the Treaty's Protections is in the U.S. Interest.*

"The terms of the U.S.-Japan FCN and the other FCN treaties which share the same language are reciprocal—that is, the principle of "national treatment" applies not only to protect the investments of foreign nationals in the United States but also to protect the investments of U.S. nationals in Japan and other countries. Thus, any interpretation of the U.S.-Japan FCN adopted by MARAD in the present context will also define the rights of U.S. nationals doing business in Japan and other countries, now and in the future. A narrow interpretation of the U.S.-Japan FCN's protections for Japanese enterprises and their investments in the present context will effectively limit the rights of U.S. investors and U.S. businesses in Japan and other countries with which the United States has concluded similar FCN treaties.

"For this reason, the State Department has interpreted the national treatment requirement of the FCN treaties broadly in the past.[61] The U.S. interest in protecting U.S. nationals doing business abroad, as well as the State Department's historical practice in interpreting the FCN treaties, requires an interpretation of the U.S.-Japan FCN which will protect the interests of foreign enterprises and the U.S. companies in which they have invested from the retroactive and discriminatory prohibitions and restrictions of the AFA and 46 C.F.R. Part 356.

"7. *The Government of Japan has Determined that Section 202 of the AFA is Inconsistent with the U.S.-Japan FCN.*

"The United States has agreed in Article XXIV of the Treaty to give "sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the [Government of Japan] may make with respect to any matter affecting the operation of the present Treaty." The Government of Japan has strongly objected to the application of the AFA's new limitations and restrictions on foreign ownership, foreign financing and foreign control of U.S. fishing vessels to Japanese nationals and companies that have invested in the U.S. fisheries prior to the effective date of the Act on the ground that such application would violate the U.S.-Japan FCN. In a letter to the Office of Legal Adviser, U.S. Department of State, dated August 30, 1999, the Minister for Economic Affairs of the Embassy of Japan stated that the AFA's "new U.S. citizen ownership and control requirements" "if applied without exception, would impair the legally acquired rights or interests of Japanese nationals and corporations in the United States of America."[62] The Minister for Economic Affairs noted Section 213(g) of the AFA and stated the position of the Government of Japan as follows:

> As an existing international agreement relating to foreign investment, we would like to refer to the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America, hereinafter referred to as "the Treaty." Paragraph two of Article VII of the Treaty states that " * * * new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party." The Government of Japan is of the view that since the new requirements under the provisions of Subsection 202(c)[63] of the AFA would be recognized as new limitations imposed by the United States, such new requirements would be inconsistent with paragraph two of Article VII of the Treaty if applied to entities that are engaged in fishing activities and owned or controlled by Japanese nationals and corporations at the time the AFA comes into force.
>
> Moreover, paragraph one of Article V of the Treaty states that "Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, in the skills, arts or technology which they have supplied;—." This provision indicates that any U.S. government measure that impairs the legally acquired rights or interests of Japanese nationals and companies should not be permitted under this Treaty. Therefore, the Japanese nationals and companies that have already invested in fisheries in the United States should be exempted from the application of the new requirements under Subparagraph 202(c) of the AFA.
>
> Accordingly, the Government of Japan is of the view that the entities that are engaged in fishing activities and owned or controlled by Japanese nationals and corporations should be exempted from the new requirements set forth in the Section 202(c) * * *[64]

In a subsequent letter to the Department of State, dated January 24, 2000, the Embassy of Japan expressed the "concern" of the Government of Japan about regulations proposed by MARAD to implement the AFA.[65] In its January 24, 2000 letter, the Embassy of Japan reiterated the view of the Government of Japan that Section 202 of the AFA is "inconsistent with paragraph two of Article VII and paragraph one of Article V of the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America" and therefore "in accordance with the provision of Section 213(g) of the Act" "will not apply to entities that are engaged in fishery activities and owned or controlled by Japanese nationals or corporations." With respect to

[59] Annex, Attachment 9, Letter to the Chairman of the House of Representatives Committee on Merchant Marine and Fisheries from Robert Lee, August 17, 1964. *See* fn. 44. *See also*, Jones Study at 80–81.

[60] Sullivan Study a 284 (emphasis added).

[61] *See, generally*, Jones Study.

[62] Annex, Attachment 15, August 30, 1999 letter from the Minister for Economic Affairs, Embassy of Japan, to Jo Brooks, Attorney-Adviser, Office of Legal Adviser, U.S. Dep't. of State) at 1.

[63] There is no Subsection 202(c) of the AFA. The reference intended is clearly subsection 202(a), amending 46 U.S.C. § 12102(c).

[64] Annex, Attachment 15, August 30, 1999 letter from the Minister for Economic Affairs, Embassy of Japan, to Jo Brooks, Attorney-Adviser, Office of Legal Adviser, U.S. Dep't. of State) at 1–2.

[65] Annex, Attachment 16 (January 24, 2000 Letter from the Embassy of Japan to the U.S. Dep't. of State at 1.

MARAD's proposed regulations, the Embassy of Japan noted that the regulations "would require the procedure of an annual petition from Japanese companies that are engaged in fishery activities even before October 1, 2001, in order for the continuation of their activities. To impose such a new burden would be inconsistent with the aforementioned obligations of the United States as stipulated by the Treaty."[66] The Embassy of Japan noted further:

> The proposed regulations would require a private company to provide interpretations of the Treaty and the AFA as an attached document to the petition for exemption from the AFA, as prescribed in Section 356.53(b)(3). It is rather the obligation of the Government of the United States as party to the Treaty to do so.[67]

The Government of Japan requested "that the Government of the United States fully ensure * * * that all Japanese companies at present engaged in fishery activities be exempted from the new requirements prescribed in Section 202 of the AFA."[68]

"Thus, the Government of Japan has strongly expressed the view that the AFA's new restrictions on foreign investment, foreign financing and foreign control of U.S. fishing vessels are inconsistent with the U.S.-Japan FCN as applied to companies with existing Japanese investment. In light of the obligation of the United States under Article XXIV of the Treaty to give "sympathetic consideration" to the representations of the Government of Japan concerning the conflict between Section 202 of the AFA and the Treaty and the interest of the United States in the protection of its own enterprises and investors abroad, MARAD should acknowledge the conflict between the AFA and the U.S.-Japan FCN and issue an order holding that Petitioners are exempt from the requirements of Section 202 of the AFA (and the implementing provisions of Section 203 and 46 CFR Part 356) with respect to the Vessels.

"B. AFA Section 213(g) Exempts Japanese Enterprises and U.S. Enterprises With Japanese Investment From the AFA's New Limitations and Restrictions on Foreign Ownership, Foreign Financing and Foreign "Control" of U.S. Fishing Vessels.

"Sections 202, 203 and 204 of the AFA and the implementing regulations published by MARAD on July 19, 2000, codified at 46 CFR Part 356, impose a host of new limitations and restrictions on foreign ownership of fishing vessels, foreign financing of fishing vessels and contractual arrangements between foreign enterprises or U.S. companies with substantial foreign ownership and U.S. fishing vessel owners. As demonstrated above, if applied to Petitioners, these new limitations and restrictions would deprive Petitioners of valuable existing ownership and contract rights and interests in violation of the U.S.-Japan FCN. Application of the new restrictions to bar Petitioners Alyeska, WAF or Maruha from entering into future transactions with the Vessel Owner, particularly financing and ancillary contractual arrangements, such as exclusive marketing agreements, would also violate the U.S.-Japan FCN by substantially impairing the ability of these Non-Citizen Petitioners to protect their existing rights and interests and to carry on their established businesses in the United States in conformity with past practice and on an equal footing with U.S. Citizens.

"To avoid these results, Congress included a provision in the AFA to ensure that the Act would not contravene U.S. treaty obligations. Section 213(g) provides in pertinent part:

> In the event that any provision of section 12102(c) or section 31322(a) of title 46, United States Code, as amended by this Act, is determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party with respect to the owner or mortgagee on October 1, 2001 of a vessel with a fishery endorsement, such provision shall not apply to that owner or mortgagee with respect to such vessel to the extent of any such inconsistency. * * *

Section 213(g) makes clear that its reach is intended to extend to every "owner" or "mortgagee" holding an ownership or mortgage interest on October 1, 2001, when Sections 202, 203 and 204 of the AFA become effective. Section 213(g) provides explicitly that the exemption does not apply to "subsequent owners and mortgagees" who acquire their interests *after* October 1, 2001 or "to the owner [of the vessel] on October 1, 2001 if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity *after such date.*" (Emphasis added).

Petitioners WAF, Maruha, Wards Cove and the Vessel Owner are "owners" who acquired their interests in the Vessel prior to October 1, 2001, and who intend to continue to hold those interests on and after October 1, 2001.[69] Petitioners WAF, Maruha, Wards Cove and the Vessel Owner have an interest in ensuring that their investments in the Vessel are protected. Such Petitioners also have an interest in ensuring that their interests as "owners" of the Vessel are not adversely affected by the Alyeska loans. Further, Maruha's common ownership interests in both Alyeska and WAF allow Maruha and WAF to assert the interests of Alyeska in the context of this Petition. In short, Maruha's common ownership interests in Alyeska and WAF are sufficient to bring Alyeska within the protection afforded by Section 213(g) to WAF and Maruha as "owners" of the Vessel. Alyeska's loans and the ownership interest acquired by WAF in the Partnership are clearly elements of a financing plan implemented by Maruha and Wards Cove to support acquisition and operation of the Vessel. As such, the Section 213(g) exemption applicable to the "owners" of the Vessel extends to Alyeska and Alyeska's loans. In any event, the interests of the "owners" in protecting their interests in the Vessel and its fishery endorsement permits them to assert the Treaty's protection for the Alyeska loans.

"The U.S.-Japan FCN is a self-executing treaty which is binding on MARAD as a matter of federal domestic law.[70] Under ordinary principles of statutory construction, the AFA and the Treaty should be construed to avoid conflict and to give effect to each. The federal courts have recognized that federal statutes should be construed in a manner to avoid conflict with international treaties. Thus, federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains."[71] Only where Congress has expressed the clear intent to depart from the obligations of a treaty will the provisions of later federal legislation be found to conflict with U.S. treaty obligations.[72] Here, it is apparent from the express terms of Section 213(g) that Congress affirmatively intended to avoid conflict with international treaties such as the U.S.-Japan FCN. The inconsistency between Sections 202, 203 and 204 of

[66] *Id.*

[67] *Id.* at 2.

[68] Id.

[69] *See* 65 Fed. Reg. at 44874c.1 ("[T]he commenters stated that the rule should make clear that anyone that has an ownership interest may utilize the petition process, e.g., a minority shareholder with a direct or indirect interest. We agree that a minority shareholder should be allowed to petition for an exemption").

[70] *See, e.g., Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd.*, 494 F. Supp 1263, 1266 (E.D.Pa. 1980).

[71] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 370 U.S. 10, 21 (1963).

[72] *Id. See also, Sumitomo Shoji America, Inc.* v. *Avagliano*, et al., 457 U.S. 176 (1982).

the AFA and the requirements of the U.S.-Japan FCN is demonstrated above. Accordingly, under Section 213(g) of the Act, Congress has directed that the provisions of Sections 202 and 203 "shall not apply" to Petitioners "to the extent of * * * such inconsistency."

"The exemption provided by Section 213(g) is not limited to property rights, contract rights, debt interests or investment interests in existence on October 1, 2001, but rather applies to exempt an "owner" from the requirements of the AFA "to the extent of the inconsistency" between the Act and the Treaty. Petitioners qualify as "owners." Petitioners are, therefore, exempt from the requirements of the AFA "to the extent of the inconsistency" between the AFA and the Treaty. As demonstrated above, the "inconsistency" between the AFA and the Treaty is three-fold: (1) The Treaty protects Petitioners' existing ownership interests in the Vessel, which the AFA would impair, prohibit or restrict; (2) the Treaty protects Petitioners' existing financing arrangements related to the Vessel, including the Alyeska loans to WAF and Wards Cove and Alyeska's Commercial Revolving Credit Line Loan and Security Agreement with the Vessel Owner and ancillary contract rights under the Fishing Commitment Agreement between Alyeska and the Vessel Owner, which the AFA would impair, prohibit or restrict; and (3) the Treaty protects future transactions between or among the Petitioners with respect to the Vessel, which the AFA would prohibit or restrict, including future loans, preferred mortgages and other financing and ancillary contractual arrangements, such as exclusive marketing agreements, which Petitioners may deem necessary or appropriate to protect their existing businesses and their existing financial interests in the Vessel and the Vessel Owner. Thus, Section 213(g) exempts Petitioners entirely from the restrictions and limitations of Sections 202, 203 and 204 of the AFA and MARAD's implementing rules with respect to the Vessel.

"The inconsistency between the provisions of the AFA and MARAD's implementing regulations and the requirements of the U.S.-Japan FCN is demonstrated above. Accordingly, under Section 213(g) of the Act, the provisions of Section 202, 203 and 204 "shall not apply" to Petitioners with respect to the Vessel."

This concludes the analysis submitted by Petitioner for consideration.

Dated: February 16, 2001.

By Order of the Maritime Administrator.

Joel Richard,

Secretary, Maritime Administration.

[FR Doc. 01-4469 Filed 2-23-01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD-2001-8930]

MORNING STAR—Applicability of Preferred Mortgage, Ownership and Control Requirements To Obtain a Fishery Endorsement

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a petition requesting MARAD to issue a determination that the ownership and control requirements and the preferred mortgage requirements of the American Fisheries Act of 1998 and 46 CFR Part 356 are in conflict with an international investment agreement.

SUMMARY: The Maritime Administration (MARAD, we, our, or us) is soliciting public comments on a petition from the owners and mortgagees of the vessel MORNING STAR—Official No. 610393 (hereinafter the "Vessel"). The petition requests that MARAD issue a decision that the American Fisheries Act of 1998 ("AFA"), Division C, Title II, Subtitle I, Public Law 105-277, and our regulations at 46 CFR Part 356 (65 FR 44860 (July 19, 2000)) are in conflict with the U.S.-Japan Treaty and Protocol Regarding Friendship, Commerce and Navigation, 206 UNTS 143, TIAS 2863, 4 UST 2063 (1953) ("U.S.-Japan FCN" or "Treaty"). The petition is submitted pursuant to 46 CFR 356.53 and section 213(g) of AFA, which provide that the requirements of the AFA and the implementing regulations will not apply to the owners or mortgagees of a U.S.-flag vessel documented with a fishery endorsement to the extent that the provisions of the AFA conflict with an existing international agreement relating to foreign investment to which the United States is a party. This notice sets forth the provisions of the international agreement that the Petitioner alleges are in conflict with the AFA and 46 CFR Part 356 and the arguments submitted by the Petitioner in support of its request. If MARAD determines that the AFA and MARAD's implementing regulations conflict with the U.S.-Japan FCN, the requirements of 46 CFR Part 356 and the AFA will not apply to the extent of the inconsistency. Accordingly, interested parties are invited to submit their views on this petition and whether there is a conflict between the U.S.-Japan FCN and the requirements of both the AFA and 46 CFR Part 356. In addition to receiving the views of interested parties, MARAD will consult with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than March 26, 2001.

ADDRESSES: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted by mail to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th St., SW., Washington, D.C. 20590-0001. You may also send comments electronically via the Internet at http://dms.dot.gov/submit/. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal Holidays. An electronic version of this document and all documents entered into this docket are available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: John T. Marquez, Jr. of the Office of Chief Counsel at (202) 366-5320. You may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR-222, 400 Seventh St., SW., Washington, D.C. 20590-0001 or you may send e-mail to John.Marquez@marad.dot.gov.

SUPPLEMENTARY INFORMATION:

Background

The AFA was enacted in 1998 to give U.S. interests a priority in the harvest of U.S.-fishery resources by increasing the requirements for U.S. Citizen ownership, control and financing of U.S.-flag vessels documented with a fishery endorsement. MARAD was charged with promulgating implementing regulations for fishing vessels of 100 feet or greater in registered length while the Coast Guard retains responsibility for vessels under 100 feet.

Section 202 of the AFA, raises, with some exceptions, the U.S.-Citizen ownership and control standards for U.S.-flag vessels that are documented with a fishery endorsement and operating in U.S.-waters. The ownership and control standard was increased from the controlling interest standard