together with petition for leave to intervene should do so in accordance with the above instructions for submitting comments. The petition should state clearly and concisely the grounds of interest, and the alleged facts relied on for relief.

If no petition for leave to intervene is received with the specified time or if it is determined that petitions filed do not demonstrate sufficient interest to warrant a hearing, the Maritime Administration will take such action as may be deemed appropriate.

In the event petitions regarding the relevant section 805(a) issues are received from parties with standing to be heard, a hearing will be held, the purpose of which will be to receive evidence under section 805(a) relative to whether the proposed operations: (a) could result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or inter-coastal service, or (b) would be prejudicial to the objects and policy of the Act relative to domestic trade operations.

(Catalog of Federal Domestic Assistance Programs No. 20.805 Operating-Differential Subsidies)

By Order of the Maritime Administrator.
Dated: January 11, 2001.

Joel C. Richard,

Secretary.

[FR Doc. 01–1359 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2000–8666]

ALASKA ROSE, BERING ROSE, and SEA WOLF—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 vessels ALASKA ROSE—Official Number 610984, BERING SEA—Official Number 609823, and SEA WOLF—Official Number 609823 (hereinafter the ''Vessels''). 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 Fed. Reg. 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 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 February 16, 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., S.W., 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., S.W., 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 2(b) of Shipping Act, 1916 (''1916 Act''), as amended, 46 App. U.S.C. 802(b), to the standard contained in 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, Pub. L. 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 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 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

Alaska Rose L.P., Bering Rose, L.P. and Kendrick Bay, L.P. (each a ''Vessel Owner'' and collectively, the ''Vessel Owners''), are the owners, respectively, of the fishing vessels ALASKA ROSE, BERING ROSE and SEA WOLF (each a ''Vessel'' and collectively, the ''Vessels''). Wards Cove Packing Company (''Wards Cove''), Gravina Fisheries, Inc., Flag Point, L.P., Duke Point, L.P., Island Point Corporation, Maruha Corporation (''Maruha''), Western Alaska Fisheries, Inc. (''WAF'') and WAFBO, Inc., are owners of direct or indirect interests in the Vessel Owners and indirect interests in the Vessels. Alyeska Seafoods, Inc. (''Alyeska'') is the owner of direct and indirect interests in the Vessel Owners and indirect interests in the Vessels and is the mortgagee under preferred mortgages on the Vessels. The parties identified above, including the shareholders and the Japanese Bank Lenders identified below are hereinafter referred to as the ''Petitioner'' or ''Petitioners.''

Petitioner's Entry Into and Participation In U.S. Fisheries

The Petitioner provided the following background on its entry into and participation in the fisheries of the United States.

''In 1985, Wards Cove, Maruha and Marubeni Corporation (''Marubeni'') formed Alyeska to acquire, construct and operate a large seafood processing facility at Dutch Harbor, Alaska. Alyeska purchased an existing processing facility in 1985 and constructed a surimi processing plant and fish meal plant at the site in 1986 and 1987 to process pollock. Alyeska's total investment in its processing plant and equipment is approximately $70 million.

''The Alyeska processing facility is one of the largest fish processing facilities in the state of Alaska. Alyeska employs approximately 400 people at its Dutch Harbor processing facility and processes in excess of 125 million pounds of seafood annually. In order to secure a stable supply of raw material to this processing facility, Alyeska, Maruha and its subsidiaries, and Wards Cove, Alyeska's U.S. Citizen shareholder, have made investments in and provided financing for a number of fishing vessels, including the Vessels. By investing in the Vessel Owners, Alyeska, Maruha and Wards Cove also sought to realize the potential profits that could accrue to the Vessel Owners from sales to Alyeska. The Vessel Owners were organized and the Vessels were acquired by the Vessel Owners in 1996.

''Alyeska assisted in financing the acquisition of the Vessels by the Vessel Owners in return for the agreement of the Vessel Owners that fish harvested by the Vessels would be sold exclusively to Alyeska and in reliance on the assured revenue stream which sales to Alyeska would provide to the Vessel Owners. Such financing is a common and traditional means in the Alaska fishing industry by which fishing vessel owners secure financing for the acquisition, improvement or operation of their vessels and seafood processors secure supply commitments from fishing vessel owners. Each of the Vessels is 100 feet or greater in registered length. Each of the Vessels was designed and constructed or rebuilt for operation in the U.S. fisheries of the North Pacific Ocean and Bering Sea.

''As a result of the enactment of Section 208(a) of the American Fisheries Act, the fishing vessels eligible to catch and deliver pollock to Alyeska's Dutch Harbor facility are limited to vessels meeting specified criteria, including prior deliveries of certain quantities of pollock to Alaskan onshore processing plants. Accordingly, there is a fixed, limited number of vessels, including the Vessels, which are permitted by law to deliver to the Alyeska facility.''

Ownership and Mortgage Structure of the Vessels

The ownership and mortgage structure is substantially the same for each of the Vessels and is summarized as follows:

A. Ownership Structure

Alaska Rose, L.P., and Bering Rose, L.P., are Washington limited partnerships that were formed in 1996 for the purpose of acquiring and operating the vessels ALASKA ROSE and BERING ROSE, respectively. From the time of formation through the present date, Alaska Rose L.P. and Bering Rose, L.P. have been owned by Duke Point, L.P. (''Duke Point''), as sole general partner, and Alyeska Seafoods, Inc., as sole limited partner, in the following percentages: Duke Point—75%; Alyeska—25%.

Duke Point is a Washington limited partnership. At all times since the acquisition of the Vessels by Alaska Rose, L.P. and Bering Rose L.P., Duke Point has been owned by Flag Point, L.P. (''Flag Point''), as sole general partner, and Alyeska, as sole limited partner, in the following percentages: Flag Point—75%; Alyeska—25%.

Flag Point is a Washington limited partnership. Flag Point is owned by Gravina Fisheries, Inc., a Washington corporation, as sole general partner; and Island Point Corporation, a Washington corporation, and Alyeska, as limited partners, in the following percentages: Gravina Fisheries, Inc.—50%; Island Point Corp.—25%; Alyeska—25%.

Gravina Fisheries, Inc. is a wholly owned subsidiary of Wards Cove, an Alaska corporation. Petitioners state that all of the capital stock of Wards Cove is owned by United States Citizens, as defined in 46 C.F.R. Part 356. All of the capital stock of Island Point Corporation is owned by Alec W. Brindle, Winn F. Brindle and Harold A. Brindle, each an individual United States Citizen.

Wards Cove is a 100% U.S. Citizen-owned fish processing company which has been engaged in processing salmon and other fish and shellfish species in Alaska since 1912. In 1928, Wards Cove was acquired by two brothers, A. W. Brindle and Harold A. Brindle, and continues to be owned by the Brindle family or entities owned and controlled by them. All of the officers and directors of Wards Cove, Gravina Fisheries, Inc., and Island Point Corporation are U.S. Citizens.

Alyeska is an Alaska corporation, formed in 1985 to acquire, construct and operate a large seafood processing facility at Dutch Harbor, Alaska. All of the capital stock of Alyeska is owned by

Wards Cove, Maruha, WAF and Marubeni. Maruha and Marubeni are publicly traded Japanese corporations. WAF is a wholly-owned U.S. subsidiary of Maruha. Maruha, WAF and Marubeni collectively own more than 25% of the capital stock of Alyeska. Accordingly, Alyeska does not qualify as a U.S. Citizen under the standards of the AFA and MARAD's implementing rules and is therefore a ''Non-Citizen,'' as defined in 46 CFR 356.3(0).

The SEA WOLF is owned by Kendrick Bay, L.P. (''Kendrick Bay''), a Washington limited partnership formed in 1996 for the purpose of acquiring and operating the SEA WOLF. At the time of its formation through the present date, Kendrick Bay has been owned by Duke Point, as sole general partner, and WAFBO, Inc., as sole limited partner, in the following percentages: Duke Point—75%, WAFBO, Inc.—25%,

The ownership structure of Duke Point is described above in connection with the discussion of the ownership of Alaska Rose, L.P. and Bering Rose, L.P. WAFBO, Inc. is a Washington corporation wholly owned by WAF. WAF is an Alaska corporation wholly owned by Maruha. Prior to the acquisition of the SEA WOLF by Kendrick Bay, the SEA WOLF was owned by Sea Wolf Limited Partnership, a Washington limited partnership in which WAF held a 25% limited partnership interest. Sea Wolf Limited Partnership distributed undivided interests in the SEA WOLF to its partners in proportion to their interests in the partnership prior to the acquisition of the Vessel by Kendrick Bay. WAFBO, Inc. is an entity which satisfies the requirements of 46 U.S.C. 12102(a), commonly referred to as a ''Documentation Citizen,'' and was formed by WAF to hold WAF's undivided 25% interest in the SEA WOLF prior to transfer of the entire Vessel to Kendrick Bay. The former partners in Sea Wolf Limited Partnership with the exception of WAFBO, Inc. sold their undivided interests in the Vessel—totaling 75%—to Duke Point, which transferred this 75% interest in the SEA WOLF to Kendrick Bay as a capital contribution. WAFBO, Inc. transferred its undivided 25% interest in the SEA WOLF directly to Kendrick Bay as a capital contribution in return for a 25% limited partnership interest in Kendrick Bay.

The ownership structure of the Vessels was reviewed and approved by the U.S. Coast Guard under the standards applicable to fishing vessels and coastwise qualified vessels in a letter ruling dated December 11, 1996.

B. Mortgage Structure

Permanent financing for the acquisition of the Vessels was provided by three Japanese banks, Mitsubishi Trust and Banking Corporation, The Industrial Bank of Japan, Limited and The Dai-Ichi Kangyo Bank, Limited (collectively, the ''Japanese Bank Lenders''), pursuant to a Term Loan Agreement dated March 27, 1997 (the ''Alyeska Loan Agreement''). Pursuant to the Alyeska Loan Agreement, the Japanese Bank Lenders made loans to Alyeska (collectively, the ''Alyeska Loan'') for use by Alyeska for loans and capital contributions to the Vessel Owners and related entities to finance the acquisition by the Vessel Owners of the fishing vessels BERING ROSE, ALASKA ROSE and SEA WOLF.

Simultaneously with the Alyeska Loan transaction, Alyeska provided permanent financing to Alaska Rose, L.P. (the ''Alaska Rose Loan'') and Bering Rose, L.P. (the ''Bering Rose Loan'') for the purchase of the ALASKA ROSE and the BERING ROSE, respectively. In addition, permanent financing for the acquisition of the SEA WOLF was provided by the Japanese Bank Lenders through the Alyeska Loan transaction to Duke Point (the ''Duke Point Loan'') for Duke Point's purchase of an undivided 75% interest in the SEA WOLF. Alaska Rose, L.P., Bering Rose, L.P. and Duke Point executed Loan Agreements, Promissory Notes and Preferred Ship Mortgages in favor of Alyeska with respect to the loans. In consideration of the loans, Alaska Rose, L.P., Bering Rose, L.P., and Kendrick Bay also executed Nonrecourse Guaranties in favor of Mitsubishi Trust and Banking Corporation, as agent for the Japanese Bank Lenders (hereafter referred to as ''MTBC, as agent''), limited to the amount of the loans outstanding from time to time plus applicable interest, together with the following documents:

(a) Preferred Ship Mortgages on the Vessels in favor of MTBC, as agent, securing the Nonrecourse Guaranties; and

(b) Assignments of Insurance Proceeds in favor of MTBC, as agent, securing the Nonrecourse Guaranties.

C. Exclusive Marketing Agreement

The Petitioners state that Alyeska financed the purchase of the Vessels in order to ensure a stable supply of fish to Alyeska's Dutch Harbor facility and in reliance on the assured revenue stream which sales to Alyeska would generate for the Vessel Owner. Accordingly, Section 5(A) of the loan agreement for each Vessel provides:

So long as there remains any outstanding balance on the Loan, Borrower agrees that the Vessel's sole market shall be Alyeska Seafoods, Inc. for any and all products regularly processed by Alyeska Seafoods, Inc., and for any and all species of catch processed by Alyeska Seafoods, Inc. Exceptions to this requirement are specified (1) on a delivery-by-delivery basis, where Alyeska informs the partnership that it lacks capacity to process the delivery; and (2) where Alyeska and [Vessel Owner] agree that the vessel may sell into other markets. Section 5(B) of the [Vessel Loan Agreement] provides that, in return for this marketing commitment, Alyeska will pay [Vessel Owner] a substantial annual ''commitment fee.''

Requested Action

The Petitioners have requested a consolidated filing for the Vessels. MARAD's regulations require at 46 CFR 356.53(c) that a separate petition be filed for each vessel for which the owner or mortgagee is requesting an exemption unless the Chief Counsel authorizes a consolidated filing. The Chief Counsel hereby authorizes the consolidated filing by Petitioners relating to the three Vessels.

The Petitioners seek a determination from MARAD under 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 C.F.R. 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 Owners and their Non-Citizen Investors; [1]

(2) the existing preferred mortgage interests in the Vessels held by Alyeska and the Japanese Bank Lenders identified below, including existing exclusive marketing agreements and other contract rights and interests ancillary to such financing arrangements; and

(3) future loan, financing and other transactions between the Non-Citizen Investors or the Japanese Bank Lenders,

[1] As used herein, the term ''Non-Citizen'' means a person or entity which is not a U.S. Citizen, as defined at 46 CFR § 356.3(e). The ''Non-Citizen Investors'' are Alyeska, Maruha, WAF, Marubeni Corporation, WAFBO, Inc., and Duke Point, L.P.

on the one hand, and the Vessel Owners, on the other, with respect to the Vessels.

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. The 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.[3]

1. The AFA's Restrictions on Foreign Ownership Violates Article VII

(a) *The AFA's Restrictions on Foreign Investment Impair Petitioners' Existing Ownership Interests.* The AFA's new restrictions on foreign investment in fishing vessels will prohibit the Vessel Owners from employing their Vessels 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.

Dept. verify hwer ref. & ft2**FOOTNOTES** [1]: [3]:

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 by the U.S. Coast Guard 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.

The Vessels are fishing vessels, 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. Each of the Vessel Owners is eligible to own a vessel with a fishery endorsement under the current standards of 46 U.S.C. Chapter 121 and each of the Vessels is documented as a vessel of the United States with a fishery endorsement.

However, the Vessel Owners will be prohibited from owning or operating the Vessels 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 (65 Fed. Reg. 44860 *et seq.*, July 19, 2000). The aggregate of the ownership interests held, directly or indirectly, in the Vessel Owners by Alyeska (in the case of the SEA WOLF, by Alyeska and WAFBO, Inc.) exceeds 25%—the maximum percentage interest permitted to be held by Non Citizens under Section 202(a) of the AFA, effective on and after October 1, 2001 (see 46 U.S.C. 12102(c)(1), as amended).[4] The AFA requires MARAD to revoke the fishery endorsement of any fishing vessel whose owner does not comply with this new requirement. AFA Section 203(e). Accordingly, unless exempted from the AFA's new requirements, the Vessel Owners will no longer be permitted to own and operate their Vessels in the U.S. fisheries as of October 1, 2001. As a result, the Vessel Owners will be deprived of income from their Vessels; will be driven into insolvency and will default under the terms of their Guaranties in favor of the Japanese Bank Lenders and their Loan Agreements with Alyeska, and Alyeska, in turn, will be forced into default under the terms of its loan agreement with the Japanese Bank Lenders. Alternatively, the Vessel Owners would be forced to sell the Vessels or their Non-Citizen Investors would be forced to sell their interests in the Vessel Owners, assuming a buyer could be found. In either case, if Alyeska loses access to the fish that would otherwise be harvested by the Vessels and delivered to its Dutch Harbor processing facility, the $70 million investment which Alyeska and its shareholders have made in that facility and the jobs of its employees would be jeopardized.

(b) *The Impairment of Petitioners' Existing Ownership Interests Violates Article VII.1 and the Grandfather Provision of Article VII.2* The impairment of Petitioners' existing ownership interests in the Vessels 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.'' Herman Walker, Jr., ''Modern Treaties of Friendship, Commerce and Navigation,'' 42 Minn. L. Rev. 805, 806 (1958) (hereinafter, ''Modern Treaties'').

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.'' Herman Walker, Jr., ''The Post-War Commercial Treaty Program of the United States,'' 73 Pol. Sci. Q. 57, 67 (1958). In a case involving interpretation of the U.S.-Japan FCN, the United States Supreme Court noted that the purpose

[3] The text of the relevant provisions of the U.S.-Japan FCN cited herein is found at Attachment 1 to the Annex I of Authorities (hereinafter ''Annex''), filed herewith.

[4] The AFA makes two primary 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%; (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%, so long as U.S. Citizen 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 requisite ownership standard). *Compare*, 46 U.S.C. 12102(c), as now in effect, 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. The Vessels are owned by U.S. Citizens (as defined at 46 CFR 356.3(e)) at each ''tier'' of ownership but the ''aggregate'' U.S. citizen ownership is less than 75%. In addition, Section 204 of the AFA repeals a provision of prior law which permits 100% foreign owned corporations to own certain vessels.

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.'' *Sumitomo Shoii America* v *Avagliano*, 457 U.S. 176, 187–88 (1982). ''[N]ational treatment of corporations means equal treatment with domestic corporations.'' Id. at 188 n. 18.

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 ownership interests acquired by Alyeska and WAFBO, Inc. in compliance with existing law clearly denies national treatment to them and to the Vessel Owners. 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*

Emphasis added. 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.'' Ronny E. Jones, ''State Department Practices Under U.S. Treaties of Friendship, Commerce, and Navigation'' (1981) (hereinafter ''Jones Study'') at 57.[5] ''[R]egulations that force divestiture of interests already acquired or established prior to promulgation of such regulation * * * raise Art. VII questions.'' *Id.* at 107. 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.'' Modern Treaties at 809. In describing the import of the phrase ''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.*

Charles H. Sullivan, ''State Department Standard Draft Treaty of Friendship, Commerce and Navigation'' (undated) (hereinafter ''Sullivan Study'') at 149 (emphasis added). ''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.'' *Id.* at 148.

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.[6]

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.[7] 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.[8]

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. * * *'' Sullivan Study at 150.

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 Alyeska and WAFBO, Inc. the right to continue to hold their direct and indirect investments in the Vessel Owners and, more generally, to continue to transact business with the

[5] Petitioners presume that MARAD has access to the Jones Study and the Sullivan Study referenced below. Petitioners will provide copies of these studies to MARAD on request.

[6] Annex, Attachment 2, Department of State Incoming Telegram dated March 20, 195, p. 1.

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

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

Vessel Owners on the same basis as permitted prior to passage of the AFA. Similarly, the Article VII.2 grandfather provision guarantees the Vessel Owners the right to own and operate the Vessels in the U.S. fisheries on equal terms with wholly domestic enterprises.

Maruha and Marubeni are clearly entitled to protection as Japanese enterprises which, at the time the AFA was adopted, were ''engaged in * * * activities'' within the United States which the AFA but for Section 213(g), would prohibit, limit or restrict. Alyeska, WAF, WAFBO, Inc. and the Vessel owners 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/or Marubeni. Thus, the Article VII.2 grandfather provision protects the ownership interests of Maruha, WAF and Marubeni in Alyeska, the ownership interests of Alyeska and WAFBO, Inc. in the Vessel Owners and the Vessel Owners' right to continue to own and operate the Vessels in the U.S. fisheries.

However, as noted above, the Article VII.2 grandfather provision not only protects preexisting rights and interests acquired, directly or indirectly, by Japanese nationals prior to a discriminatory change in the law, but protects *existing enterprises* from such changes. Accordingly, the Article VII.2 grandfather provision, together with Section 213(g) of the AFA, exempts the Vessel Owners and their Non-Citizen Investors from the new restrictions of Section 202, 203 and 204 of the AFA and 46 CFR Part 356 with respect to (a) the Non-Citizen Investors' existing direct and indirect ownership interests in the Vessel Owners and the Vessels, (b) the continued operations of the Vessels by the Vessel Owners in the U.S. fisheries, and (c) future transactions between the Non-Citizen Investors and the Vessel Owners to further or protect the existing rights and interests of the Non-Citizen Investors in the Vessels and the Vessel Owners, such as the refinancing of existing loans, the making of new loans, the modification of existing mortgages, the taking of new mortgages or other security and the conclusion of other contractual arrangements ancillary to such financing activities.

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 will nullify the preferred mortgage interests in the Vessels currently held by Alyeska and the Japanese Bank Lenders, impair their rights and interests under existing financing documents and prevent them from protecting their established businesses and interests by entering into future financing and related business transactions with the Vessel Owners.

Current law permits wholly or partly Japanese-owned lenders, including the Japanese Bank Lenders, Alyeska and the other Non-Citizen Investors, to finance U.S. fishing vessels and to hold preferred mortgage interests in U.S. fishing vessels to secure their loans. *See* 46 USC 31322. A ''preferred mortgage'' is a creature of federal statute and gives the mortgagee a lien on the mortgaged vessel, enforceable in U.S. District Court under a priority scheme that protects the mortgagee from most maritime liens. *See, generally*, 46 USC Chapter 313. 46 USC 31326(b)(1) gives the preferred mortgage lien priority over all maritime liens arising after filing of the mortgage except a limited number of ''preferred'' maritime liens listed at 46 USC 31301(5) and provides that a sale of the vessel by order of the District Court terminates all liens or other claims against the vessel, thus ensuring the purchaser clear title and allowing the mortgagee to realize maximum value for its security. Since maritime liens arise in favor of suppliers, materialmen, repairmen and others in the course of the ordinary operations of the vessel, protection against such liens is essential to the mortgagee's security, as is the ability to terminate those liens on foreclosure and to sell the vessel ''free and clear'' of liens. Absent preferred mortgage status, a mortgage provides little or no security for the lender. Thus, the preferred mortgages which Alyeska and the Japanese Bank Lenders hold in the Vessels are valuable property interests in the Vessels.

The AFA will prohibit Alyeska and the Japanese Bank Lenders from continuing to hold their existing preferred mortgages on the Vessels unless, in the case of the Japanese Bank Lenders, their mortgages are transferred to a qualified Mortgage Trustee (*see* AFA Section 202(b), amending 46 USC 31322, and 46 CFR 356.19) *and* the terms of the financing documents are approved by a MARAD under the AFA's new ''control'' standards (see AFA Section 202(a), adding 46 USC 12102(c)(4)(A), and 46 CFR 356.15(d) and 356.21(d)). The AFA contains a new definition of impermissible Non-Citizen ''control'' (AFA Section 202(a), codified at 46 USC 12102(c)(2)) and requires transfers of ''control'' of fishing vessels to be ''rigorously scrutinized'' by MARAD under this new standard (AFA Section 203(c)(2)). MARAD has implemented the AFA's new ''control'' standard by adopting a host of new restrictions and limitations on contractual and other business arrangements between fishing vessel owners and Non-Citizens. *See, generally,* 46 CFR 356.11, 356.13–15, 356.21–25, 356.39–45. Unless MARAD reviews and approves the terms of the loan agreements, preferred mortgages and other financing documents previously executed by the Vessel Owners in favor of the Alyeska and the Japanese Bank Lenders prior to October 1, 2001 under these new standards, the Vessels will lose their fishery endorsements and the Vessel Owners will no longer be permitted to own or operate the Vessels in the U.S. fisheries. See 46 CFR 356.15(d), 356.21(d). This, in turn, will destroy the value of the Vessels as security under the mortgages held by Alyeska and the Japanese Bank Lenders and destroy the ability of the Vessel Owners to pay the debts which the mortgages secure. By prohibiting Alyeska and the Japanese Bank Lenders from continuing to hold their existing preferred mortgages on the Vessels, imposing new conditions and restrictions on the terms of their existing financing documents, including a new requirement of administrative review and approval of those financing documents under AFA's new ''control'' standards, the AFA and MARAD's implementing regulations will impair the contractual rights and mortgage interests of Alyeska and the Japanese Bank Lenders under their existing preferred mortgages and related financing documents.

In the case of Petitioner Alyeska's mortgages, *MARAD has made clear that there is no way that Alyeska can preserve its mortgage interests under the AFA.* 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, even if the mortgage is held by a qualified Mortgage Trustee and the loan and mortgage terms are otherwise acceptable to MARAD. 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''). Thus, in the case of Alyeska, the AFA's requirements will nullify Alyeska's existing preferred mortgage interests in the Vessels. If Alyeska's mortgages are not released, the Vessels will lose their fishery endorsements, destroying the

value of the Vessels as collateral for Alyeska's loans and destroying the Vessel Owners' ability to pay their debts.

Further, even if Alyeska's *existing* financial interests in the Vessel Owners were found to be exempt from the requirements of the AFA and MARAD's implementing rules, the AFA's restrictions on *future* financing transactions between Alyeska or its Japanese shareholders and the Vessel Owners will substantially impair the rights and interests of Alyeska and its Japanese shareholders in violation of Article VII.1. The AFA's restrictions on foreign financing of fishing vessels will prevent Alyeska and its Japanese shareholders from protecting their investments in Alyeska's Dutch Harbor processing facility and their existing investments in and loans to the Vessel Owners by offering the Vessel Owners financing, secured by mortgages on the Vessels or otherwise, for vessel repairs or improvements which may become necessary to permit the Vessel Owners to operate profitably—or at all. If alternative financing from a financial institution is unavailable to the Vessel Owners, the ability of Alyeska to make loans to support the Vessels' continuing operations may be the only means available to protect the Vessel Owners from insolvency and default on their existing loans from Alyeska—triggering a default by Alyeska under its loan agreement with the Japanese Bank Lenders. Thus, the AFA's restrictions on the ability of Alyeska or its Japanese shareholders to make new loans to the Vessel Owners and to take security in the Vessels jeopardize the existing financial interests of Alyeska and its Japanese shareholders in the Vessel Owners and the Vessels, as well as Alyeska's own financial health.

Finally, the new restrictions imposed by the AFA and MARAD's regulations on the ability of Alyeska to make loans to fishing vessel owners will disrupt Alyeska's ability to secure a reliable supply of fish to its processing facility. Alyeska's ability to offer financing for the construction, acquisition or improvement of fishing vessels is a necessary means to secure a stable supply of fish to its processing plant. A processor's agreement to provide financing on favorable terms 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 the acquisition, repair or improvement of their vessels and processors secure a reliable supply of fish to their plants. Such arrangements between vessel owners and processors, both wholly domestic and Non-Citizen processors, are common and traditional in the Alaska fishing industry. 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 a reliable supply of fish to their plants by financing the acquisition or improvement of fishing vessels on normal commercial terms in return for the vessel owner's agreement to sell exclusively to that processor during the term of the loan. Just as their existing ownership and mortgage interests are protected by the Treaty; Alyeska, its Japanese shareholders and the Japanese Bank Lenders must also be able to modify and restructure their loans and related security arrangements with the Vessel owners and make new loans to the Vessel Owners with respect to the Vessels in order to further and protect their existing investments, mortgages and business interests, as circumstances may require.

(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) depriving Alyeska and the Japanese Bank Lenders of existing preferred mortgage interests securing existing loans; (2) subjecting the terms of their existing loan documents to a new requirement of administrative review and approval by MARAD under the new ''control'' standards of the AFA and MARAD's implementing rules; (3) depriving Alyeska and the Japanese Bank Lenders of the value of their collateral and the income stream from operations on which they relied in making their loans; and (4) preventing Alyeska, its shareholders or the Japanese Bank Lenders from refinancing existing loans, making new loans to the Vessel Owners, taking new mortgages on the Vessels or entering into other contractual arrangements with respect to the Vessels or the Vessel Owners necessary to further or protect their existing financial and business interests.

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.[9] 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.[10] 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.[11] 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.'' Id. 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

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

[10] Annex, Attachment 6, Dept. of State Outgoing Telegram dated March 10, 1952, p. 1.

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

government eventually agreed to withdraw its proposed change.[12]

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).'' Sullivan Study at 144. 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 the Japanese Bank Lenders or Alyeska. 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.[13]

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 secured by vessels of their national flag.

The AFA and MARAD's implementing rules impose new restrictions on the ability of Alyeska and the Japanese Bank Lenders, going forward, to protect their existing financial interests in the Vessel Owners and the Vessels by, *e.g.*, re-financing existing loans, advancing new loans for repair or improvement of the Vessels or entering into other financing or contractual arrangements with the Vessel Owners. These restrictions are not permitted by Article VIII of the Treaty. Article VIII 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, its shareholders or the Japanese Bank Lenders involving the Vessels or the Vessel Owners.

Application of the AFA's new ''control'' standards to restrict the ability of Alyeska to do business with the Vessel Owners that supply fish to its processing plant, as it has done in the past and on the same terms as its U.S. Citizen competitors, would deny national treatment to Alyeska and its Japanese shareholders. 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.[14] Article VII.1 applies, and 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 Alyeska's ability to enter into future financing and other contractual arrangements with the Vessel Owners to ensure a stable supply of fish to Alyeska's Dutch Harbor processing facility clearly violate Article VII.1.

For these reasons, Petitioners seek a determination by MARAD that Sections 202, 203 and 204 of the AFA and MARAD's implementing regulations do not apply to Petitioners with respect to (a) existing preferred mortgages and associated loan and security documents previously executed by the Vessel owners in favor of Alyeska or the Japanese Bank Lenders, including the exclusive marketing agreements contained in Alyeska's loan agreements with the Vessel Owners (or, in the case of the SEA WOLF, with the Vessel Owner's general partner); or (b) fixture financing and ancillary contractual arrangements between Alyeska or the Japanese Bank Lenders and the Vessel Owners, including 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 the Non-Citizen Petitioners from holding their pre-existing ownership interests, mortgage interests and contract rights would deprive them of their property 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.'' Protocol, ¶ 2 (emphasis added). 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.[15] In short, ''all property interests are contemplated by the provision.''[16] This necessarily includes the direct and indirect ownership interests which

[12] Annex, Attachment 8, Memorandum of Conversation dated October 15, 1952, p. 15.

[13] 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, its shareholders and the Japanese Bank Lenders with respect to their existing rights and interests, as the holders of ownership and debt interests in the Vessel Owners and mortgage interests in the Vessels, and with respect to future financing activities undertaken to further or protect those interests. Alyeska, WAFBO, Inc., their Japanese shareholders and the Japanese Bank Lenders clearly ''acquired interests'' in the Vessel Owners prior to enactment of the AFA and are thus entitled to national treatment in future dealings with the Vessel Owners.

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

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

[16] *Id.*

Petitioners have in the Vessel Owners and in the Vessels and the preferred mortgage interests which Alyeska and the Japanese Bank Lenders have in the Vessels, together with ancillary contract rights granted in their loan documents.

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.*'' Sullivan Study at 116 (emphasis added). Here, the AFA's new restrictions on foreign investment and foreign financing will prohibit the Vessel Owners from using their Vessels in the U.S. fisheries. In effect, the AFA will either deprive the Petitioners of the economic value of their interests in the Vessels by prohibiting their productive use or force divestiture. The impairment of the presently existing rights of the Vessel Owners to use their Vessels in the U.S. fisheries—and the rights of the other Petitioners to hold their existing direct and indirect ownership interests in the Vessel Owners and mortgage interests in the Vessels—is a sufficient impairment of those 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 Owners so as to force a divestiture of the interests of Alyeska or WAFBO, Inc. to a private party which qualifies as a U.S. Citizen 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 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.'' Sullivan Study at 115. Herman Walker observed that this language is designed ''to account for the possibility of injurious governmental harassments short of expropriation or sequestration.'' Herman Walker, Jr., ''Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,'' 5 Am. T. Comp. Law at 236 (1956). 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.'' [17]

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.[18]

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. Sullivan Study at 115. Thus, it would apply to the variety of discriminatory prohibitions and restrictions that the AFA and MARAD's implementing regulations impose on Petitioners' existing ownership and mortgage interests and other contract rights and on Petitioners' ongoing ability to protect those rights and interests by entering into future transactions with the Vessel Owners.

The intrusive and discriminatory restrictions imposed by the AFA and MARAD's implementing rules on transactions between Non-Citizen lenders, such as Alyeska and the Japanese Bank Lenders, and U.S. fishing vessel owners place the Non-Citizen lenders 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 obtain a reliable supply of fish by financing fishing vessel acquisitions, conversions and improvements in return for exclusive marketing relationships while Non-Citizen processors are prohibited from making similar arrangements. As previously noted, 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 Non-Citizen lender is not even permitted to make an *unsecured* loan to a fishing vessel owner, if (a) the loan exceeds the annual value of the vessel's catch (where an exclusive marketing agreement is involved—see § 356.45(a)(2)(i)); or (b) 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 * * * '' (see § 356.45(b)(1)). Under these standards, Alyeska's existing loans to the Vessel Owners would not have been permitted and Alyeska will not be permitted to make future loans to the Vessel Owners, secured or unsecured, to protect its existing interests. Further, the requirement of MARAD review and approval is itself an unreasonable and discriminatory burden, particularly in the absence of coherent standards. 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

[17] 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).

[18] Annex, Attachment 12; Department of State Division of Communications & Records Outgoing Airgram dated October 28, 1952, p. 2.

and the Japanese Bank Lenders, 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 and financing contained in the AFA and MARAD's implementing rules.

Even if Article XIX. 6 is interpreted as applying to fishing vessels,[19] 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.'' [20] 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.'' *See* Memorandum of Conversation dated April 3, 1952, at 5.[21] The State Department understood the Japanese suggestion as an attempt to obtain a blanket exception from the entire Treaty for national fisheries. *See* 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'').[22] The U.S. rejected the Japanese proposal and the language of Article XIX.6 remained unchanged. 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? [23]

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.'' Sullivan Study at 284 (emphasis added).

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, VII or IX.2, each of which bars application of those restrictions to Petitioners with respect to the Vessel Owners and the Vessels.

6. 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. *See, generally,* Jones Study. 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.

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, 203 and 204 of the AFA and the implementing regulations published by MARAD on July 19, 2000, codified at 46 C.F.R. 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 and the Japanese Bank Lenders of valuable existing ownership, mortgage and contract rights and interests in violation of the U.S.-Japan FCN. Application of the new restrictions to bar Petitioner Alyeska or its Japanese shareholders from entering into future transactions with the Vessel Owners, 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 Alyeska and its shareholders to protect

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

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

[21] Annex, Attachment 13, Memorandum of Conversation dated April 3, 1952.

[22] Annex, Attachment 14, Department of State Outgoing Airgram dated June 12, 1952.

[23] *See* fn. 21. *See also,* Jones Study at 80–81.

their existing rights and interests and to carry on their existing lawful business 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 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 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 Sections 202, 203 and 204 ''shall not apply'' to Petitioners ''to the extent of the 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 an ''owner'' or ''mortgagee'' on October 1, 2001 ''to the extent of the inconsistency'' between the Act and the Treaty. Petitioners qualify as ''owners'' and ''mortgagees.'' 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 two-fold: (1) The Treaty protects the existing ownership and mortgage interests of Petitioners and the Japanese Bank Lenders in the Vessels and related contract rights, which the AFA would prohibit or restrict; and (2) the Treaty protects future transactions between Alyeska, its Japanese shareholders or the Japanese Bank Lenders and the Vessel Owners, which the AFA would prohibit or restrict, including future loans, preferred mortgages and other financing and contractual arrangements, which Petitioners may deem necessary or appropriate to protect their existing businesses and their existing interests in the Vessels and the Vessel Owners. Thus, Section 213(g) exempts Petitioners from the restrictions and limitations of Sections 202, 203 and 204 of the AFA and MARAD's implementing rules.

IV. Conclusion

For the reasons stated above, Sections 202, 203 and 204 of the AFA and 46 CFR Part 356 are inconsistent with the U.S.-Japan FCN and therefore may not be applied to Petitioners with: respect to the Vessels or the Vessel Owners.

This concludes the analysis submitted by Petitioner for consideration.

Dated: January 11, 2001.

By Order of the Maritime Administrator.

Joel Richard,

Secretary, Maritime Administration.

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DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–8665]

ARICA—Applicability of Ownership and Control Requirements to Obtain a Fishery Endorsement to the Vessel's Documentation

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'') is soliciting public comments on a petition from the owners and mortgagees of the vessel ARICA—Official Number 550139 (hereinafter the ''Vessel''). The petition requests that MARAD issue a decision that the American Fisheries Act of 1998 (''AFA'' or ''Act''), Division C, Title II, subtitle I, Pub. L. 105–277, and the implementing regulations at 46 CFR part 356 (65 FR 44860 (July 19, 2000)) are in conflict with the Agreement Between the United States of America and Denmark Regarding Friendship, Commerce and Navigation, 421 UNTS 105, TIAS: 4797,12 UST 908951 (1961) (''Denmark Treaty'' or ''FCN''). The petition is submitted pursuant to 46 CFR 356.53 and 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 Denmark Treaty, 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 Denmark Treaty 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 February 16, 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, DC 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.