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

(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, section 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 section 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

Alyeska Seafoods, Inc. ("Alyeska"), Wards Cove Packing Company ("Wards Cove"), Maruha Corporation ("Maruha") and Western Alaska Fisheries, Inc. ("WAF"), are the owners of direct or indirect interests in Morning Star, L.P. (the "Vessel Owner") and indirect interests in the Vessel. Alyeska is the mortgagee under a preferred mortgage on the Vessel. (Alyeska, Maruha, Wards Cove and WAF are referred to hereinafter as a "Petitioner" and, collectively, as the "Petitioners.")

Ownership and Mortgage Structure of the Vessel

The ownership and mortgage structure for the Vessel is as follows:

A. Ownership Structure

Morning Star, L.P., a Washington limited partnership (the "Vessel Owner"), is the owner of the Vessel. The Vessel Owner was formed in 1997 for the purpose of allowing Alyeska to acquire an interest in the Vessel. The sole general partner of Morning Star, L.P. is Morning Star Management, LLC, a Washington limited liability company which is owned entirely by individual U.S. Citizens and which owns 75% of the interest in Morning Star, L.P. Alyeska is the limited partner of Morning Star, L.P. and owns the remaining 25% interest in the limited partnership.

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(o).

B. Mortgage Structure

Alyeska provided a loan to the Vessel Owner that is secured by a preferred mortgage on the Vessel. This loan remains outstanding and continues to be secured by this preferred mortgage.

C. Exclusive Marketing Agreement

Alyeska agreed to invest in the Vessel Owner and to provide a loan to that entity 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. The Limited Partnership Agreement of Morning Star, L.P. provides that the Vessel will sell its products primarily to Alyeska Seafoods, Inc. and that Alyeska will pay competitive prices for all such products. The only exceptions to the Partnership's obligation to deliver to Alyeska are where Alyeska lacks capacity to process a delivery and where Alyeska and Morning Star Management agree that the Vessel may sell into other markets.

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;

(2) the existing exclusive marketing agreement and other contract rights and interests ancillary to Alyeska's ownership interest in and financing arrangements with the Vessel Owner; and

(3) future loans, financing and other contract arrangements between the Petitioners and the Vessel Owner with respect to the Vessel the existing preferred mortgage interests in the Vessel held by Alyeska.

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 Restrictions on Foreign Financing and Foreign "Control" of Fishing Vessels Violate Article VII.*

"a. *The AFA's Restrictions on Foreign Financing and Foreign "Control" of Fishing Vessels Impair Petitioners' Rights and Interests With Respect to Existing Financing and Other Contractual Arraignments.*

"The AFA will nullify the preferred mortgage interest in the Vessel currently held by Alyeska, impair Alyeska's rights and interests under existing financing documents, impair Alyeska's rights and interests under the exclusive marketing provision of the limited partnership agreement governing the Vessel Owner and prevent Alyeska and its Japanese shareholders from protecting their established businesses and interests by entering into future financing and contractual arrangements with the Vessel Owner.

"Current law permits wholly or partly Japanese-owned entities, including Alyeska, Maruha and WAF, to finance U.S. fishing vessels and to hold preferred mortgage interests in U.S. fishing vessels to secure their loans. [7] 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.[8] 46 U.S.C. 31326(b)(1) gives the preferred mortgage lien priority over all liens arising after filing of the mortgage except a limited number of "preferred maritime liens" listed at 46 U.S.C. 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 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 mortgage which Alyeska holds in the Vessel is a valuable property interest in the Vessel.

"The AFA will prohibit Alyeska from continuing to hold its existing preferred mortgage on the Vessel. Section 202(b) of the AFA amends 46 U.S.C. 31322(a) to disqualify Non-Citizens, such as Alyeska, from holding preferred mortgages on fishing vessels over 100 feet in registered length.

"Further, The AFA contains a new definition of impermissible Non-Citizen "control" [9] and requires transfers of "control" of fishing vessels to be "rigorously scrutinized" by MARAD under this new standard.[10] 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, including loans and exclusive marketing agreements.[11] Unless MARAD reviews and approves the terms of the preferred mortgage and other financing documents previously executed by the Vessel Owner in favor of Alyeska prior to October 1, 2001 under these new standards, the Vessel will lose its fishery endorsement and the Vessel Owner will no longer be permitted to own or operate the Vessel in the U.S. fisheries.[12] This, in turn, will destroy the value of the Vessels as security under the mortgage held by Alyeska and destroy the ability of the Vessel Owner to repay the debt which the mortgage secures. By prohibiting Alyeska from continuing to hold its existing preferred mortgage on the Vessel and imposing new conditions and restrictions on the terms of Alyeska's existing financing documents, including a new requirement of administrative review and approval of those financing documents under the AFA's new "control" standards, the AFA and MARAD's implementing regulations impair the contract rights and mortgage interests of Alyeska.

"In addition, however, MARAD has made clear that there is no way that Alyeska can preserve its mortgage interest 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.[13] Thus, the AFA's requirements will nullify Alyeska's existing preferred mortgage interest in the Vessel. If Alyeska's mortgage is not released, the Vessel will lose its fishery endorsement, destroying the value of the Vessel as collateral for Alyeska's loan and destroying the Vessel Owner's ability to pay its debts.[14]

"Alyeska's rights and interests under the exclusive marketing provision of the limited partnership agreement governing the Vessel Owner are also impaired by the AFA. Because of the injunction of Section 202(c)(2) of the AFA to "rigorously scrutinize" exclusive marketing agreements with Non-Citizens, 46 CFR 356.43(c) requires a fishing vessel owner to obtain prior MARAD approval before entering into such an agreement "if the agreement * * * contains provisions that in any way convey to the [Non-Citizen] purchaser * * * control over the operation, management or harvesting activities of the vessel, [or] vessel owner * * * other than as provided for in paragraph (b)" of that section. Since the Agreement of Limited Partnership of Morning Star, L.P. contains a variety of provisions related to the rights and obligations of Alyeska and Morning Star Management, LLC with respect to the management of the partnership, none of which are referenced in Section 356.43(b), it could be argued that the agreement "contains provisions that in [some] way convey to [Alyeska] control over * * * the vessel owner." Accordingly, the AFA and Section 356.43(c) render the permissibility of the exclusive marketing provision of the limited partnership agreement and, accordingly, the Vessel Owner's continued eligibility for a fishery endorsement, uncertain.

"Further, even if Alyeska's existing mortgage interest and contract rights were found to be exempt from the requirements of the AFA and MARAD's implementing rules, the AFA's restrictions on future financing

[7] *Compare* 46 U.S.C. 31322(a), as now in effect, with 46 U.S.C. § 31322(a)(4), as amended by Section 202(b) of the AFA.

[8] *See, generally,* 46 U.S.C. Chapter 313.

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

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

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

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

[13] 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").

[14] While Alyeska's 25% limited partnership interest in the Vessel Owner is permissible under the AFA's new Non-Citizen ownership restriction, it is uncertain whether MARAD would approve a preferred mortgage held by a 25% Non-Citizen limited partner, even where the Non-Citizen limited partner is not a fish processor with which the Vessel Owner has entered into an exclusive marketing agreement.

transactions and contractual arrangements between Alyeska or its Japanese shareholders and the Vessel Owner 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 and foreign "control" of fishing vessels will prevent Alyeska and its Japanese shareholders from protecting their investments in Alyeska's Dutch Harbor processing facility and their existing investment in and loan to the Vessel Owner by offering the Vessel Owner financing for operating funds or for vessel repairs or improvements which may become necessary to permit the Vessel Owner to operate profitably—or at all. If alternative financing from a financial institution is unavailable to the Vessel Owner, the ability of Alyeska to make loans to support the Vessel's continuing operations may be the only means available to protect the Vessel Owner from insolvency and default on its existing loan from Alyeska. Thus, the AFA's restrictions on the ability of Alyeska and its Japanese shareholders to make new loans to the Vessel Owner, to take security in the Vessel or to enter into contracts with the Vessel Owner jeopardize the existing investment and other financial interests of Alyeska and its Japanese shareholders 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 and to enter into exclusive marketing arrangements with 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 operation, construction, acquisition, repair 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 to qualified 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 operation, 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 operation, acquisition, repair or improvement of fishing vessels in return for fish deliveries. Just as their existing ownership and mortgage interests are protected by the Treaty, Alyeska and its Japanese shareholders must also be able to modify and restructure their loans and related security arrangements with the Vessel Owner and make new loans to the Vessel Owner with respect to the Vessel in order to further and protect Alyeska's existing investment, mortgage and business interests in the Vessel, as circumstances may require.

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

"The new restrictions on foreign financing and foreign "control" of fishing vessels imposed by the AFA and MARAD's implementing regulations violate Article VII.1's national treatment guaranty by (1) depriving Alyeska of its existing preferred mortgage interest, securing its existing loan; (2) subjecting the terms of Alyeska's existing loan documents and exclusive marketing agreement with the Vessel Owner 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 of the value of its collateral and the income stream from operations on which Alyeska relied in making its loan; and (4) preventing Alyeska or its shareholders from refinancing its existing loan, making new loans to the Vessel Owner, taking a new mortgage on the Vessel or entering into other contractual arrangements with respect to the Vessel or the Vessel Owner necessary to further or protect their existing financial and business interests in the Vessel.

"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.[15] 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."[16] 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 that the exception would extend to "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.[17] 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."[18] 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.[19]

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

[16] Annex, Attachment 3, Dept. of State Outgoing Telegram dated March 10, 1952, p. 1. *See also* Attachment 5 at p. 3, noting that the "* * * first paragraph of Article VI 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."

[17] Annex, Attachment 4, Dept. of State Outgoing Telegram dated May 21, 1952, p. 3.

[18] *Id.*

[19] Annex, Attachment 5, Memorandum of Conversation concerning discussions on the draft FCN held between October 15, 1952 and March 11, 1953, p. 15.

"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)." [20] 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. 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.[21]

"The provisions of the AFA and MARAD's implementing rules which restrict the right of Japanese-owned entities to make loans secured by preferred mortgages on U.S. vessels or to make loans or enter into other commercial contracts with a vessel owner without prior MARAD approval of the loan or contract 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 commercial * * * financial and other business activities." Under Article VII.1, neither State Party may restrict loans by foreign-owned entities to the owners of fishing vessels of their national flag or commercial contract arrangements between them.

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

"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.[22] 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 Owner 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) Alyeska's existing preferred mortgage and associated loan documents previously executed by the Vessel Owner in favor of Alyeska; (b) the exclusive marketing agreement contained in the Morning Star Limited Partnership Agreement; or (c) future financing and ancillary contractual arrangements between Alyeska or its Japanese shareholders and the Vessel Owner, including exclusive marketing agreements.

"2. *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 Alyeska from holding its existing contract rights and preferred mortgage interest in the Vessel would deprive Alyeska of its 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."[23] 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.[24]

In short, "all property interests are contemplated by the provision."[25] This necessarily includes the preferred mortgage interest which Alyeska has in the Vessel, together with ancillary contract rights granted to Alyeska in the

[20] Charles H. Sullivan, "State Department Standard Draft Treaty of Friendship, Commerce and Navigation" (undated) (hereinafter "Sullivan Study") at 144.

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

[22] Annex, Attachment 6, Letter to the Chairman of the House of Representatives Committee on Merchant Marine and Fisheries from Robert Lee, August 17, 1964, as published in Ronny E. Jones, "State Department Practices Under U.S. Treaties of Friendship, Commerce, and Navigation" (1981) (hereinafter "Jones Study") at p. 80.

[23] Protocol, ¶ 2 (emphasis added).

[24] Annex, Attachment 7, Memorandum of Conversation dated April 15, 1952 at p. 3.

[25] *Id.*

loan documents and related agreements executed by the Partnership in conjunction with that loan.

"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."[26] Here, the AFA's new restrictions on foreign investment and foreign financing will prohibit the Vessel Owner from employing the 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 productive use, force divestiture by Alyeska of its loan and preferred mortgage interests in the Vessel or force complete divestiture by the Vessel Owner of its interests in the Vessel. The impairment of the presently existing right of the Vessel Owner to employ the Vessel in the U.S. fisheries—and the right of Alyeska to hold its loan and preferred mortgage interests in the Vessel—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 Owner so as to force a divestiture of Alyeska's loan and preferred mortgage interests or complete divestiture of the Vessel 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," as required by Article VI.3—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.

"3. *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."[27] Herman Walker observed that this language is designed "to account for the possibility of injurious governmental harassments short of expropriation or sequestration."[28] 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."[29]

"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.[30]

"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.[31] 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 among themselves related to the Vessel.

"The intrusive and discriminatory restrictions imposed by the AFA and MARAD's implementing rules on transactions between Non-Citizen lenders, such as Alyeska, 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, repairs 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 loan to the Vessel Owner would no longer be permitted and Alyeska will not be permitted to make future loans to the Vessel Owner to protect its existing interests. Further, the requirement of MARAD review and approval is itself an unreasonable and discriminatory

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

[27] *Id.* at 115.

[28] 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).

[29] Annex, Attachment 8, 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).

[30] *Id. See also*, Annex, Attachment 9, Department of State Division of Communications & Records Outgoing Airgram dated October 28, 1952, p. 2. 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."

[31] Sullivan Study at 115.

burden, particularly in the absence of coherent published standards. The AFA and MARAD's rules thus impose "unreasonable or discriminatory measures" on Non-Citizen fish processors, such as Alyeska, 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.

"4. 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,[32] 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."[33] 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."[34] The State Department understood the Japanese suggestion as an attempt to obtain a blanket exception from the entire Treaty for national fisheries.[35] 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.[36]

"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."[37]

"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.

"5. *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.[38] 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 CFR Part 356.

"6. *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 Jo Brooks of 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

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

[33] Annex, Attachment 6, Letter to the Chairman of the House of Representatives Committee on Merchant Marine and Fisheries from Robert Lee, August 17, 1964. *See* fn. 22.

[34] Annex, Attachment 10, Memorandum of Conversation held April 3, 1952, at p. 5.

[35] Annex, Attachment 11, Department of State Outgoing Airgram dated June 1952, at pp. 1–2 (nothing 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").

[36] *See* fn. 22. *See also*, Jones Study at 80–81.

[37] Sullivan Study at 284 (emphasis added).

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

America."[39] 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)[40] 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). * * *[41]

"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.[42] 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 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."[43] 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.[44]

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."[45]

"Thus, the Government of Japan has strongly expressed its 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 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 of valuable existing preferred mortgage interests and contract rights 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 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 Alyeska and its shareholders to protect their existing rights and interests and to carry on their existing lawful 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

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[39] Annex, Attachment 12 (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.

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

[41] Annex, Attachment 12 at 1–2.

[42] Annex, Attachment 13 (January 24, 2000 Letter from the Embassy of Japan to the U.S. Dep't. of State at 1.

[43] *Id.*

[44] *Id.* at 2.

[45] *Id.*

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.[46] 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."[47] 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.[48] 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 ownership or mortgage interests in existence on October 1, 2001, but rather applies to an "owner" or "mortgagee" on October 1, 2001 and extends the exemption "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 "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 preferred mortgage interests of Petitioners in the Vessel and related contract rights (including the exclusive marketing agreement) which the AFA would impair, prohibit or restrict; and (2) the Treaty protects future transactions between Alyeska or its Japanese shareholders and the Vessel Owner, 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 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."

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. 01-4468 Filed 2-22-01; 8:45 am]

BILLING CODE 4910-81-P

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

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

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

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34009]

Toledo, Peoria & Western Railway Corporation—Trackage Rights Exemption—Peoria and Pekin Union Railway Company

Peoria and Pekin Union Railway Company (P&PU) has agreed to grant overhead trackage rights to Toledo, Peoria & Western Railway Corporation (TP&W) over P&PU's track between the point of connection between The Burlington Northern and Santa Fe Railway Company and P&PU near Darst Street in Peoria, IL, milepost 2.1, and the point of connection between P&PU and TP&W at North Main Street in East Peoria, IL, commonly known as P&PU Junction, milepost 0.0, a distance of approximately 4 miles.[1]

The transaction is scheduled to be consummated on or shortly after February 16, 2001.

The trackage rights will enable TP&W to enhance competitive service for intermodal traffic and provide more efficient and economical routings and service for this traffic.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34009 must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Louis E. Gitomer, Esq., Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our website at *WWW.STB.DOT.GOV.*

Decided: February 15, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 01-4524 Filed 2-22-01; 8:45 am]

BILLING CODE 4915-00-P

[1] A redacted version of the amendment to the trackage rights agreement between TP&W and P&PU was filed with the verified notice of exemption. The full version of the agreement, as required by 49 CFR 1180.6(a)(7)(ii), was concurrently filed under seal along with a motion for a protective order. A protective order was served on February 14, 2001.

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995,