Thus, the entire S.E. Alaskan waterways area."

(4) Date and Place of construction and (if applicable) rebuilding. Date of construction: 1973. Place of construction: Holland—or Foreign.

(5) A statement on the impact this waiver will have on other commercial passenger vessel operators. According to the applicant: "We feel this will have little impact on existing operators as we ALREADY operate a Crewed Charter Business in S.E. Alaska (FOR THE PAST THREE YEARS) and are in the process of SELLING our existing Crewed Charter Boat "High Scooter" and thus will ONLY be substituting vessels. Thus, the real impact is very marginal.

Our current web page is *www.alaskanwcharters.com*. There are other existing boats in the region both foreign and U.S., which operate similar operations and most if not all run at 95 to 100% full basis. There are even vessels, which are currently booked into 2002 because the demand for such charters is extremely high. As most of the existing boats have well established client bases—as do we—the impact of this—substitution vessel for our existing vessel will be non-existent."

(6) A statement on the impact this waiver will have on U.S. shipyards. According to the applicant: "As the vessel was built almost 30 years ago and as new vessels of this size are too expensive to make a profitable charter business out of—the impact will again be nonexistent. Additionally, as we are planning some changes and redecorating of the 30 year old vessel—to bring the vessel into 2001 standards—it will actually bring additional business to the vessel and ship builders in the area."

Dated: February 20, 2001.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 01–4523 Filed 2–22–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–8929]

Frontier Spirit, Frontier Mariner, and Frontier Explorer—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") is soliciting public comments on a petition from the owners and mortgagees of the vessels FRONTIER SPIRIT—Official Number 951441, FRONTIER MARINER—Official Number 951440, and FRONTIER EXPLORER—Official Number 975015 (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, 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 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, 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.

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, DC 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 § 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 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

Spirit Limited Partnership, Mariner Limited Partnership and Explorer Limited Partnership (each a "Vessel Owner" and collectively, the "Vessel Owners") are the owners respectively of the Frontier Spirit, Frontier Mariner and Frontier Explorer. The Vessel Owners, in conjunction with Frontier Spirit Company, Frontier Mariner Company, Frontier Explorer Company, Alaska Frontier Company ("AFCO"), North American Maritime Corporation ("NAMCO") and North Japan Maritime Corporation ("NOMCO"), the owners of direct or indirect interest in the Vessel Owners and indirect interests in the Vessels, are hereinafter collectively referred to as "Petitioner" or "Petitioners."

Ownership, Mortgage Structure, and Contractual Arrangements for the Vessels

The ownership and financing structures of the Vessels are substantially identical. The Petitioner provided the following information about the ownership, mortgage structure and other contractual obligations of the Vessels:

A. Ownership Structure

Spirit Limited Partnership, a Washington limited partnership, is the owner of the Frontier Spirit. The general partner, Frontier Spirit Company, is a Washington corporation that owns 51% of the interest in the partnership. Frontier Spirit Company is wholly owned by AFCO. A majority of AFCO's stock is owned by U.S. Citizens; however, it does not qualify as a U.S. Citizen under the AFA because Japanese entities and individuals own more than 25% of AFCO's capital stock.

The sole limited partner of Spirit Limited Partnership is NAMCO, a Washington corporation owned by an individual Japanese citizen and NOMCO, a Japanese Corporation. NAMCO owns 49% of the interest in the partnership.

The Frontier Mariner is owned by Mariner Limited Partnership, a Washington limited partnership. The general partner, Frontier Mariner Company, is a Washington corporation which owns 51% of the partnership interest. Frontier Mariner Company is also wholly owned by AFCO. NAMCO is the sole limited partner and owns 49% of the partnership interest.

The Frontier Explorer is owned by Explorer Limited Partnership, a Washington limited partnership. The general partner, Frontier Explorer Company, is a Washington corporation which owns 51% of the partnership interest. Frontier Explorer Company is also wholly owned by AFCO. NAMCO is the sole limited partner and owns 49% of the partnership interest.

B. Financing Structure

The Petitioners set forth certain loan and currency swap agreements that the Vessel Owners have entered into with Bank of America, N.A., a U.S. financial institution, to finance the remaining obligations of the Vessel Owners related to the construction of the Vessels. Under these agreements and related loan documents, each of the Vessel Owners is jointly and severally obligated to Bank of America. These agreements are secured by preferred mortgages on each of the Vessels. The Petitioners note that Vessel Owners have also executed security agreements granting UCC security interests in the Vessels, their appurtenances and fishing rights to Bank of America to secure these loans.

In addition to the above, the Petitioners state that the Vessel Owners have entered into a loan agreement with Bank of America pursuant to which Bank of America has agreed to provide them jointly a $1 million line of credit for working capital. Each of the Vessel Owners is jointly and severally obligated to Bank of America under this line of credit loan agreement and related loan documents. The obligations of the Vessel Owners to Bank of America under the line of credit are secured by second preferred mortgages on the Vessels. The Vessel Owners have also executed security agreements granting security interests in the Vessels, their appurtenances and fishing rights to Bank of America to secure these obligations.

Except as described above, Petitioners state that no other mortgages, security interests or other consensual liens affect the assets of the Vessel Owners.

Frontier Spirit Company, Frontier Mariner Company, Frontier Explorer Company, NAMCO, NOMCO, AFCO and AFCO's U.S. Citizen and Non-Citizen shareholders have each guaranteed all of the obligations of the Vessel Owners to Bank of America pursuant to substantially identical Commercial Guaranty agreements in favor of Bank of America.

C. Other Contractual Arrangements

1. Management Agreement

The Petitioners state that each of the Vessel Owners has entered into a Management Agreement with AFCO. Under the agreement, AFCO provides an extensive array of vessel management services to the Vessel Owners including: identifying and recommending qualified licensed officers and other navigational personnel for employment by the Vessel Owner; performing accounting services, including maintenance of payroll records, preparation of tax returns, keeping the general ledger, managing accounts payable and receivable, reconciling bank records and preparing financial statements; coordinating and directing the victualling, supplying fueling and repairing of the Vessel, including the procurement of bait, outfit, equipment and spare or replacement parts; arranging for the payment of all expenses incident to the Vessel's operation; periodic drydocking of the Vessel; making travel arrangements for the licensed officers

and other navigational personnel, including airfare, transportation and lodging incidental to rotation of relevant personnel to and from the Vessel; and any other activities incidental to the management of the Vessel.

2. Vessel Manning Agreement.

Petitioners state that each of the Vessel Owners has entered into a Vessel Manning Agreement with NAMCO, dated as of January 1, 2001, under which NAMCO identifies, hires and employs unlicensed processing personnel and quality control technicians for service aboard the Vessels and provides certain related services. Licensed officers and other navigational personnel are not covered by the Vessel Manning Agreement according to the Petitioners, as they are employed directly by the Vessel Owner. The Petitioners assert that the Vessel Manning Agreement contains no terms giving NAMCO or any other Non-Citizen the right to manage, control or direct the Vessel's operations.

3. Marketing Agreement.

The Petitioners submit that each of the Vessel Owners has entered into a marketing Agreement with NOMCO, effective January 1, 2000, governing sales and purchases by the parties of Pacific Cod and other groundfish sold by the Vessel Owners to NOMCO. Petitioners state that these marketing Agreements do not require that any quantity or percentage of a Vessel's catch be sold to NOMCO or the Japanese market; however, NOMCO has a right of first refusal on all fish products sold by the Vessel Owners in the Japanese market. Each of these Agreements is for a term of one year, but is renewed annually unless either party gives notice of termination to the other in writing at least 60 days prior to the end or the term, including any renewal term. The Petitions submit that the Agreements contain no terms giving NOMCO or any other Non-Citizen the right to manage, control or direct the operations of the Vessels.

D. Services Agreement

The Petitioners note that each of the Vessel Owners has entered into a Services Agreement with NOMCO, dated as of January 1, 2001, whereby NOMCO has agreed (1) to supply current market information to the Vessel Owners concerning market demand, processing and handling requirements, prices and trends; and (2) to provide an unsecured, subordinated standby line of credit to the Vessel Owners.

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 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;

(2) the existing exclusive marketing agreements, loan guaranties, financing and other contractual arrangements between or among the Petitions with respect to the Vessels; and

(3) future loan, financing and other contractual arrangements between or among the Petitioners 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. 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 Ownership Violate 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 the investment by Japanese nationals and Japanese companies in the Vessel Owners exceeds the maximum investment permitted by the AFA to be held by Non-Citizens.[3]

"A vessel cannot be employed lawfully 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 for use in the U.S. fisheries and operated in the U.S. fisheries of the North Pacific Ocean and Bering Sea. The Vessels have no other economically productive uses. 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 FR 44860 *et seq.*, July 19, 2000). The aggregate of the ownership interests held, directly or indirectly, in the Vessel Owners by Japanese companies and Japanese nationals 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.[4]

[3] As used herein, "Non-Citizen" has the meaning specified at 46 CFR § 356.3(o).

[4] *See* 46 U.S.C. 12102(c)(1), as amended. 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 "a majority" to 75%; and (2) this new test is to be applied both "at each tier of ownership and in the aggregate," whereas the existing standard is applied solely at each tier of ownership, allowing indirect foreign interests "in the aggregate" to exceed 50%, so long as majority 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 majority 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 entities which satisfy the majority U.S. ownership standard of current law at each "tier" of

Continued

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 loan and currency swap agreements with Bank of America, triggering the obligations of their limited partners, general partners and the direct and indirect shareholders of the general partners under their guaranties. Alternatively, the Vessel Owners will be forced to sell the Vessels or their Japanese Investors [5] will be forced to sell some or all of their direct and indirect interests in the Vessel Owners, assuming a buyer for their minority interests can be found.

"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." [6] Article VII.1 of the U.S.-Japan FCN guarantees broad "national treatment" for the nationals and enterprises of the U.S. and Japan when doing business within the jurisdiction of the other country. Article XXII.1 of the U.S.-Japan FCN defines "national treatment" as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." The principle of national treatment is the central principle of all of the post-war FCN treaties. National treatment requires that each State Party must treat nationals of the other in the same way that it treats its own nationals. The treaties focus on business and investment. "The right of corporations to engage in business on a national-treatment basis may be said to constitute the heart of the treaty as an investment instrument." [7] In a case involving interpretation of the U.S.-Japan FCN, the United States Supreme Court noted that the purpose of the FCN treaties was "to assure [foreign corporations] the right to conduct business on an equal basis without suffering discrimination based on their alienage." [8] "[N]ational treatment of corporations means equal treatment with domestic corporations." [9]

"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 the Japanese Investors in compliance with existing law clearly denies national treatment to them, to the Vessel Owners and to the other Petitioners. 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. [10] "[R]egulations that force divestiture of interests already acquired or established prior to promulgation of such regulation * * * raise Art. VII questions." [11] 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." [12] 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.* [13]

"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." [14]

"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 limitations to companies already engaged in relevant business activities. [15]

"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

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ownership but which do not meet the new 75% U.S. ownership requirements of the AFA.

[5] As used herein, the "Japanese Investors" are NOMCO, NAMCO, their Japanese shareholders and the Japanese shareholders of AFCO.

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

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

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

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

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

[11] *Id.* at 107.

[12] Modern Treaties at 809.

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

[14] *Id.* at 148.

[15] Annex, Attachment 2, Department of State Incoming Telegram dated March 20, 1953, p. 1.

granting grandfather rights to existing businesses were deleted.[16] 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.[17]

"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. * * * "[18] 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 NAMCO, NOMCO and their Japanese shareholders 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 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 U.S. Citizen-owned enterprises.

"NOMCO and the individual Japanese citizens who have invested in the Vessel Owners are clearly entitled to protection as Japanese nationals 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. NAMCO, Frontier Spirit Company, Frontier Mariner Company, Frontier Explorer Company, the Vessel Owners and AFCO 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 the Japanese Investors. Thus, the Article VII.2 grandfather provision protects the ownership interests of NOMCO and the Japanese Investors in AFCO and NAMCO; the ownership interests of AFCO[19] and NAMCO in the Vessel Owners; and the Vessel Owners' right to continue to own and operate their respective Vessels in the U.S. fisheries.

"However, as noted above, the Article VII.2 grandfather provision not only protects pre-existing rights and interests acquired, directly or indirectly, by Japanese nationals prior to a discriminatory change in the law, but protects *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 the Japanese Investors from the new restrictions of Section 202 and 203 of the AFA and 46 C.F.R. Part 356 with respect to (a) the Japanese Investors' existing direct and indirect ownership and financial 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 or among the Japanese Investors and the Petitioners to further or protect their existing rights and interests in the Vessels and the Vessel Owners, such as by extending loans, taking preferred mortgages or other security in the Vessels or entering into contractual arrangements in furtherance of their existing ownership, financial or other business interests with respect to the Vessels.

"2. *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' Existing Rights and Interests With Respect to the Vessels.*

"The AFA's restrictions on foreign financing and foreign "control" of fishing vessels imposed by Sections 202 and 203 of the AFA impair the existing rights and interests of Frontier Spirit Company, Frontier Mariner Company, Frontier Explorer Company, NOMCO, NAMCO, AFCO and AFCO's Non-Citizen shareholders (the "Non-Citizen Guarantors") under their guaranties in favor of Bank of America and impair the ability of the Japanese Investors to protect and further their existing investment and business interests in the Vessels and the Vessel Owners.

"The harm to Petitioners caused by the AFA consists of three types.

"First, the AFA impairs the existing rights and interests of Petitioners as guarantors of the obligations of the Vessel Owners to Bank of America.

"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 and non-maritime liens.[20] 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 maritime liens in favor of suppliers, materialmen, repairmen others arise 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 all liens. Absent "preferred mortgage" status, a mortgage provides no protection against maritime liens and little or no security for the lender. Thus, Bank of America's rights under the existing preferred mortgages on the Vessels are valuable rights.

"Current law permits wholly or partly Japanese-owned lenders, such as the Non-Citizen Guarantors, to hold preferred mortgage interests in U.S. fishing vessels directly.[21] As guarantors of the loan and currency swap agreements between the Vessel Owners and Bank of America, the Non-Citizen Guarantors may be required to pay off the obligations of the Vessel Owners in the event they default on repayment of their loans. In this situation, under the law of subrogation, the guarantors will step into the shoes of Bank of America with respect to its existing loan documents, including the preferred mortgages on the Vessels.[22] While neither the AFA nor MARAD's implementing rules expressly address the rights of a guarantor in this situation, the AFA prohibits a Non-Citizen, such as the Non-Citizen Guarantors, (1) from directly acquiring Bank of America's interests in the preferred mortgages;[23] and (2) from holding even a beneficial interest in the mortgages (*i.e.*, as the beneficiary under a mortgage trust arrangement) unless MARAD has previously reviewed and approved the terms of all related loan documents.[24] Acquisition by the Non-Citizen Guarantors of Bank of America's position vis-à-vis the Vessel Owners pursuant to their existing rights under the law of subrogation would result in the invalidation of the Vessels' fishery endorsements.[25]

"The AFA contains a new definition of impermissible Non-Citizen "control"[26] and requires transfers of "control" of fishing vessels to be "rigorously scrutinized" by

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

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

[18] Sullivan Study at 150.

[19] Through its wholly owned subsidiaries, Frontier Spirit Company, Frontier Mariner Company and Frontier Explorer Company.

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

[21] *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.

[22] Restatement, Third, Suretyship and Guaranty Section 27 (1996); Restatement of Security Section 141 (1941); Dobbs Law of Remedies Section 4.3(4) (2d ed. 1993); 73 Am.Jur., 2d Subrogation Section 106 (1974); *Petro Point Mfg. Co.* v. *Freeman*, 170 Wash. 390, 392, 16 P.2d 609 (1932). *See also, Mahler* v. *Szucs*, 135 Wn.2d 398, 412, 957 P.2d 632 (1998); *Livingston* v. *Shelton*, 85 Wn.2d 615, 619, 537 P.2d 774 (1975); *Timms* v. *James*, 28 Wn.App. 76, 80, 621 P.2d 798 (1980); *MGIC Financial Corp.* v. *H.A. Briggs Co.*, 24 Wn.App. 1, 6, 600 P. 2d 573 (1979).

[23] 46 U.S.C. § 31322(a)(4), as amended by Section 202(b) of the AFA, and 46 C.F.R. § 356.19.

[24] 46 U.S.C. § 12102(c)(4)(A), as amended by Section 202(a) of the AFA, and 46 C.F.R. §§ 356.15(d) and 356.21(d).

[25] 46 U.S.C. 12102(c)(4)(A), as amended by the AFA, and AFA Section 203(c). 46 C.F.R. 356.45 would not apply, among other reasons, because the Bank's loans are secured by preferred mortgages on the Vessels.

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

MARAD under this new standard.[27] 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 financing transactions, management agreements and marketing agreements.[28] Unless MARAD reviews and approves the loan agreements, preferred mortgages and other financing documents previously executed by the Vessel Owners in favor of Bank of America 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, if the Non-Citizen Guarantors succeed to the rights and interests of Bank of America—even through a qualified Mortgage Trustee.[29] This, in turn, will destroy the value of the Vessels as security under the mortgages and destroy the ability of the Vessel Owners to pay the debts which the mortgages secure. By prohibiting the Non-Citizen Guarantors from succeeding to the interests of Bank of America under the law of subrogation and imposing new conditions and restrictions on the terms of their existing financing arrangements, including a new requirement of administrative review and approval of the loan documents under AFA's new "control" standards, the AFA and MARAD's implementing regulations impair the rights and interests of the Non-Citizen Guarantors under their guaranties and under the existing preferred mortgages and related loan documents.

"The second way in which the AFA's new restrictions on foreign "control" harm the Petitioners is by impairing, prohibiting or restricting their existing contractual arrangements with respect to the Vessels. The Management Agreements between the Vessel Owners and AFCO may be impermissible because of the role played by AFCO, a Non-Citizen, in managing the Vessels. It is similarly uncertain whether the Vessel Manning Agreements between the Vessel Owners and NAMCO and the Marketing Agreements and Services Agreements between the Vessel Owners and NOMCO are permissible. The standards for evaluating such agreements under the AFA and Part 356—individually, in combination with one another and in combination with other factors—are so vague that the permissibility of Petitioners' existing contract arrangements under the AFA cannot be determined except by obtaining an ad hoc decision by MARAD. Accordingly, the AFA requires Petitioners to seek MARAD approval of all of these agreements, unless Petitioners are exempted from the AFA's requirements with respect to these agreements.[30]

"The third way in which the AFA's new restrictions on foreign financing and foreign "control" harm the Petitioners is by restricting the ability of the Japanese Investors and the U.S. companies in which they have invested to enter into future financing and other contractual arrangements with the Vessel Owners in order to protect and further their existing investment and other business interests in the Vessel Owners and the Vessels. The AFA's restrictions on foreign "control" and foreign financing of fishing vessels will limit the ability of the Japanese Investors and the U.S. companies in which they have invested to protect their investments and interests in the Vessels by entering into management agreements, exclusive marketing agreements or by offering the Vessel Owners financing for vessel operations, repairs or improvements. The ability of the Japanese Investors to make loans to support the Vessels' continuing operations or necessary repairs or improvements may be the only means to protect the Vessel Owners from insolvency and default on their loans from Bank of America, potentially jeopardizing Petitioners' investments and triggering the obligations of the Non-Citizen Guarantors on their guaranties. Thus, the AFA's restrictions on the ability of the Japanese Investors to make loans to the Vessel Owners, to take security in the Vessels and to enter into other contractual arrangements related to the Vessels jeopardize the existing financial and business interests of all of the Petitioners.

"The provisions of 46 C.F.R. 356.45 which approve certain loans by Non-Citizens to fishing vessel owners are too restrictive to permit the types of loans which may be necessary to permit Petitioners to protect their ownership and other business interests in the Vessels. Section 356.45(a)(2) permits advances to vessel owners by Non-Citizens "[w]here the basis of the advancement is an agreement between the Non-Citizen and the vessel owner * * * to sell all or a portion of the vessel's catch to the Non-Citizen" but prohibits the lender from taking security in the vessel and limits such loans to the annual "value of the product to be supplied to the [Non-Citizen]." These limitations are not found in existing law and significantly restrict the ability of the Japanese Investors to make loans which business circumstances may require. Section 356.45(b) permits certain types of loans but only if the loan is wholly unsecured and only if the Non-Citizen lender "is not affiliated with any party with whom [the vessel owner] has entered into a mortgage, long-term or exclusive sales or purchase agreement, or other similar contract." Thus, future financing arrangements between the Vessel Owners and the Japanese Investors are severely limited and restricted under these provisions.

"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) Impairing the existing legal rights and interests of the Non-Citizen Guarantors under Bank of America's existing preferred mortgages and related loan documents; (2) subjecting the rights of the Non-Citizen Guarantors under Bank of America's 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) impairing the existing rights and interests of Petitioners under existing contracts ancillary to their ownership and financing arrangements with respect to the Vessels; and (4) restricting the ability of Petitioners and the Japanese Investors to extend credit to the Vessel Owners, take preferred mortgages on the Vessels or enter into other contractual arrangements with respect to the Vessels or the Vessel Owners necessary to further or protect the existing financial and business interests of the Japanese Investors.

"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. It follows that the rights and interests of Non-Citizen Guarantors who succeed to the rights of the lender under existing loan documentation are also protected.

"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.[31] 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."[32] 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

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

[28] *See, generally*, 46 C.F.R. 356.11, 356.13–15, 356.21–25, 356.39–45.

[29] *See* 46 U.S.C. 12102(c)(4)(A), 46 C.F.R. 356.15(d), 356.21(d) and AFA Section 203(e).

[30] Of course, if AFCO and the Vessel Owners are exempt from the ownership requirements of the AFA, then they should also be exempt with respect to their contractual arrangements.

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

[32] Annex, Attachment 6, 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 VII can be considered the heart of the treaty; it is the basic 'establishment' provision, prescribing the fundamental principle governing the doing of business and the making of investments, in a treaty which is, above all, a treaty of establishment."

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.[33] 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." [34] 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.[35]

"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)." [36] 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 financing activities of the Non-Citizen Guarantors or the Japanese Investors. 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.[37]

"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, to enter into contracts with the vessel owner or to make loans or enter into 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 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 Non-Citizen 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 nationals of the other to a fishing vessel owner or other contractual arrangements between such foreign nationals and vessel owners.

"The AFA and MARAD's implementing rules impose new restrictions on the ability of the Petitioners and the Japanese Investors, going forward, to protect their existing investments, financial interests and other business interests in the Vessel Owners and the Vessels by, e.g., refinancing existing loans, advancing new loans for operation, 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 VII.1 of the Treaty. Article VII.1 extends the Treaty's protection both to loans, mortgages and other financing or contractual arrangements that are now outstanding under the terms of existing financing documents or contracts and to future financing and contractual arrangements by the Japanese Investors with respect to the Vessels or the Vessel Owners.

"For these reasons, Petitioners seek a determination by MARAD that Sections 202 and 203 of the AFA and MARAD's implementing regulations do not apply to Petitioners with respect to (a) existing rights and interests of the Non-Citizen Guarantors under preferred mortgages on the Vessels and associated loan, guaranty and security documents previously executed by the Vessel Owners and the Non-Citizen Guarantors in favor of Bank of America; (b) contracts entered into with respect to the Vessels between or among the Petitioners or the Japanese Investors prior to the effective date of the AFA; and (c) future financing and contractual arrangements between or among the Petitioners or the Japanese Investors with respect to the Vessels.

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

"The new restrictions imposed by Sections 202 and 203 of 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." [38] Herman Walker observed that this language is designed "to account for the possibility of injurious governmental harassments short of expropriation or sequestration." [39] 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." [40]

"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.[41]

"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

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

[34] *Id.*

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

[36] Sullivan Study at 144.

[37] To the extent that it could be argued that the first sentence of Article VII.2 might permit restrictions on foreign financing or "control" of fishing vessels, the grandfather provision of Article VII.2 would clearly protect the Japanese Investors and the Non-Citizen Guarantors with respect to their existing rights and interests, as the holders of ownership interests and contingent mortgage interests in the Vessels and rights under existing contracts—and with respect to future financing and contractual arrangements undertaken to further or protect those interests. The Japanese Investors and Non-Citizen Guarantors "acquired interests" in the Vessel Owners and the Vessels in reliance on existing law and are thus entitled to national treatment with respect to both their existing rights and interests and with respect to future dealings with the Vessel Owners to further or protect those existing rights and interests.

[38] Sullivan Study at 115.

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

[40] 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).

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

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, based on the Japanese Investors' ownership interests, preferred mortgage interests and other contract rights and interests, and on the ability of the Japanese Investors 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 financing and other business transactions between Non-Citizens, such as the Japanese Investors, and U.S. fishing vessel owners place Non-Citizens and vessel owners in which they have invested at a significant competitive disadvantage. U.S. Citizen investors are free to make loans and to enter into contracts with the fishing vessel owners in which they have invested without restriction. 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;[42] 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. * * *"[43] Under these standards, the Japanese Investors will not be permitted to make future loans to the Vessel Owners, secured or unsecured, to protect their existing ownership and other financial 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 the Japanese Investors and the companies in which they have invested, 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. *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 Petitioners from holding their pre-existing ownership interests, their rights and interests as guarantors under the Bank of America mortgages and other loan documents and their rights under ancillary contracts with the Vessel Owners 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.[44]

In short, "all property interests are contemplated by the provision."[45] This necessarily includes the direct and indirect ownership interests which the Petitioners have in the Vessel Owners and in the Vessels and the interests of the Non-Citizen Guarantors, as potential subrogees, under Bank of America's preferred mortgages and other loan documents, together with ancillary contract rights.

"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 their contingent 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 the Japanese Investors 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 C.F.R. 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.

"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,[46] 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."[47] 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."[48] The State Department understood the Japanese suggestion as an attempt to obtain a blanket exception from the entire Treaty for national fisheries.[49] 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

[42] *See* § 356.45(a)(2)(i).

[43] *See* § 356.45(b)(1).

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

[45] *Id.*

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

[47] Annex, Attachment 9, Letter to the chairman of the House of Representatives Committee on Merchant Marine and Fisheries from Robert Lee, August 17, 1964, as published in the Jones Study, p. 80.

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

[49] Annex, Attachment 14, Department of State Outgoing Airgram, dated 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").

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.[50] 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.

"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."[51]

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

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

"For this reason, the State Department has interpreted the national treatment requirement of the FCN treaties broadly in the past.[52] 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.

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

"The United States has agreed in Article XXIV of the Treaty to give "sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the [Government of Japan] may make with respect to any matter affecting the operation of the present Treaty." The Government of Japan has strongly objected to the application of the AFA's new limitations and restrictions on foreign ownership, foreign financing and foreign control of U.S. fishing vessels to Japanese nationals and companies that have invested in the U.S. fisheries prior to the effective date of the Act on the ground that such application would violate the U.S.-Japan FCN. In a letter to 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 America."[53] 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)[54] 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). * * *[55]

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.[56] 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."[57] 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.[58]

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."[59]

"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

[50] *See* fn. 45. *See also,* Jones Study at 80–81.

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

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

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

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

[55] Annex, Attachment 15 at 1–2.

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

[57] *Id.*

[58] *Id.* at 2.

[59] Id.

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

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

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

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

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

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

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

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

This concludes the analysis submitted by Petitioner for consideration.

Dated: February 16, 2001.

By Order of the Maritime Administrator.

Joel Richard,

Secretary, Maritime Administration.

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

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

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

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

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–8928]

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

AGENCY: Maritime Administration, Department of Transportation.

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

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