

Likewise, the alternatives development and screening process from the WTC MIS will be used as a starting point for the NEPA process. Recognizing that NEPA requires the consideration of a reasonable range of alternatives that will address the purpose and need, the Environmental Impact Statement will include a range of alternatives for detailed study consisting of a no-build alternative as well as alternatives consisting of transportation system management strategies, mass transit, improvements to existing roadways, and/or new alignment facilities. These alternatives will be developed, screened, and carried forward for detailed analysis in the Draft Environmental Impact Statement based on their ability to address the purpose and need that will be developed while avoiding known and sensitive resources.

Letters describing the proposed NEPA study and soliciting input will be sent to the appropriate Federal, State and local agencies who have expressed or are known to have an interest or legal role in this proposal. It is anticipated that two formal scoping meetings will be held as part of the NEPA process, one in the Fredericksburg area and one in Northern Virginia, to facilitate local, state, and federal agency involvement and input into the project in an effort to identify all of the issues that need to be addressed in developing the Environmental Impact Statement.

Private organizations, citizens, and interest groups will also have an opportunity to provide input into the development of the Environmental Impact Statement and identify issues that should be addressed. A comprehensive public participation program will be developed to involve them in the project development process. This program will utilize the following outreach efforts to provide information and solicit input: newsletters, the Internet, a telephone hotline, e-mail, informal meetings, public information meetings, public hearings and other efforts as necessary and appropriate. Notices of public meetings or public hearings will be given through various forums providing the time and place of the meeting along with other relevant information. The draft Environmental Impact Statement will be available for public and agency review and comment prior to the public hearings.

To ensure that the full range of issues related to this proposed action are identified and taken into account, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action and draft Environmental Impact

Statement should be directed to FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed action.)

Authority: 23 U.S.C. 315; 49 CFR 1.48.

Issued on: December 8, 2000.

Edward S. Sundra,

Senior Environmental Specialist.

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DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD-2000-8517]

Pacific Knight; Applicability of Ownership and Control Requirements for 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 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 of the vessel PACIFIC KNIGHT, Official Number 561771 (Vessel), for a ruling that the requirements of MARAD's regulations at 46 CFR part 356 and the American Fisheries Act of 1998 (AFA), Title II, Division C, Pub. L. 105-277, do not apply with respect to the Vessel. The petition is submitted pursuant to 46 CFR 356.53 and section 213(g) of the 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 bilateral investment treaty, the requirements of

46 CFR part 356 will be determined not to apply the Vessel 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 international agreement 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 January 18, 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://smses.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 is 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, Title II, Division C, Public Law 105-277, was enacted in 1998 to give U.S. interests a priority in the harvest of U.S.-fishery resources by increasing the requirements for U.S. citizen ownership, control and financing of U.S.-flag vessels documented with a fishery endorsement. MARAD was charged with promulgating implementing regulations for fishing vessels of 100 feet or greater in registered length while the Coast Guard retains responsibility for vessels under 100 feet.

Section 202 of the AFA, raises, with some exceptions, the U.S.-Citizen ownership and control standards for U.S.-flag vessels that are documented

with a fishery endorsement and operating in U.S.-waters. The ownership and control standard was increased from the controlling interest standard (greater than 50%) of § 2(b) of Shipping Act, 1916, as amended (1916 Act), to the standard contained in § 2(c) of the 1916 Act which requires that 75 percent of the ownership and control in a vessel owning entity be vested in U.S. Citizens. In addition, § 202 of the AFA establishes new requirements to hold a preferred mortgage on a vessel with a fishery endorsement. State or federally chartered financial institutions must now comply with the controlling interest standard of § 2(b) of the 1916 Act in order to hold a preferred mortgage on a vessel with a fishery endorsement. Entities other than state or federally chartered financial institutions must either meet the 75% ownership and control requirements of § 2(c) of the 1916 Act or utilize an approved U.S.-Citizen Trustee that meets the 75% ownership and control requirements to hold the preferred mortgage for the benefit of the non-citizen lender.

Section 213(g) of the AFA provides that if the new ownership and control provisions 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

Maruha Corporation (Maruha), its subsidiaries, Westward Seafoods, Inc. (WSI) and Westward Alaska Fisheries, Inc. (WAI), Pyramid Fishing Co. (Pyramid), and Western Alaska Investment Co. (WACO) (hereinafter collectively referred to as "Petitioner" or "Petitioners") together with Pacific

Knight, LLC (Owner) have filed a petition with MARAD pursuant to 46 CFR § 356.53 for exemption from the provisions of 46 CFR part 356 for the vessel PACIFIC KNIGHT, Official Number 561771 (Vessel), on the grounds that a conflict exists between the Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, signed at Tokyo, on 2 April 1953 (the "FCN Treaty" or the "Treaty"), 4 UST 2063; TIAS 2863; 206 UNTS 143, and both the AFA and 46 CFR part 356. Maruha is a Japanese Corporation. WSI and WSA are wholly owned subsidiaries of Maruha and are not considered U.S.-citizens. Both Pyramid and WACO, the members of the direct owner of the vessel, Pacific Knight, LLC, are U.S.-corporations that are indirectly owned by Maruha but that qualify as documentation citizens.

The Petitioners became the indirect owner of the Vessel when it was purchased on June 7, 1996. The Petitioner states that it was encouraged to invest in the Alaska shoreside fishing industry as part of the U.S. "Fish and Chips" policy. Petitioner and its subsidiaries own processing facilities in Kodiak and Dutch Harbor Alaska and are involved in a joint venture that owns a processing facility in Dutch Harbor, Alaska. Due to substantial investment in shore based processing, Petitioner states that it recognized that it needed to ensure access to sources of a steady supply of fish. In part at the urging of independent fishermen and in part due to business necessity, Petitioner maintains that it made a variety of investments in fishing vessels that deliver to its shore based facilities in Alaska.

The Vessel at issue was acquired by Petitioners and is indirectly wholly owned by Petitioners through Pacific Knight, LLC. Because the Vessel is indirectly owned by non-citizens, it would not qualify for documentation with a fishery endorsement under the new ownership and control requirements of the AFA and 46 CFR part 356. The Petitioners note, however, that the Vessel was "grandfathered" under the savings clause of the Anti-Reflagging Act of 1987, 46 App. U.S.C. 12102 note (1998), and thus was not required to comply with the ownership and control provisions of § 2(b) of the 1916 Act to which most vessels were subjected in order to obtain a fishery endorsement prior to the passage of the AFA. Vessels "grandfathered" under the savings clause of the Anti-Reflagging Act are only required to be owned by a documentation citizen in order to be eligible for documentation with a fishery endorsement. If MARAD issues

a ruling that the AFA and 46 CFR part 356 do not apply to the Vessel, the Vessel must comply with the law as it existed prior to the enactment of the AFA. Therefore, the Petitioners imply that if MARAD determines that there is a conflict between the FCN Treaty and both the AFA and 46 CFR part 356, the "grandfathered" Vessel would only be subject to the requirement that it be owned by a documentation citizen as it was required to do prior to the enactment of the AFA.

The FCN Treaty

The entire text of the FCN Treaty is available on MARAD's internet site at <http://www.marad.dot.gov>. Following are the provisions of the Treaty that Petitioners allege are in conflict with the AFA and 46 CFR part 356.

Article V

1. 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, or in the skills, arts or technology which they have supplied; nor shall either Party unreasonable impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills, arts and technology it needs for its economic development.

Article VI, Paragraphs 2 and 3

2. The provisions of Article VI, paragraph 3, providing for the payment of compensation 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.

3. Property 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. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Article VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such

nationals and companies shall be permitted within such territories: (a) To establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

2. Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or 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. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.

3. The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present article.

Article IX

2. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored national

treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, movable property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on the activities listed in the first sentence of paragraph 2 of Article VII, but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

Petitioners' Description of the Conflict Between the FCN Treaty and 46 CFR Part 356

MARAD's regulations require 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 remainder of this notice is the Petitioners' description of how the regulations and the FCN Treaty are in conflict. This information 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 Vessel.

"(a) Background: The Pre-AFA State of the Law and Fisheries Industry

"In 1976, Congress passed the Fishery Conservation and Management Act, Pub. L. 94-265, 90 Stat. 331 (1976). Known colloquially as the Magnuson-Stevens Act, the legislation was a comprehensive statute addressing a variety of issues related to the fisheries. Four years later, Congress amended various provisions of the Magnuson-Stevens Act when it passed the American Fisheries Promotion Act of 1980, Pub. L. 96-561, 94 Stat. 3275 (1980). The 1980 amendments instituted a policy referred to as the "Fish and Chips" policy, which resulted in a phase out of direct foreign fishing and fish processing. Foreign owned processing companies that wished to continue participation in U.S. fishing activity, principally activity located in the United States Exclusive Economic Zone ("EEZ") off of Alaska, were required to invest in U.S. flag vessels or U.S. shore based processing facilities. See generally W. McLean & S. Sucharitkul, *Fisheries Management and Development in the EEZ: The North South and Southwest Experience*, 63 NOTRE DAME L. REV. 492 (1988). More specifically, "Fish and Chips" provided that the allocation of surplus fish resources to various foreign nations

(including Japan) was to be based on, among other things, the extent to which a particular foreign nation entered into joint business ventures in the United States. See 16 U.S.C. § 1821(e)(1)(E)(v). These new factors were then included in the several Governing International Fishery Agreements that the United States concluded with each of the nations engaged in fishing activities in the U.S. EEZ. In particular, the United States urged Japan to contribute to the development of the then-underutilized Alaska pollock fisheries by entering into joint ventures with United States companies.

"As part of the "Fish and Chips" policy, half of Japan's annual fish quota allocation in the U.S. EEZ was withheld for later allocation, depending on economic cooperation. In the summer of 1982, the United States Department of State refused to allocate a substantial portion of Japan's allotment until Japan "responded in a more positive manner to U.S. goals and agreed to more appropriate levels of joint ventures with U.S. fishermen." Remarks of Ambassador Theodore G. Kronmiller, U.S. Dep't of State, Seattle, Washington, Oct. 15, 1982. As a consequence of these policies and actions, Petitioners began investments in shoreside facilities in Alaska for the processing of Alaska pollock into surimi and other byproducts.

"In 1987, Congress passed the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, Pub. L. 100-239, 101 Stat. 1778 (1987) (the "Anti-Reflagging Act"). The Anti-Reflagging Act required that United States citizens own the controlling interest, at each tier of ownership, in any entity that owns a U.S. fishing vessel. "Controlling interest" includes a majority of each class of stock or other equity interest in the vessel owner. Under the Anti-Reflagging Act, foreign investors were thus permitted to hold a minority (up to 49%) of the equity in a vessel-owning entity at each tier of ownership. Because the Anti-Reflagging Act permitted foreign investors to hold 49% of the equity "at each tier of ownership," indirect foreign ownership could exceed 50% under the Anti-Reflagging Act. In addition, the Anti-Reflagging Act contained an "ownership grandfather" provision, which permitted certain fishing vessels, including Vessel, to be 100% indirectly owned by a non-citizen. See *Southeast Shipyard Ass'n v. United States*, 979 F.2d 1541 (D.C. Cir. 1992).

(b) The AFA and Section 213(g)

"The AFA will impose new foreign ownership and control restrictions

effective October 1, 2001. Under the AFA, foreign nationals may not own or control more than a 25% interest in any U.S. fishing vessel. This new restriction applies both "at each tier of ownership" and "in the aggregate." In addition, long term marketing agreements with non-citizens as well as loans from non-citizens are subject to regulation under the AFA. See 46 CFR §§ 356.43, 356.45.

The AFA's new ownership and control restrictions are to apply retroactively to existing foreign investments and business arrangements. See Pub. L. No. 105-277, §§ 202-04, 112 Stat. 2681-636 (1998).

"Section 213(g) of the AFA, however, provides that the foreign ownership and control restrictions are not to apply to the extent that those restrictions are "determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party." Pub. L. No. 105-277, § 213(g), 112 Stat. 2681-636 (1998). The FCN Treaty is an "international agreement relating to foreign investment." As explained in greater detail below, applying the Act's ownership and control restrictions so as to preclude the Petitioners' ownership of, or control over, the Vessel would result in an inconsistency with the FCN Treaty. As a matter of statutory interpretation, then, Section 213(g) prohibits the application of those restrictions to Petitioners' interests in the Vessel.

(c) *The U.S.-Japan FCN Treaty in Context*

"The substantive background of the FCN Treaty makes clear that one of its central purposes was to protect precisely the type of interests at issue here. The U.S.-Japan FCN Treaty was modeled on a "standard" State Department treaty text, which formed the basis of more than a dozen FCN treaties that the United States entered into in the period immediately following World War II. All of these treaties, including the U.S.-Japan FCN Treaty, were part of the broader goal of the United States to encourage and protect foreign investment. As described by Herman Walker, Jr., who was responsible for the formulation of the postwar form of the FCN treaties and was also one of the chief FCN treaty negotiators, the FCN treaties are "concerned with the protection of persons, natural and juridical, and of the property and interests of such persons." Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 *Minn L. Rev.* 805, 806 (1958) [hereinafter "Modern Treaties"].

"Central to the structure of all of these treaties was the national-treatment principle, the notion that nationals of one Party should be treated like nationals of the other Party. As put by Walker, "The right of corporations to engage in business on a national-treatment basis may be said to constitute the heart of the treaty." Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 *Pol. Sci. Q.* 57, 67 (1958). The United States Supreme Court has likewise noted, in a case involving the interpretation of the U.S.-Japan FCN Treaty, 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." *Sumitomo Shoji America v. Avadiano*, 457 U.S. 176, 187-88 (1982). Indeed, according to the preamble of the U.S.-Japan FCN Treaty, ensuring that nationals of each Party be accorded "national * * * treatment unconditionally" by the other Party is one of the two general principles upon which the FCN Treaty was concluded. The word "unconditionally" is of course clear: it demonstrates the drafters' intent that departures from the general principle of "national treatment" had to be articulated clearly. Indeed, in some instances, the Treaty does contain specific and limited exceptions to the national-treatment principle. See, e.g., FCN Treaty Protocol, para. 6 (parties may impose restrictions on introduction of foreign capital in order to protect monetary reserves). Based simply on the preamble, then, the fact that the Treaty does not have such an exception for the forced divestiture of investments such as those at issue in the AFA strongly suggests, without more, that the Treaty meant to preclude application of such restrictions. A more detailed look at the Treaty's substantive provisions, as set forth below, only reinforces that conclusion.

"Moreover, because the U.S.-Japan FCN Treaty shares language with many of the other post-war FCN treaties, the State Department has been called upon to interpret that language on many occasions. In the early 1980s, two studies commissioned by the State Department surveyed both the background of the treaties as well as the Department's subsequent interpretations. As explained in greater detail below, these two reports (known colloquially as the Jones Study and the Sullivan Study, after their respective primary authors) confirm the inconsistencies between the AFA's ownership and control restrictions and

several provisions of the U.S.-Japan FCN Treaty, including in particular the national-treatment provisions.

"It is also worth noting that, as in most bilateral treaties, the relevant terms of the FCN Treaty are reciprocal—that is, the principle of "national treatment" applies not only to investment by Japanese nationals in the United States but also to investment by U.S. nationals in Japan. The Chief Counsel should thus consider the reciprocal implications of interpreting the FCN Treaty; that interpretation will effectively bind the United States government in situations involving *American* nationals that might wish to invest in *Japanese* businesses, both now and in the future. A cramped interpretation of the Treaty could thus hamper American foreign investment in unforeseen ways. Moreover, the State Department has interpreted FCN treaties broadly in the past, including the provisions articulating the national-treatment principle. See generally *State Dep't Practices Under U.S. Treaties of Friendship Commerce and Navigation* (1981) [hereinafter "Jones Study"]. Consistency with the State Department's historical practice would thus also militate towards a liberal interpretation of the Treaty so as to protect the settled expectations of foreign investors.

"Finally, when interpreting the FCN Treaty, it is worth recalling the historical backdrop against which the Treaty was negotiated and adopted, because understanding that context puts perspective on the important role the Treaty plays in U.S.-Japan relations. The FCN Treaty was signed on April 2, 1953, less than a year after the end of the Allied military occupation of Japan (the legal conclusion of the state of war). Indeed, the FCN Treaty was an extension of one part of the 1951 Treaty of Peace with Japan, Article 12 of which declared Japan's "readiness to enter into negotiations" to conclude a treaty with the U.S. that would "place [the two countries'] commercial relations on a stable and friendly basis." Signing the FCN Treaty so soon after the post-war restoration of Japanese national sovereignty was a significant step for both countries and was an implicit recognition that transnational investment and commerce are important elements in "strengthening the bonds of peace and friendship." See FCN Treaty, preamble. Those bonds were built on, and continue to rest on, the principles of fairness and nondiscriminatory conduct embedded in the FCN Treaty and its national-treatment principles.

(d) Article VII—National Treatment in Commercial/Business Activities

“Article VII is “the heart of the treaty. It is central to the basic treaty objective of providing rules of fair and equitable treatment. * * * The rule it embodies is national treatment.” *State Dep’t. Standard Draft—Treaty of Friendship, Commerce, and Navigation* 124 (undated) [hereinafter “Sullivan Study”]. The relevant portions of Article VII have a three-part structure: (1) Article VII, paragraph 1, provides a broad grant of national treatment for all business activities; (2) the first sentence of Article VII, paragraph 2, provides for a few exceptions for certain sensitive activities, including one of relevance here; and (3) the second sentence of Article VII, paragraph 2, provides that, notwithstanding those exceptions, a Party may not impose new restrictions on entities of the other Party that were already participating in the activities in question. Article VII is thus inconsistent with the ownership and control restrictions of the AFA, as those restrictions impose new constraints on Maruha, an enterprise that has been involved in the U.S. fishing industry for over 35 years.

“Article VII(1) of the FCN Treaty requires the United States to give to “[n]ationals and companies” of Japan “national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities [in the U.S.], whether directly or by agent or through the medium of any form of lawful juridical entity.” FCN Treaty, Art. VII(1) (emphases added). Article XXII(1) 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.” FCN Treaty, Art. XXII(1) (emphasis added). This grant of national treatment includes the right of Japanese-controlled enterprises to be “accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of [the U.S.]” FCN Treaty, Art. VII(1); see also *Sumitomo*, 457 U.S. at 188 n.18 (“[N]ational treatment of corporations means equal treatment with domestic corporations.”); *Modern Treaties*, 42 Minn. L. Rev. at 811 (“[T]he objective [of the “national treatment” provisions] is to secure non-discrimination or equality of treatment * * * as compared with citizens of the [U.S.] and national things.”). As applied to Petitioners’ interests in the Vessel, the AFA clearly treats enterprises

controlled by Japanese nationals and corporations “less favorabl[y] than [the treatment] accorded like enterprises controlled by nationals and companies of [the U.S.]” and is thus inconsistent with Article VII(1).

The national-treatment provision of Article VII, paragraph 1, is limited by the first sentence of Article VII, paragraph 2, which reserves for each nation “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 * * * natural resources.” Article VII(2) provides the parties to the Treaty with what is known as a “screening” right, the right to “screen” foreign investments in “certain sensitive lines of business, specially affected with a public interest.” See *Modern Treaties*, 42 Minn. L. Rev. at 818. As fisheries are generally considered a “natural resource,” this provision would appear to permit the United States to impose foreign ownership and control restrictions on fishing industry vessels under this exception, notwithstanding the national-treatment requirement in Article VII, paragraph 1.

“The very next sentence of Article VII, paragraph 2, however, places limits on the “screening” exception to the national-treatment principle. It makes clear that any such restrictions shall not be imposed on any enterprise that was engaged in the fishing industry prior to promulgation of the AFA. Article VII(2) states, “[N]ew limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on [the activities described in the first sentence of Article VII(2)] 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.” FCN Treaty, Art. VII(2) (emphases added). In effect, then, this sentence requires that any such ownership or control restrictions grandfather those companies, such as Petitioners, that were engaged in the fishing industry prior to promulgation of the AFA. In short, the ability to “screen” foreign investments prior to their being made does not bring with it the right to restrict those Japanese nationals, like Maruha, that have already made investments in the industry.

“This plain text interpretation of the language of the second sentence of Article VII(2) also comports with past State Department practice. See Jones Study at 57 (noting that pursuant to this

sentence, “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”); see also *id.* at 107 (“[R]egulations that force divestiture of interests already acquired or established prior to the promulgation of such regulation[s] * * * raise Art. VII questions.”); cf. also *Modern Treaties*, 42 Minn. L. Rev. at 809 (recognizing that exceptions to national treatment principle were necessary, but noting that “[t]he 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.”). It also comports with the clear intent of the drafters. In describing the import of the phrase “new limitations,” the State Department’s Sullivan Study states,

“The net effect [of the second sentence of Article VII(2)] is that, although [the United States is 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.”

Sullivan Study at 149 (emphasis added).

“More even than the national-treatment principle, the prohibition on the imposition of new limitations on foreign entities already engaged in a particular industry is a matter of basic fairness. See Sullivan Study at 148 (“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.”). Here, not only were Maruha, WSI and WAF each “engaged in” the fishing business prior to the AFA’s promulgation, but their investments in that industry were actively encouraged by the “Fish and Chips” policy of the United States government. The concerns of the Treaty’s drafters are thus doubly implicated.

“Article VII, then, completely precludes application of the AFA’s ownership and control restrictions to Petitioners since Petitioners had interests in vessels with fishery endorsements prior to the AFA’s adoption. As the language of the second sentence of Article VII, paragraph 2, makes clear, the Treaty protects enterprises engaged in the restricted activities (*i.e.*, commercial fishing) rather than protecting simply the particular property interests related to

those activities (such as the fishing vessels themselves). *Cf.* Sullivan Study at 137 (noting that the term “enterprises” was used “to designate a business entity or undertaking irrespective of the particular form it has for legal purposes”). Its purpose was to ensure that foreign-owned or foreign-controlled companies already engaged in a particular industry were given full national treatment—that is, treated like U. S. nationals—and were permitted to compete against their domestic competitors without any impediments not suffered by those domestic companies. Since Petitioners were clearly “engaged in * * * the exploitation of * * * natural resources” prior to the AFA’s adoption, the Treaty, if applied as its language mandates, would completely preclude application of the AFA’s foreign ownership and control restrictions to any of Petitioners’ activities.

“Section 213(g) makes clear, however, that as a matter of statutory—as opposed to treaty—interpretation, the AFA’s ownership and control provisions are not to be applied retroactively, although they may be applied prospectively. The provisions are not to be applied to the extent that a foreign owner’s or mortgagee’s interest in a vessel precedes October 1, 2001. The first sentence of section 213(g) provides that, if any of the ownership and control provisions are determined to be inconsistent with the treaty, those provisions “shall not apply * * * to the extent of any such inconsistency.” The second sentence of section 213(g), however, allows them to be applied prospectively, stating that the ownership and control provisions shall apply to all subsequent owners and mortgagees of such vessel, and shall apply, notwithstanding the previous sentence, to the owner on October 1, 2001 of such vessel if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity after such date. Pub. L. No. 105–277, § 213(g), 112 Stat. 2681–616, 2681–637 (1998). Thus, since Petitioners’ interests in the Vessel predate October 1, 2001, those interests are protected under the explicit language of the statute.

(e) Article IX(2)—National Treatment in Owning/Possessing Movable Property

“Article IX(2) of the FCN Treaty is another national-treatment provision that conflicts with the AFA, and the analysis of that conflict mimics that of Article VII, described above. The first sentence of Article IX(2) states that the United States must accord “[n]ationals and companies” of Japan “national treatment * * * with respect to owning and possessing[] movable property of all

kinds, both tangible and intangible.” Just as they conflict with Article VII’s mandate of national treatment with respect to business activities, the AFA’s ownership and control restrictions obviously impair Petitioners’ ability to “own[] [or] possess[] movable property”—namely, the Vessel—in ways that American-owned companies are not affected. Petitioners are thus not being “accorded * * * national treatment * * * with respect to owning and possessing[]” U.S. flag vessels.

The second sentence of Article IX(2) then says,

However, either Party may impose restrictions on * * * alien ownership of interests in enterprises carrying on the activities listed in the first sentence of paragraph 2 of Article VII, but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

“In effect, then, the second sentence of Article IX(2) subjects the “national treatment for owning immovable property” provision of the first sentence of Article IX(2) to the same constraints as Article VII(1): The United States may impose limitations on the acquisition of interests in the exploitation of natural resources (such as fish), but may not impose *new* restrictions on enterprises such as Petitioners that were engaged in the fishing business prior to the adoption of those restrictions. The AFA’s ownership and control restrictions are thus inconsistent with Article IX(2) of the FCN Treaty.

(f) Article VI(3)—No Takings Without Just Compensation

“The first sentence of Article VI, paragraph 3, of the FCN 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 is in effect a “takings clause” which precludes expropriations and other measures that substantially impair a Japanese national’s property rights. Applying the AFA’s ownership or control restrictions to prohibit Petitioners from maintaining their pre-existing interests in the Vessel would effectively render Petitioners’ interests in the Vessel nearly worthless and would thus violate Article VI(3) of the Treaty.

“First, the term “property” includes not simply direct equity stakes in property but also a wide variety of property interests, such as those that Petitioners have in the Vessel. The

Protocol to the FCN Treaty 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.” FCN Treaty Protocol, para. 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.” See Memorandum of Conversation dated April 15, 1952, at 3. In short, “all property interests are contemplated by the provision.” *Id.* This necessarily includes not only the indirect equity stake Petitioners have in the Vessel but also the other contracts that might indicate some level of “control” within the meaning of the AFA.

“Second, 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.” See Sullivan Study at 116 (emphasis added). Therefore, the fact that applying the AFA’s ownership and control restrictions to Petitioners’ interests in the Vessel would effectively result in a forced sale of the Vessel at a bargain basement price is a sufficient impairment of rights to constitute a violation of Article VI(3).

“Third, the Treaty requires that the taking be for a “public purpose,” and it is doubtful whether application of the AFA’s ownership or control restrictions to Petitioners’ interests in the Vessel would implicate a “public purpose” within the meaning of the FCN Treaty, given that the primary result would simply be a windfall to private U.S. nationals. Even if the AFA’s putative goal of Americanization of the fishing industry could be characterized as a “public purpose,” the AFA makes no provision for the “prompt payment of just compensation,” as required by the Treaty. Indeed, more than the Takings Clause of the United States Constitution’s Fifth Amendment, Article VI(3) of the FCN Treaty details the payment procedures with which a government must comply in the event of a taking. After the first sentence, quoted above, Article VI(3) goes on to say,

“Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.” The fact that the AFA and 46 CFR part 356 both fail to provide any compensation scheme—let alone, “adequate provision * * * at or prior to the time of taking”—thus renders any application of those ownership or control restrictions to Petitioners’ interests in the Vessel inconsistent with Article VI, paragraph 3, of the FCN Treaty.

(g) Article V—Prohibition on Discriminatory Measures

“Article V of the FCN Treaty prohibits the United States from “tak[ing] unreasonable or discriminatory measures that would impair the legally acquired rights or interests * * * of [Japanese] nationals and companies in the enterprises which they have established.” This is a catch-all provision that reinforces both the national-treatment principles in Articles VII and IX(2) and the property-rights principles in Article VI(3). The term “discriminatory” in this clause includes “denials of * * * national * * * treatment,” Sullivan Study at 115, such as that which would be occasioned by application of the AFA’s ownership and control provisions to Petitioners’ interests in the Vessel. Moreover, there is no question that the phrase “legally acquired rights or interests” means exactly what it says and includes interests such as those Petitioners have in the Vessel. See id. (“[T]he intent is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful.”).

(h) Article XIX(6)—National Fisheries Clause

“As discussed above, application of the AFA’s ownership and control restrictions to Petitioners’ interests in the Vessel clearly conflict with several provisions of the FCN Treaty. Article XIX(6) deals specifically with fisheries issues, and although it might at first appear to support a different result, it does not undermine the conclusion that the Treaty is inconsistent with the ownership and control restrictions in both the AFA and 46 CFR part 356.

“Article XIX, paragraph 6, of the Treaty states, “Notwithstanding any other provision of the present Treaty, each Party may reserve exclusive rights and privileges to its own vessels with respect to the * * * national fisheries * * *.” Though a cursory reading of this language might lead one to believe this

provision permits foreign ownership or control restrictions with respect to fishing vessels, there are two reasons why Article XIX(6) does not permit application of the AFA’s foreign ownership and control restrictions to Petitioners’ interests in the Vessel.

“First, Article XIX, paragraph 7, defines the term “vessel” to exclude “fishing vessels” for the purposes of Article XIX(6). Thus, by its terms, Article XIX(6) simply does not apply to vessels such as the Vessel, because any vessel seeking a fishery endorsement is quite clearly a “fishing vessel.”

“Second, even if Article XIX(6) were to apply to “fishing vessels,” it would be irrelevant to foreign ownership and investment restrictions. The Treaty’s text and negotiating history, along with subsequent State Department practice, support this view. The text makes clear that Article XIX(6) simply permits the United States to reserve fishing rights and privileges to “its own vessels”—that is, U.S. flag vessels. It says nothing about a Party’s right to restrict foreign investment in, or ownership of, that Party’s “own vessels” and thus cannot be read to exempt such restrictions from the Treaty’s requirement of national treatment.

“The historical record of the negotiations provides further evidence of this straightforward textual reading. At one point, the Japanese negotiators proposed rewriting Article XIX(6) so as effectively to add the words “nationals,” and “companies” to the reference to “vessels.” The Japanese sought language that would have stated that the Treaty was not to be construed to extend to “nationals, companies and vessels of the other Party any special privileges reserved to national fisheries.” See Memorandum of Conversation dated April 3, 1952, at 5. The State Department understood this as an attempt by the Japanese to seek a blanket exception from the entire Treaty for national fisheries. See U.S. Dep’t of State, Outgoing Airgram to U.S. Embassy in Tokyo (June 12, 1952), at 1–2 (noting that a clearer way to effect the Japanese intent was with a single comprehensive exception stating that “[t]he provisions of the present Treaty shall not apply with respect to the national fisheries of either Party, or to the products of such fisheries”). The Japanese proposal was not adopted, and the language of Article XIX(6) remained unchanged, limiting its scope to *vessels* of the other Party, thereby underscoring the fact that Article XIX(6) applies only to Japanese-flag vessels and not to Japanese citizens or companies.

“Subsequent practice of the State Department also confirms this reading

of Article XIX(6). In 1964, the State Department reaffirmed the narrow nature of the exclusion in 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. See Jones Study at 80–81.

“This reading of the U.S.-Japan FCN Treaty 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.*” See Sullivan Study at 284 (emphasis added).

“Thus, the text, negotiating history and subsequent practice and understanding explicitly confirm that Article XIX(6) is irrelevant to, and thus does not exempt from the Treaty’s other provisions, laws restricting foreign ownership and control of the entities that own U.S. flag vessels seeking fishery endorsements. As a result, Article XIX(6) does not exempt the AFA’s ownership and control restrictions from Articles V, VI(3), VII, and IX(2), each of which bars application of those restrictions to Petitioners’ interests in the Vessel.

Conclusion

“Applying the AFA’s ownership and control restrictions so as to preclude Petitioners from maintaining their interests in the Vessel violates both the spirit and the text of the FCN Treaty, which guarantees nationals of one Party “national treatment” by the other and precludes the imposition of measures that effectively strip a Japanese national of its legally-acquired property rights.”

This concludes the analysis submitted by Petitioner for consideration.

Dated: December 12, 2000.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

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