their existing rights and interests and to carry on their existing lawful business in the United States in conformity with past practice and on an equal footing with U.S. Citizens.

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

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

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

Petitioners are ''owners'' and ''mortgagees'' who acquired their interests in the Vessels prior to October 1, 2001, and who intend to continue to hold those interests on and after October 1, 2001. The inconsistency between the provisions of the AFA and MARAD's implementing regulations and the requirements of the U.S.-Japan FCN is demonstrated above. Accordingly, under Section 213(g) of the Act, the provisions of Sections 202, 203 and 204 ''shall not apply'' to Petitioners ''to the extent of the inconsistency.''

The exemption provided by Section 213(g) is not limited to existing property rights, mortgage interests or investment interests in existence on October 1, 2001, but rather applies to an ''owner'' or ''mortgagee'' on October 1, 2001 ''to the extent of the inconsistency'' between the Act and the Treaty. Petitioners qualify as ''owners'' and ''mortgagees.'' Petitioners are, therefore, exempt from the requirements of the AFA ''to the extent of the inconsistency'' between the AFA and the Treaty. As demonstrated above, the ''inconsistency'' between the AFA and the Treaty is two-fold: (1) The Treaty protects the existing ownership and mortgage interests of Petitioners and the Japanese Bank Lenders in the Vessels and related contract rights, which the AFA would prohibit or restrict; and (2) the Treaty protects future transactions between Alyeska, its Japanese shareholders or the Japanese Bank Lenders and the Vessel Owners, which the AFA would prohibit or restrict, including future loans, preferred mortgages and other financing and contractual arrangements, which Petitioners may deem necessary or appropriate to protect their existing businesses and their existing interests in the Vessels and the Vessel Owners. Thus, Section 213(g) exempts Petitioners from the restrictions and limitations of Sections 202, 203 and 204 of the AFA and MARAD's implementing rules.

IV. Conclusion

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

This concludes the analysis submitted by Petitioner for consideration.

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

Joel Richard,

Secretary, Maritime Administration.

[FR Doc. 01–1357 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–8665]

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

AGENCY: Maritime Administration, Department of Transportation.

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

SUMMARY: The Maritime Administration (''MARAD'') is soliciting public comments on a petition from the owners and mortgagees of the vessel ARICA—Official Number 550139 (hereinafter the ''Vessel''). The petition requests that MARAD issue a decision that the American Fisheries Act of 1998 (''AFA'' or ''Act''), Division C, Title II, subtitle I, Pub. L. 105–277, and the implementing regulations at 46 CFR part 356 (65 FR 44860 (July 19, 2000)) are in conflict with the Agreement Between the United States of America and Denmark Regarding Friendship, Commerce and Navigation, 421 UNTS 105, TIAS: 4797,12 UST 908951 (1961) (''Denmark Treaty'' or ''FCN''). The petition is submitted pursuant to 46 CFR 356.53 and 213(g) of AFA, which provide that the requirements of the AFA and the implementing regulations will not apply to the owners or mortgagees of a U.S.-flag vessel documented with a fishery endorsement to the extent that the provisions of the AFA conflict with an existing international agreement relating to foreign investment to which the United States is a party. This notice sets forth the provisions of the international agreement that the Petitioner alleges are in conflict with the AFA and 46 CFR part 356 and the arguments submitted by the Petitioner in support of its request. If MARAD determines that the AFA and MARAD's implementing regulations conflict with the Denmark Treaty, the requirements of 46 CFR Part 356 and the AFA will not apply to the extent of the inconsistency. Accordingly, interested parties are invited to submit their views on this petition and whether there is a conflict between the Denmark Treaty and the requirements of both the AFA and 46 CFR Part 356. In addition to receiving the views of interested parties, MARAD will consult with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than February 16, 2001.

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

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 § 2(b) of Shipping Act, 1916 (''1916 Act''), as amended, 46 App. U.S.C. 802(b), to the standard contained in § 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), which requires that 75 percent of the ownership and control in a vessel owning entity be vested in U.S. Citizens. In addition, section 204 of the AFA repeals the ownership grandfather ''savings provision'' in the Anti-Reflagging Act of 1987, Pub. L. 100–239, § 7(b), 101 Stat 1778 (1988), which permits foreign control of companies owning certain fishing vessels.

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

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

The Petitioners

Arica Fishing Company Limited Partnership (''Arica Fishing Co.'') is the owner of the Vessel. Arica Fishing Co. is owned by JOMM Enterprises, Inc, the General Partner, and limited partners Royal Greenland Inc.-USA, JZ, Ltd., Kenneth Morrison, and Robert F. Allen. Royal Greenland Inc.-USA directly owns 47% of Arica Fishing Co. and indirectly owns an additional percentage through its participation in both JOMM Enterprises, Inc. and JZ, Ltd.. Royal Greenland, Inc.-USA is a Washington State Corporation that holds an aggregate interest at all tiers of the partnership ownership structure of approximately 54%.

Royal Greenland, Inc.-USA is a subsidiary of Royal Greenland Trading ApS, a Danish company registered in Denmark. In 1994, Royal Greenland Trading ApS was approached to invest in U.S. fishing operations on the West coast of the United States. The following year Royal Greenland agreed to make these investments through a U.S. subsidiary, Royal Greenland Inc.-USA. Arica Fishing Co, Royal Greenland, Inc.-USA, Royal Greenland Trading ApS, JOMM Enterprises, Inc. and JZ, Ltd are hereafter collectively referred to as the ''Petitioner'' or ''Petitioners.''

Requested Action

The Petitioners seek a determination from MARAD under § 213(g) of the AFA and 46 CFR 356.53 that they are exempt from the U.S. citizen ownership and control requirements of the AFA and 46 CFR part 356 on the grounds that the requirements of the AFA and 46 CFR part 356, as applied to Petitioners with respect to the Vessel, conflict with U.S. obligations under the Denmark Treaty. Specifically, the Petitioners request that MARAD determine that the ownership and control restrictions do not apply to Royal Greenland Trading ApS, its wholly-owned subsidiary Royal Greenland, Inc.-USA, or its equity ownership in the Vessel, through its ownership interest in Arica Fishing Company Limited Partnership, JOMM Enterprises, Inc., and JZ, Ltd.

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 Denmark 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 Denmark Treaty and both the AFA and MARAD's implementing regulations forms the basis on which the Petitioner requests that the Chief Counsel issue a ruling that 46 CFR part 356 does not apply to Petitioner with respect to the Vessel. The Petitioner's description of how the provisions of the Denmark Treaty are in conflict with both the AFA and 46 CFR Part 356 is as follows:

Summary of Argument

The ownership and control provisions of the AFA are directly inconsistent with the U.S-Denmark Treaty of Friendship, Commerce and Navigation (the ''Denmark Treaty''), an existing international agreement relating to foreign investments to which the United States is a party. The issue is relevant because there is investment by Royal Greenland Trading, a Danish company, in the U.S. flag fishing vessel Arica that would be directly impaired by the AFA. Specifically, the AFA's unambiguous, retroactive discrimination against fishing companies with foreign ownership interests, for the benefit of super-majority U.S. owned fishing companies—as applied to Danish investment in such companies—is directly at odds with the Denmark Treaty.

The purpose of the Denmark Treaty is to encourage investment between the United States and Denmark. The Treaty prohibits the impairment of rights legally acquired by Danish investors in U.S. enterprises. The Denmark Treaty also explicitly accords Danish investors national treatment—treatment by the U.S. government as if such investors were U.S. nationals, with respect to their investments in the United States. Most plainly, the Denmark Treaty explicitly forbids interference with Danish investors'

rights to manage enterprises which they have established or acquired.

Therefore, under Section 213(g) of the Act, the irreconcilable conflict between the investment protection provisions of the Denmark Treaty and the AFA's retroactive impairment of Royal Greenland Trading's investment rights requires Marad to grant this petition to exempt from the U.S. citizen ownership and control requirements of the AFA Royal Greenland Trading's equity ownership in the Arica (through its ownership interest in Arica Fishing Company Limited Partnership, JOMM Enterprises, Inc., and JZ, Ltd.).

The U.S. Treaties of Friendship, Commerce and Navigation Are a Class of International Agreements Protecting Bilateral Investment

The Denmark Treaty was one of a group of post-World War II treaties designed to create open-door investment between the U.S. and nearly twenty other countries. Unlike previous agreements, these ''Friendship, Commerce and Navigation'' treaties dealt explicitly with corporate investment between countries.

The purpose of the FCN treaties in the post-war period was to provide a stable environment for private international investment.[14] The FCN treaties sought ''national treatment,''[15] and were intended to create an ''open door'' for foreign investment.[16] After the war, the United States ''took the lead in developing [a liberal] international investment regime, and began to negotiate a series of Friendship, Commerce and Navigation treaties, a major purpose of which was to protect U.S. investment abroad.''[17]

Federal courts recognized the FCN treaties as ''the medium through which the U.S. and other nations could provide for the rights of each country's citizens, their property and their interests, in the territories of the other.''[18] The treaties were the means by which nationals of each country could ''manage their investment in the host country.''[19]

These FCN treaties ''define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises.''[20] Foreign investment issues were a centerpiece of the Treaties' purpose:

''[The FCN treaties] preoccupation with [national treatment issues] has been especially responsive to the contemporary need for a code of private foreign investment; and their adaptability for use as a vehicle in the forwarding of an investment aim follows from their historical concern with establishment matters.''[21]

The FCN Treaties reached after World War II, had:

''a new consideration * * * which lent special impetus to the program following World War II, [that consideration] was the need for encouraging and protecting foreign investment, responsively to the increasing investment interests of American business abroad and to the position the United States has now reached as principal reservoir of investment capital in a world which has become acutely ''economic development'' conscious.''[22]

It is also important to note that the FCN Treaties, including the Denmark Treaty, are self-executing treaties, that is, they are binding domestic law of their own accord, without the need for implementing legislation.[23] Such treaties are the supreme law of the land, and even federal statutes ''ought never to be construed to violate the law of nations if any other possible construction remains.''[24] Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern.[25]

The U.S.-Denmark Treaty of Friendship, Commerce and Navigation Protects Danish Investment in U.S. Companies and is Clearly Inconsistent with the American Fisheries Act

The Denmark Treaty contains 26 Articles, several of which contemplate, and expressly prohibit, retroactive limitations on foreign investment in U.S. companies, such as those imposed by the AFA.[26]

A. Proclamation: Encouraging International Investment

The first provision of the Denmark Treaty, entitled ''A Proclamation,'' contains broad language relevant to an understanding of the subsequent Treaty Articles relating to bilateral investment. The Proclamation states:

''The United States of America and the Kingdom of Denmark, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their people, and *being cognizant of the contributions which may be made toward these ends by arrangements encouraging mutually beneficial investments,* promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded * * *'' (emphasis added).

By emphasizing the importance of international investments, the Proclamation provides the Denmark Treaty's context for interpreting its investment protection provisions.[27] In entering into this Treaty, the United States recognized, and accepted as ''consideration,'' the advantages provided by

[14] Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805 (1958). Herman Walker, Jr., the chief commentator on the purpose of the Friendship, Commerce and Navigation (''FCN'') treaties, served, at the time of the drafting of the Treaty as Adviser on Commercial Treaties at the State Department and was responsible for formulation of the postwar form of the FCN Treaty, negotiating several of the treaties for the Untied States. See *Sumitomo Shoji America Inc.* v. *Avagliano et al.,* 457 U.S. 176, 182 (1982).

[15] Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 817 (1958).

[16] ''National Treaties'' is defined by Article XXII of the Denmark Treaty 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 maybe, of such parties.'' National treatment in to be accorded automatically and without condition of reciprocity (*Sullivan Report* at page 64; see, infra at p.5 fn. 19.)

Harold F. Lidner, Deputy Assistant Secretary of State for Economic Affairs, testified before the Senate during hearings on ratification of the Denmark Treaty (among others) and corrected U.S. Senator Sparkman at this hearing on his misapprehension that ''national treatment'' meant treatment of U.S. nationals in a foreign nation in the same way foreign nations were treated in the United States, clarifying that it meant, instead, treatment of foreign nationals in the U.S. exactly as U.S. citizens are treated. Hearing Subcommittee on Commercial Treaties and Consular Conventions, at p. 7, 82nd Cong. (May 9, 1952).

[17] Vandevelde, *Sustainable Liberalism and The International Investment Regime,* 19 Mich. J. Int'l L. 373 (1998).

[18] *Spiess* v. *C. Itoh and Co. (Am.) Inc.,* 643 F.2d 353, 361 (5th Cir. 1981), vacated on other grounds, 457 U.S. 1128 (1982), quoting Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present Untied States Practice 5 Am J. Comp. L. 229 (1956).*

[19] *Lemnitzer* v. *Philippine Airlines,* 783 F. Supp. 1238 (N.D. Cal. 1991), quoting *Spiess,* supra at 361.

[20] *Wickes* v. *Olympic Airways,* 745 F.2d 363 (6th Cir. 1984), quoting Walker, *Modern Treaties of Friendship Commerce and Navigation,* 42 Minn. L. Rev. 805, 806 (1958).

[21] Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 805, 806 1958).

[22] *Wickes* v. *Olympic Airways,* 745 F.2d 363 (6th Cir. 1984), quoting Walker, *The Post-War Commercial Treaty Program of the United States,* 73 Pol. Sci. Q. 57, 59 (1957); *See also,* Waldek, Note, Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment, 42 Hastings L.J. 1175, 1235 (1991).

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

[24] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21 (1963).

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

[26] The conflict between the AFA and certain international treaties has been recognized by one of the principal authors of the Act. Senator Slade Gorton (R–WA), one of the chief sponsors of the final legislation, was quoted in the press shortly after the Act passed questioning the validity of the new ownership provisions in relation to these investment treaties: 'Another provision [of the American Fisheries Act] requires vessels operating in this fishery to have at least 75 percent U.S. ownership three years after the law goes into effect, but [Senator Slade] Gorton said *this ''Americanization'' feature ''may very well be found invalid'' under U.S. trade agreements if challenged by foreign ownership interests. Marine Digest and Transportation News* at p. 29 November 1998) (emphasis added).

[27] The Sullivan Report is an Article-by-Article discussion of the standard draft treaty of Friendship, Commerce and Navigation, based on the record of negotiation, State Department messages providing instructions, and internal memoranda dealing with issues raised in the course of negotiations, that was completed in November, 1973. The Sullivan Report states that the standard FCN Treaty Preamble (designated ''Proclamation'' in the Denmark Treaty ''does have legal effect, for the courts rely on it at as a guide to interpretation concerning the applicability of the operative articles.'' *Sullivan Report* at 62.

foreign investment in this country and protection of U.S. investments abroad.[28] The national treatment benefits of the Danish Treaty are ''to be accorded automatically and without condition of reciprocity.'' [29]

B. Article VIII: Managing Commercial Enterprises

Paragraph 1 of Article VIII of the Denmark Treaty states that nationals of each signatory Nation shall be permitted to:

''constitute companies for engaging in commercial,[30] manufacturing, processing [and] financial * * * activities, and to *control and manage enterprises which they have been permitted to establish or acquire* [31] * * * *for the foregoing and other purposes.''* (emphasis added).

Royal Greenland Trading owns Royal Greenland Inc.-USA, a U.S. entity owning interests through a variety of entities in the fishing vessel Arica. There is no question that Royal Greenland Inc.-USA engages in commercial activities directly or through related entities: the sale of fish harvested by the fishing vessel Arica, and the fish processing undertaken aboard the vessel Arica.[32] Royal Greenland Inc.-USA is also directly engaged in financial activities: e.g., the investment of funds in the U.S. fishing industry.

The AFA would force Royal Greenland Trading to *divest itself of its current ownership and control of Royal Greenland, Inc.—USA,* requiring the sale of *75%* of that company's equity in order for it to be able to maintain its investment in Arica Fishing Company Limited Partnership.[33] Forced divestiture is facially inconsistent with the control and management protections required by Article VIII of the Denmark Treaty, above.

The clear conflict between Article VII.1 of the Denmark Treaty and the AFA can be seen from the stated purpose of the original bill that was eventually enacted as the AFA:

''*to prevent foreign ownership and control of United States flag vessels* employed in the fisheries in the navigable waters and exclusive economic zone of the United States * * *'' (emphasis added).[34]

One additional point regarding Paragraph 1 of Article VIII is worthy of note. Article VIII states that it protects the control only of enterprises which a Danish entity has ''been permitted to establish or acquire.'' That is, only retroactive limitations, such as the one here at issue, are forbidden.

2. Paragraph 2: National Treatment

Paragraph 2 of Article VIII states:

''Companies, *controlled by nationals and companies of either Party* and constituted under the applicable laws and regulations within the territories of the other Party for engaging in the activities listed in paragraph 1 of the present Article, *shall be accorded national treatment therein with respect to such activities.''* (emphasis added).

Under the definition of national treatment,[35] paragraph 2 of Article VIII requires that duly constituted companies controlled by Danish entities shall be treated precisely as if they were U.S. investors. Such an obligation can hardly be met by requiring the transfer of ownership and control of a company from Danish investors to U.S. investors.

The U.S. State Department has repeatedly recognized this interpretation of Article VIII. For example, in 1971, the State Department opposed legislation in Guam requiring that 50% of the voting stock of corporations doing business in Guam be owned by U.S. citizens. The State Department took the position that such legislation was inconsistent with Article VII of the Japan FCN Treaty, which, (as do Articles VII and VIII of the Denmark Treaty), establishes a right to national treatment of non-U.S. companies and nationals engaged in business activity.[36]

In sum, the provisions of the AFA requiring retroactive divestment of Danish ownership of a business entity in the United States are facially inconsistent with both paragraphs of Article VIII of the Denmark Treaty that explicitly protect foreign investors engaged in the control of U.S. companies.

C. Article VI, Paragraph 4: Impairment of Interest in Supplied Capital Is Prohibited

Paragraph 4 of Article VI of the Denmark Treaty prohibits:

''*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, or in the capital,* skills, arts or technology *which they have supplied*.'' (emphasis added).

The explicit purpose and effect of the AFA is to discriminate against foreign nationals and companies. The Act's ownership provisions require divestment of substantial equity in U.S. fishing vessels and the loss of future profits from the enterprise. On their face, these provisions directly ''impair the legally acquired interests'' of Danish investors both ''in the enterprises which they have established,'' and ''in their capital * * * which they have supplied.''

It is clear from the expressed purposes of the FCN treaties, and from this provision in particular, that their central goal was to encourage capital investment between treaty signatories by protecting potential investors from the fear that government action would retroactively impair equity ownership rights in that investment. It was only in this context of mutually understood and guaranteed investment rights that open invitations to foreign capital to develop the U.S. fishing fleet could be, and was, successful.

Thus, the retroactive forced divestment of owned equity imposed on Danish investors by the AFA directly violates Article VI of the Denmark Treaty, and as such is inconsistent with the Treaty as contemplated under Section 213(g) of the Act.

D. Article VII: National Treatment Required

Paragraph 1 of Article VII of the Denmark Treaty states:

''Nationals and companies of either party shall be accorded * * * national treatment with respect to engaging in all types of commercial * * * [and] * * * financial activities.''

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[28] Harold F. Linder, Deputy Assistant Secretary of State for Economic Affairs, testified before the Senate during hearings on ratification of the Denmark Treaty (among others) as follows: ''. . . These treaties are not one-sided. They are drawn up in mutual terms, in keeping with their character as freely negotiated instruments between sovereign equals. Rights assured to Americans in foreign countries are assured in equivalent measure to foreigners in this country. Hearing, Subcommittee on Commercial Treaties and Consular Conventions, May 9, 1952 at p. 6

[29] *Sullivan Report* at 64. Although the Denmark Treaty requires investment protection without the requirement of reciprocity, it may be useful to note that a review of the *Jones Study, infra* p. 7 at fn. 23 shows no incidents of State Department conflicts with Denmark under the Denmark Treaty).

[30] The Minutes of interpretation appended to the Denmark Treaty state: ''The word ''commercial'' as used in Article VII, paragraph 1 and Article VIII paragraph 1, does not extend to the fields of navigation and aviation. The word ''commercial'' ''relates primarily but not exclusively to the buying and selling of goods and activities incidental thereto.'' Royal Greenland Inc. -USA is chiefly concerned with the sale of fishery products and activities incidental thereto. It is also important to note that the term ''navigation'' does not include commercial fishing. First, the Danish Treaty mentions ''national fisheries,'' and ''inland navigation'' as separate, independent activities under paragraph 3, Article XIX. ''Navigation'' is generally defined as ''the act of sailing a vessel on water.'' Black's Law Dictionary, 7th ed. West Publishing, 1999. Finally, it may be important to note that in the Denmark Treaty, the word navigation is represented by the Danish word ''sofort,'' which means transportation activity on sea and would not include fishing or fish processing. Had fishing or fish Processing been intended, the appropriate word would have been ''fiskrei.''

[31] This provision as well as others found in Article VII of the standard draft treaty examined by the Sullivan Report, is considered ''the heart of the treaty.'' *Sullivan Report* at 124.

[32] See, *e.g.* State Department opposition to H.R. 12275 (expanding the definition of fisheries to include processing activities) as contrary to U.S.-Japan FCN treaty; processing activities under the FCN are entitled even to prospective national treatment, Aug. 17, 1964. *Jones Study* at 80 (citation infra at p. 7 fn 29).

[33] Alternatively, Royal Greenland USA would be forced to sell its direct investment in the Arica Fishing Company, L.P., which would have the same impact on its parent company, Royal Greenland Trading.

[34] S. 1221, 105th Cong. (preamble) (1997).

[35] See supra at p. 3, fn. 9.

[36] The State Department's position on this and other FCN issues are reviewed in the ''Jones Study,'' prepared by Ronny E. Jones for the U.S. State Department, and is a compilation of post-World War II State Department positions on FCN Treaties through 1981. See e.g. State Department position re: Letter to A. Papa (U.S. Attorney General's office) from F.R. Brown (Legislative Counsel of 11th Legislature of Guam), Sept. 27, 1971, *Jones Study* at 76. See also, State Department position concluding under the French FCN Treaty that control and national treatment provisions ''bar new discriminatory limitations from being applied to established or authorized operations and rights of a protected foreign company'' (differentiating from permissible prospective limitations on ownership), *Jones Study* at 54; State Department position opposing Korean government's restricting foreign majority ownership of companies in certain industries, October, 1972, *Jones Study* at 86; State Department position opposing Thai government's restrictions on majority ownership of companies in some industries. 1972 *Jones Study* at 104–106.

As set forth above, the AFA directly affects Danish nationals and their companies that are ''engaging in * * * commercial and other business activities.'' Royal Greenland Trading engages in commercial and financial investment activities through a subsidiary, Royal Greenland Inc.-USA. The Denmark Treaty requires that Royal Greenland Trading's commercial and investment activities be accorded national treatment, and as demonstrated above, the AFA's explicit discrimination against non-U.S. citizens violates this national treatment provision when applied to Danish investment.

Paragraph 2 of Article VII *also* requires most-favored-nation treatment with respect to ''organizing, participating in and operating companies of [the United States].'' Most-favored-nation treatment is defined by Article XXII of the Denmark Treaty as ''treatment accorded * * * 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 any third country. Thus, it is important to note that *if nationals of any other country are afforded protection under section 213(g) of the Act failure to provide the same protection to Danish nationals would also be inconsistent with Article VII.*

E. Article IX: Protection of Movable Property

Article IX of the Denmark Treaty explicitly applies the protections afforded by the rest of the Treaty, and in particular those protections secured by Articles VII and VIII, to the purchase, ownership and disposition of property.

Paragraph 4 of Article IX sets out the only conditions under which nationals and companies of either party may be required to dispose of property they have acquired.[37] Subparagraph a, Paragraph 4 of Article IX permits such a requirement for movable property so *long as such a requirement conforms to Article VIII, paragraph 1 and all other provisions of the Denmark Treaty.* As set forth above and below, the retroactive equity divestment requirements of the AFA do not conform with Article VIII and the other provisions of the Denmark Treaty. Article IX of the Denmark Treaty, in effect, repeats that ownership of movable property may not be subject to forced retroactive divestiture.[38]

F. Article I: Equitable Treatment Required for Danish Interests

Article I of the Denmark Treaty states:

''Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.''

This Article was intended to provide a fail safe mechanism in the Treaty to ensure that fair and equitable treatment be afforded to nationals of both countries.[39] The forced divestiture of investments and/or sale of assets cannot be viewed as equitable treatment under any logical reading of Article I. Nevertheless, if this Article has any meaning whatsoever, at the very least, it cannot mean forcing a sale of valuable assets, such as the equity interest in a fishing company.

G. Article VI, Paragraph 3: Taking of Property Requires Just Compensation

Paragraph 3 of Article VI of the Denmark Treaty requires that the U.S. government cannot take property belonging to Danish nationals:

''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 * * * ''

There is no practical difference between forcing a sale of property to the U.S. government and forcing such a sale to American nationals.[40] Thus, to the extent that a forced sale of property (1) diminishes the value of the asset for the company by virtue of the AFA's passage; or (2) results in a below-market sale of assets, the AFA violates Article VI,[41] as it makes no provision for compensation of Danish investors.[42] [43]

H. Article XIX: Vessels Flying the U.S. Flag are Deemed U.S. Vessels For Purposes of Access to U.S. Fisheries

Paragraph 4 of Article XIX of the Denmark Treaty states:

''each Party may reserve exclusive rights *and privileges to its own vessels* with respect to * * *. *national fisheries.*'' (emphasis added).

This provision allows the U.S. and Denmark to reserve exclusive rights and privileges to ''its own vessels'' operating in the fisheries of their respective countries. The national identity of a vessel is determined by the country in which the vessel is documented, *i.e.* by the flag that it flies. The national identity of a vessel is not determined by the nationality of the investor in the owning entity.[44]

The Arica is a U.S. vessel documented under the laws of the United States. The U.S. entity owning this U.S. flag vessel—like General Motors, Ford Motor Company and Coca-Cola—has foreign investors. The purpose of this provision in the Treaty was to allow the United States and Denmark the opportunity to restrict fisheries to vessels each country could control. That control, historically, has always been through the flag of the vessel, subjecting the vessel to our environmental, labor and tax laws—not to

[37] ''Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring * * * and with respect to owning movable property of all kinds . . . subject to the right of such other Party to limit or prohibit, *in a manner that does not impair rights and privileges secured by Article VIII, paragraph 1,* [See discussion at pp. 58 supra] or by other provisions of the present treaty, alien ownership of particular materials that are dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activities.'' (emphasis added).

[38] ''The term ''discriminatory'' as used in this context would comprehend denials of either national or most-favored-nation treatment, or both . . . *the intent is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful* * * *'' (emphasis added). *Sullivan Report* at 115.

[39] This Article ''provides a basis for making representation against actions detrimental to [a signatory's] interests that may not be covered by any specific legal rule in the treaty, as, for example, a measure that is superficially nondiscriminatory but is so framed as to harm only some [signatory's] interest * * *. the construction leading to a just or equitable result is to be preferred.'' *Sullivan Report* at 67. See also, Webster's New Universal Unabridged Dictionary, Barnes and Noble Books, 1996, ''Equitable: Characterized by equity or fairness; just and right; fair; reasonable: *equitable treatment of all citizens*''; Black's Law Dictionary, 7th ed. West Publishing, 1999, ''Equitable: just; conformable to principles of justice and right.''

[40] The rule of just compensation covers partial takings. In such cases, the compensation should be a full approximation of the amount by which the taking impaired the value of the property.'' *Sullivan Report* at 117.

[41] At the very least, paragraph 3 of Article VI requires application of a standard similar to that under the 5th Amendment to the United States Constitution. Paragraph 5 of Article VI requires that Danish citizens ''shall in no case be accorded * * * less than national treatment * * * with respect to the matters set forth'' in paragraph 3. No federal court would permit the government to force a sale of assets by a U.S. citizen, thus denying that citizen any use of that property in the future, without requiring just compensation. Further, the Danish Protocol 2 appended to the Denmark Treaty requires that the provision of Article VI for payment of just compensation shall extend to interests held directly or indirectly by nationals and companies of either party.

[42] ''The intent of this requirement [that provision is made for the determination and payment of compensation] is to afford protection against *ex post facto* proceedings that could work to the disadvantage of the person whose property is taken.'' *Sullivan Report* at 119.

[43] Even with respect to the forced sale of ''materials dangerous from the standpoint of public safety,'' permitted under Article IX of the Treaty, the Danish Treaty requires that ''a term of at least five years shall be allowed in which to effect such disposition.'' Subparagraph b, Paragraph 4, Article IX.

[44] In order to be documented under the U.S. flag, for example, a vessel must be owned by a U.S. citizen corporation, partnership or other entity. There is no limitation on the citizenship of the investment for the basic documentation. 42 U.S.C. 12102(a). Should the vessel be used in specific trades, such as coastwise or fisheries, there may be limitation on the citizenship of the investors. 46 U.S.C. 12106; 12108. It is significant to note that *at the time the Denmark Treaty was signed there was no such limitation on fishing vessels.* It was not until 1988 that a *prospective* limitation was imposed on the citizenship of the investors in an entity owning a vessel with a fisheries endorsement. See, *The Commercial Fishing Industry Vessel Anti-Reflating Act of 1987*; Section 7(b) of Public Law 100–239.

allow the foreign investment capital to be taken.

This issue is further clarified by Paragraph 2 of Article XIX, which states explicitly:

''Vessels under the flag of either Party * * * shall be deemed to be vessels of that Party * * *''

Thus, the United States has the full authority to reserve exclusive rights and privileges to the U.S. flag vessel Arica, ever since Royal Greenland Trading made its first investment in the Vessel. What the United States has not had the right to do under the Denmark Treaty is to take away that investment once it was made. Article XIX does not permit the United States to reserve rights or privileges under the Denmark Treaty for some of ''its vessels'' (those with super-majority U.S. investment) as against others of ''its vessels'' (those that include some Danish investment). On the contrary, it guarantees U.S. fishing vessels with Danish investment equal access to U.S. fisheries.

I. Article XXI: Restrictions on the Rights of ''Third Country'' Nationals Are Not Applicable to the Danish Citizens of Greenland

Greenland is a legal territory of Denmark, not an independent country.[45] Residents of Greenland are Danish citizens. The Danish Constitution of 1953 covers all parts of Denmark, including Greenland. Subsequent to this constitution, Greenland was administered as a department directly under the central Danish government authority. In 1978, a parliamentary statute established Greenlandic ''home-rule'' effective May 1, 1979 for some internal legal areas. However, Greenland remains a legal part of the sovereign nation, Denmark, and is subject to Danish statutes, such as the ''Companies Act.''

As stated earlier,[46] Royal Greenland Trading, the Danish company with investment in Arica Fishing Company Limited Partnership, is owned by investors in the Territory of Greenland. Article XXI, Paragraph 1(d) of the Denmark Treaty denies:

''to any company in the ownership or direction of which nationals of any *third country or countries* have directly or indirectly a controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.'' (emphasis added).

This reservation is a provision to permit piercing the corporate veil when nationals of non-signatories seek to ''obtain rights under the treaty through the device of obtaining and exercising interests in companies of the treaty partner * * * *Absent such a provision, such corporate interests could take advantage of the definition of ''companies'' [in the Treaty], which establishes place of incorporation as the sole test of the nationality of a corporation.*[47] (emphasis added).

Greenland is not a ''third country'' within the meaning of this provision. Greenland is a territory of Denmark, dependent upon it for foreign policy determinations. It is also facially evident that no ''device'' to gain the benefits of the Treaty has taken place. The ownership arrangements for Royal Greenland Inc.-USA were completed long before enactment of the AFA. The duly constituted Danish company Royal Greenland Trading has the right to expect the protection afforded all incorporated Danish companies under the Denmark Treaty.

J. Article XXIII: Restriction on the Denmark Treaty's Application to Greenland Does Not Apply to Greenlandic Investment in a Duly Constituted Danish Company

Article XXIII of the Denmark Treaty states:

''The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each of the Parties, other than Greenland, the Panama Canal Zone and trust Territory of the Pacific. ''

As set forth above, Royal Greenland Trading is a duly incorporated Danish company, subject to Danish government authority and chartered by the Danish Crown. Royal Greenland Trading is located at Langerak 15, 9220 Aalborg, Denmark. Overall, Royal Greenland Trading's affiliated companies have several hundred employees in Denmark. Article XXII, Paragraph 3 states:

''* * * Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other 'party.' ''

Thus, the Denmark Treaty is absolutely explicit that:

''*the place of charter or incorporation [i]s the sole fact determining the nationality of the company.* This test is in contrast to the so-called 'seat' test favored in some European countries where the location of the real center of management of the company or the place or places where its principal activities are carried on are looked to as determining its nationality, even though its incorporation may be in another country. Under the test of place of incorporation, there is no specific requirement of a substantial de facto contact of the company with the chartering country other than the issuance of the charter * * * Adoption of the single test of place of incorporation was based in part on the practical consideration that it makes the nationality of a company simple and easy to determine.'' [48] (emphasis added).

The only exception to this ''place of charter or incorporation'' rule, is that set forth in Article XXI of the Denmark Treaty discussed in Section I above. As discussed, Danish citizen investors residing in Greenland do not fall within the narrow exception for third country nationals seeking by device to take advantage of another nation's favorable trade relations. Therefore, Royal Greenland Trading must be afforded the protections for Danish companies under the Denmark Treaty.

In addition, it is important to recognize that Article XXIII was not intended to preclude protection for the Danish nationals of Greenland and their companies, to which Danish law applies. It appears clear that this exception was intended to protect areas having special territorial, commonwealth or merely military relationships with their home countries, such as the Panama Canal Zone and the U.S. Trust Territory of the Pacific Islands. Such policy rationales are not applicable to investments by the Danish citizens of Greenland in their host country.

V. Conclusion: Royal Greenland Trading is Entitled to an Exemption Under Section 213(g) of the American Fisheries Act Because the Act's Retroactive Ownership and Control Provisions are Inconsistent With the Denmark Treaty.

The Danish Treaty clearly contemplates the very category of investment restrictions here at issue. It is important to recognize that should the United States or Denmark have wished to exclude investment in the fishing industry vessels of one party on behalf of the nationals or companies of the other, they could easily have done so. For example, Article XIV of the Treaty relates to prohibitions and restrictions on imports. Paragraph 4 of Article XIV explicitly excludes from the protections of the Article ''advantages accorded * * * products of [each country's] national fisheries.'' Similarly, Paragraph 4 of Article XIX reserves exclusive rights and privileges to each signatory's own vessels with respect to national fisheries. The Treaty simply does not permit forced divestment of investment—or a prohibition on management of that investment—in U.S. companies operating in the national fisheries.

The overlapping, self-reinforcing investment protections provided by the several Articles analyzed in this petition were clearly intended to prohibit the category of coerced retroactive investment divestiture required by the AFA. The Treaty's explicit agreement as to a national's right to control interests in companies they have established in each Treaty partner's territory, its requirement for the highest possible degree of investment protection—national treatment, and its prohibition of the impairment of equity rights gained by supplied capital, are all, singly and in the aggregate, at odds with the AFA's ownership provisions.

If the investment of Royal Greenland Trading is not protected, the implications would be significant and the economic climate fostered by the Treaty damaged. Forcing the sale of Danish nationals' assets in the industry they helped to create would likely make more far reaching free trade agreements difficult. The United States has long been a champion worldwide of free market investment, often decrying other governments' actions in restricting their import markets, currencies and venture capital opportunities. To interpret the Treaty

[45] ''Greenland first came under Danish rule in 1380. In the revision of the Danish Constitution in 1953, Greenland became part of the Kingdom and acquired the representation of two members in the Danish Folketing * * * Greenland is part of the Kingdom of Denmark, and the Danish Government remains responsible for foreign affairs, defense and justice.'' *The Europa World Year Book* 1999, Europe Publications Ltd. (1999); Volume I at pp 1203–04.

[46] See *Exhibit A* and discussion accompanying supra at p.2 fn. 6.

[47] *Sullivan Report* at 308.

[48] *Sullivan Report* at 318–20.

so as to permit enforced, retroactive loss of assets, and the expulsion of Danish nationals overseeing their own investments from their corporate positions may seriously weaken the standing of the U.S. to continue in its leadership role.

Marad should therefore grant Royal Greenland Trading's petition pursuant to Section 213(g) of the AFA and 46 C.F.R. 356.53 promulgated thereunder, and rule that the citizen ownership and control restrictions in the Act and those portions of 46 C.F.R. Part 356 that implement those restrictions do not apply to Royal Greenland Trading ApS (or its wholly-owned subsidiary) with respect to its ownership equity in the vessel Arica (O.N. 550139), through its ownership interest in Arica Fishing Company Limited Partnership, JOMM Enterprises, Inc., and JZ, Ltd.

This concludes the analysis submitted by Petitioner for consideration.

Dated: January 11, 2001.

By Order of the Maritime Administrator.

Joel Richard,

Secretary, Maritime Administration.

[FR Doc. 01–1358 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Marine Transportation System National Advisory Council

ACTION: National Advisory Council Public Meeting.

SUMMARY: The Notice of Marine Transportation System National Advisory Council Public Meeting which was published in the January 12, 2001 issue of the **Federal Register** contains an error. The meeting, scheduled for Friday, February 2, 2001, will begin at 8:30 a.m., not 9:00 a.m., as originally stated.

FOR FURTHER INFORMATION CONTACT: Raymond Barberesi, (202) 366–4357; Maritime Administration, MAR 830, Room 7201, 400 Seventh St., SW., Washington, DC 20590; Raymond.Barberesi@marad.dot.gov.

(Authority: 5 U.S.C. App 2, Sec. 9(a)(2); 41 CFR 101–6. 1005; DOT Order 1120.3B)

Dated: January 11, 2001.

Murray A. Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. 01–1415 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33990]

C & C Railroad, Inc.—Operation Exemption—Centerpoint Properties, L.L.C.

C & C Railroad, Inc. (C & C), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire the operating authority on eight rail lines (lines) owned by Centerpoint Properties, L.L.C. (Centerpoint), and leased to The Custom Companies, Inc. (previously Custom Cartage, Inc.). The lines total about 1.71 miles and they connect with track located in the Union Pacific Global Two Intermodal Yard, near Union Pacific milepost 3.0. The lines are located in an office, warehouse, and dock facility at 317 West Lake Street in Northlake, IL.[1]

The transaction is expected to be consummated on the effective date of the exemption. The earliest the exemption can be consummated is January 9, 2001, the effective date of the exemption (7 days after the exemption was filed).[2]

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

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33990, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Michael A. Abramson, Esq., 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606.

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

Decided: January 9, 2001.

Vernon A. Williams,

Secretary.

[FR Doc. 01–1331 Filed 1–16–01; 8:45 am]

BILLING CODE 4915–00–P

[1] Pursuant to an agreement with The Custom Company, Inc., C & C will acquire the right to operate the lines for the purpose of shuttling cars solely on Centerpoint's property.

[2] On January 8, 2001, a petition to stay the effective date of the exemption was filed by Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board. The petition for stay was denied in *C & C Railroad, Inc.—Operation Exemption—Centerpoint Properties, L.L.C.,* STB Finance Docket No. 33990 (STB served Jan. 8, 2001).