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INDIVIDUAL TRANSFERABLE FISHING QUOTAS AND ANTITRUST LAW

*William J. Milliken**

I. INTRODUCTION

Around the world, the allocation of individual rights in the fisheries has proved to be a successful fisheries management tool. To date, the Individual Transferable Quota [ITQ]¹ approach has been adopted for only a few fisheries in the U.S.,² although there is strong support for extending the approach to others.³ The basic goal of the ITQ approach is to create well-defined, exclusive property rights in a fishery, giving holders of those rights the incentive to fish efficiently and manage the resource for long-term sustainable yield. The property rights allocated

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1. ITQs are also variously referred to as catch rights, individual fisherman's quotas [IFQs], quantitative rights, and stock certificates. See James R. Waters, *Restricted Access vs. Open Access Methods of Management: Toward More Effective Regulation of Fishing Effort*, Paper presented to the Gulf of Mexico Fishery Management Council (1991) [hereinafter Waters] (on file with OCEAN AND COASTAL LAW JOURNAL).

2. In 1990, regulations were adopted implementing ITQs for surf clams and ocean quahogs in the Mid-Atlantic. 55 Fed. Reg. 24184 (June 14, 1990) (codified at 50 C.F.R. pt. 652.20 (1990)). An ITQ system for management of wreckfish in the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region was implemented under regulations adopted in 1992. 57 Fed. Reg. 7886 (Mar. 5, 1992) (codified at 50 C.F.R. pt. 646 (1992)). Pacific halibut and sablefish will be managed under an ITQ system beginning in 1995. 58 Fed. Reg. 59375 (Nov. 9, 1993) (to be codified at 50 CFR pts. 204, 672, 675, 676).

3. See, e.g., 57 Fed. Reg. 36385 (Aug. 13, 1992) (ITQ programs being considered for snapper-grouper complex, amberjack, tilefish, grouper, speckled hind, red porgy and silk and vermilion snapper fisheries). See also *Hearing on The Use of ITQs as a Tool for Fishery Management and Conservation Before the House Subcomm. on Fisheries Management, House Merchant Marine Fisheries Comm.*, 103d Cong., 2d Sess. (Feb. 9, 1994) (testimony of Lee G. Anderson, Chair, Mid-Atlantic Fishery Management Council).

are often percentage shares of the total annual allowable harvest or quota for the particular fishery. The transferability of these shares is key to the ITQ approach—being marketable, the shares will come to be owned by those who will most efficiently utilize them.

Analysis of the ITQ approach, however, gives rise to the question of whether ITQ programs will have effects resulting in violations of U.S. antitrust law. The Sherman Antitrust Act,⁴ the Clayton Act,⁵ and the Federal Trade Commission Act⁶ all serve to protect consumers from anti-competitive activity. Once shares in a fishery are placed on the market, will trading result in single-owner accumulation of shares approaching monopoly in violation of these statutes? Will impermissible domination of competition and pricing result from concentrations of shares in the hands of a few?

This Article examines the legal implications of ITQs with regard to antitrust law.⁷ It begins by identifying the benefits of the ITQ approach

4. 15 U.S.C. § 1-11 (1988).

5. 15 U.S.C. § 12-27 (1988).

6. 15 U.S.C. § 41-58 (1988).

7. Although beyond the scope of this paper, ITQ systems also raise other important legal questions. Generally, equal protection challenges can be avoided if the governmental agency is careful in how it determines initial allocations. For a discussion of both the state and the federal equal protection problems that the Alaska program has encountered, see *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976); *Commercial Fisheries Entry Comm. v. Apokedak*, 606 P.2d 1255 (Alaska); *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983); and *State v. Hebert*, 803 P.2d 863 (Alaska 1990). The element of the initial classification most challenged is the cut-off date, which the courts have ruled must bear a rational relation to the government interest sought to be advanced. See *Isakson v. Rickey*, 550 P.2d at 363; *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Reed v. Reed*, 404 U.S. 71 (1971). If the cut-off is deemed to meet this test, the courts will not strike down the allocation. See *New Orleans v. Dukes*, 427 U.S. 297 (1976).

For its part, the National Oceanic and Atmospheric Administration (NOAA), in drafting its National Standards under the Magnuson Act, elaborates on the requirement for the allocation to be rationally connected to achieving optimum yield or in furtherance of another legitimate objective in the FMP, calling for fairness and equity. 50 C.F.R. § 602.14(c)(3)(i) (1992). The surf clam/ocean quahog FMP, based upon this standard, withstood a legal challenge to its initial allocation, which was based upon past vessel history. In *Sea Watch Int'l v. Mosbacher*, the plaintiffs claimed that the FMP "treat[ed] similarly situated fishermen unequally[.]" *Sea Watch Int'l v. Mosbacher*, 762 F. Supp. 370, 376 (D.D.C. 1991). This contention was rejected by the court, which concluded that the allocations were rationally determined and therefore were not arbitrary and capricious. *Id.* at 378.

For a discussion of other legal issues such as takings, conflicts, and other applicable law, unlawful legislative delegation, substantive due process, and procedural due process,

and considering the potential anticompetitive effects of an ITQ system. It then discusses the legal requirements for finding of monopoly, illegal price restraints and other impermissible restraints on competition. The Article concludes that ITQ systems can be designed to avert the possibility of excessive accumulation of shares in the hands of a few, and that such ITQ systems are unlikely to have effects that will result in antitrust violations.

II. COMMON RESOURCES, THE INDIVIDUAL TRANSFERABLE QUOTA, AND THEIR ROLE IN FISHERIES MANAGEMENT

A. *The Tragedy of the Open Access System*

Most U.S. fisheries have been managed as an open-access system. That is, anyone who wants to buy a boat and gear and hire a crew can enter the market as a fisherman.⁸ This system has been blamed for creating wasteful and short-sighted exploitation of fisheries, leading to the eventual overharvest and destruction of the species.⁹ In lieu of limiting access to the resource, many open-access management plans have restrictions that work by making fishing inefficient: seasonal restrictions, gear restrictions, minimum size restrictions, and area restrictions are imposed.¹⁰

The problem with such restrictions is that although they may achieve biological improvements in the short-term, they create long-term

see, Christopher Koch, *A Constitutional Analysis of Limited Entry*, in LIMITED ENTRY AS A FISHERY MANAGEMENT TOOL 251 (R. Bruce Rettig et al. eds., 1978).

8. This entry is subject of course to regulation by the state and federal governments, who are trustees of the public resource. See *infra* note 28 and accompanying text.

9. Economist Garrett Hardin described this condition as the "tragedy of the commons." He uses the example of a common pasture open to all the townsfolk. Each herdsman realizes that for each additional animal added to his herd, he gains the full value of the animal while the whole commons sustains the over-grazing created by the animal. Hence, it is in the interests of the herdsman to keep adding more animals to his herd. The problem is that all of the herdsman are doing the same thing. Soon, the commons can no longer sustain the additional animals and the pasture is destroyed. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). The first analysis of the commons problem was in fact in the context of a fishery. See H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

10. See Waters, *supra* note 1 at 2.

economic inefficiencies by promoting more expensive and less productive methods of fishing.¹¹ A fisherman must increase effort in order to recoup losses due to the economically inefficient methods imposed by the regulations.¹² Because the industry is open-ended, this increased pressure overwhelms the resource.¹³ As a result, each fisherman must continuously expand effort in order to be economically competitive with others.¹⁴ In the end, an open-access fishery provides no incentive to conserve the resource; if a fisherman hesitates today to take a catch, that catch will not be saved for tomorrow. Instead it will be harvested by the next fisherman.

Not only do the regulations create an incentive to overfish, they also create the incentive to fish illegally. Fishermen who can circumvent some of the economic inefficiency of complying with the regulations will increase their profits. This occurrence has the tendency to "snowball," causing stocks to further decline and putting pressure on the already beleaguered fisherman.¹⁵ Otherwise honest fishermen are thus induced to fish illegally, merely to keep up economically with everyone else.¹⁶

11. *Id.* at 2-3.

12. For example, in the case of sea scallops, many smaller scallops are caught and then shoveled overboard, requiring a great deal of time and effort to search for legal-sized scallops.

13. For further discussion of this phenomenon, see LEE G. ANDERSON, *THE ECONOMICS OF FISHERIES MANAGEMENT* (1977); FREDERICK W. BELL, *FOOD FROM THE SEA: THE ECONOMICS AND POLITICS OF OCEAN FISHERIES* (1978); ELMER A. KEEN, *OWNERSHIP AND PRODUCTIVITY OF MARINE FISHERY RESOURCES: AN ESSAY ON THE RESOLUTION OF CONFLICT IN THE USE OF OCEAN PASTURES* (1988).

14.

A crowding externality occurs because fishermen harvest from a common pool of fish. Therefore, every new entrant into a fishery would capture some fish that would have been caught by his competitors. Each fisherman may seem to have little or no effect on the catch rates of his competitors, but when fishermen simultaneously expand their fishing effort, the result is lower catch rates for all. In other words, the addition of fishing effort causes the fishery pie to be divided into smaller pieces.

Waters, *supra* note 1, at 2 (citations omitted).

15. See Jon G. Sutinen, Alison Rieser, and John R. Gauvin, *Measuring and Explaining Noncompliance in Federally Managed Fisheries*, 21 *OCEAN DEV. AND INT'L LAW* 335 (1990) [hereinafter Sutinen].

16. *Id.* This situation in the scallop fishery prompted the New England Fishery Management Council in 1990 to implement a "twelve hour window" during the day for landing of scallops, in order to discourage illegal landings at night. 55 *Fed. Reg.* 433 (Jan. 5, 1990) (final rule).

B. The Theory Behind the Individual Transferable Quota

The ITQ approach replaces the incentives to overfish or fish illegally with incentives to conserve the resource and maximize profit through efficiency of effort. Under an ITQ system the traditional common right to fish is transformed into a private right. Of course, in order to be successful, the approach must be accepted both socially and politically.¹⁷

The major purposes behind the ITQ are to control fishing effort and to promote efficiency. Both the number of participants and the overall amount of fish harvested are restricted. ITQs limit entry into the fishery through vessel or participant limits in the form of licenses, which become property rights in the harvest of the fish stock. Fishermen receive marketable, transferable certificates, each allowing the catch of a certain quantity of fish. Effort can be controlled, therefore, by the number of certificates the government decides to issue. For example, each year the government could determine the maximum amount of fish to be harvested, and then allocate a percentage of this amount to the participating fishermen, determined by the past history of how much fish they have landed, their vessel size, or other factors.

ITQs also help to limit effort by limiting competition. The percentage or quota that an individual fisherman receives is, in effect, reserved for that fisherman.¹⁸ One fisherman does not have to worry that another will capture his or her "share" of the resource. Hence, the incentive to race for the catch of fish on a first-come-first-serve basis is

17. One commentator explains:

As a first step in determining the nature of the shares, it is crucial that citizens and the legislature accept the concept of a property right in fisheries. Although property rights to homes, businesses, land, etc., are an accepted and indeed a central part of most western economic systems, property rights in fisheries are viewed with much suspicion and distrust. In fact, in many instances attempts to limit entry by granting property rights are greeted with wails of "communist conspiracy" and "a socialist takeover of a basically free enterprise system." Actually, of course, it is just the reverse. The granting of private property rights is one of the basic fundamentals of capitalism.

See generally LEE G. ANDERSON, A COMPARISON OF LIMITED ENTRY FISHERIES MANAGEMENT SCHEMES 31 (1980).

18. *See* Jon G. Sutinen et al., Consideration of the Potential Use of Individual Transferable Quotas in the Atlantic Sea Scallop Fishery, Vol. 5, The National ITQ Study Report, prepared for the National Oceanic and Atmospheric Administration 49-76 (Mar. 13, 1992) (unpublished report, on file with the OCEAN AND COASTAL LAW JOURNAL).

eliminated.¹⁹ The situation found in a common property system, that of a race for a "bigger slice of the pie," is replaced by a more orderly and controlled harvesting of the resource.

ITQs also achieve efficiency and encourage innovation. Fisherman are able to choose the gear, vessel, or technique that costs the least.²⁰ For many fisheries, fishing practices could become more efficient if traditional restrictions such as gear, time, and area restrictions—restrictions that are designed specifically to make fishing more inefficient—were to be lifted.²¹ For instance, fishermen holding a certificate that limited their catch to a certain number of sea scallops would be able to maximize profits only by improving gear, more efficiently utilizing time at sea, and harvesting only the largest scallops.

By holding a property interest, the fisherman also has the incentive to conserve and manage the resource. Once the fisherman owns a share of the fishery, and that fishery is no longer a "commons," any abuse dealt to the fishery will result in a reduced share to the fisherman. The fisherman will have made an investment to acquire the share, and will need to protect that investment over the long-term in order to get a favorable return. In a fishery managed with ITQs fishermen theoretically would not catch and discard juveniles of the species, because to do so would injure the value of their property.²²

Overall, the advantages of quantitative transferable fishing rights make them an attractive option for fisheries management. For the benefits to be realized, however, the ITQ must have several qualities.²³ First, the quota must be enforceable. Fishermen must be confident that the ITQ system will protect quotas, eliminating the need to race out to get what is left of the stocks. Second, in order for the fishermen to treat the certificate as a vested interest, the ITQ must have some permanency. Permanency is also important to encourage long-term capital investment in the fishery. Third, ITQs must be regarded by the courts and judicial system as a legitimate and protectable property right—the right to participate in the fishery. Finally, to achieve efficiencies possible in a market system, the ITQs must be transferable.

19. *See id.* at 67.

20. *Id.* at 65.

21. *See Waters, supra* note 1, at 3-4.

22. This practice is referred to as "highgrading," and is generally recognized as a problem in ITQ systems. *See Sutinen et al., supra* note 18, at 57, 58.

23. *See id.* at 49-76.

The transferability aspect is beneficial in several ways. First, the most efficient fishermen who do not own quotas will purchase them, and the least efficient fishermen who do own quotas will lease or sell them to gain the most favorable return. Thus, in the end, the stocks will be harvested in the most efficient manner.²⁴ ITQ holders, knowing that the price of the certificate is dependent upon the long-term health and value of the fishery, will have an incentive to maintain a strong stock of fish, making it a less risky and more marketable asset. Furthermore, transferability allows the government itself to buy back or to sell additional licenses in response to annual variabilities of the health of the fish stocks, and thereby to manage the resource more flexibly.²⁵ Finally, creating transferable rights in the fishery is a way of making the system politically acceptable. Because ITQs are new and controversial, there may be less opposition to receiving a smaller catch under a quota system if fishermen know that their right to that catch is a valued commodity.²⁶

C. *The Magnuson Act and ITQs*

Exercising its power under the Commerce Clause of the United States Constitution,²⁷ Congress enacted the Magnuson Fishery Conservation and Management Act, authorizing the federal government to actively manage the nation's fishery resources through the implementation of fishery management plans.²⁸ Each plan must incorporate the stewardship functions that conserve the health and long-term viability of the fishery.²⁹ The central goal of the Magnuson Act is to achieve optimum yield from each fishery on a continuing basis, with conservation measures an important factor in obtaining that goal.³⁰ The Magnuson Act allows this goal to be achieved through the use of allocations:

Any fishery management plan ... may-

24. *Id.* at 65. The theory is that inefficient fishermen would find it more profitable to sell their licenses than to continue fishing. The buyers of the licenses would be more efficient fishermen who could afford to buy the license from the profits made by fishing. Slowly, the inefficient fishermen would be weeded out and replaced by more efficient operations, making the industry as a whole more efficient.

25. *Id.* at 53-54.

26. *Id.* at 64.

27. U.S. CONST. art. I, §8, cl.3.

28. 16 U.S.C. § 1801-1882 (1988).

29. 16 U.S.C. § 1853(a)(1)(A) (1988).

30. 16 U.S.C. § 1851(a)(1) (1988).

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account-

- (A) present participation in the fishery,
- (B) historical fishing practices in, and dependence on, the fishery,
- (C) the economics of the fishery,
- (D) the capability of fishing vessels used in the fishery to engage in other fisheries,
- (E) the cultural and social framework relevant to the fishery, and
- (F) any other relevant considerations;³¹

....

While Congress has allowed the use of allocations to promote efficiency in the fishery resource, it has been careful to require that *economic* allocation not be its sole purpose.³² The Magnuson Act also requires that allocations be fair and equitable, that they promote conservation, and that no individual acquires an excessive share.³³ Within the above standards, Congress has given the Secretary of Commerce authority to promulgate regulations incorporating ITQs.

NOAA, acting on behalf of the Secretary of Commerce, has incorporated this "stewardship" approach into its Magnuson Act regulations.³⁴ The regulations, like the Act, aim to prevent overfishing

31. 16 U.S.C. § 1853(b)(6) (1988).

32. 16 U.S.C. § 1851(a)(5) (National Standard #5) (1988).

33. 16 U.S.C. § 1851(a)(4)(C) (National Standard #4) (1988).

34.

NOAA believes that, for purposes of standard 5, efficiency can be defined as the ability to produce a desired effect or product (to achieve an objective) with a minimum of effort, costs, or misuse of valuable biological and economic resources. In other words, Councils should choose management measures that achieve the [Fishery Management Plan's] objectives with minimum costs and burdens on society. NOAA believes that particular care should be taken when considering management of common property resources—where intensive individual market actions risk the "tragedy of the commons," a concept that comprises damage not only to the individual fisherman, but to the very resource on which he depends. Where there are no property rights, the role of government takes on the dimension of stewardship. NOAA also believes that managing at least cost to society and managing at least cost to the fisherman are not mutually exclusive.

Guidelines for Fishery Management Plans, 50 C.F.R. pt. 602, subpt. B, app. A Standard

while achieving the optimum yield from the fishery.³⁵ Under the regulations, allocations are allowed if they further the objectives of economic efficiency or conservation.³⁶ NOAA defines "allocation" as "a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals."³⁷ ITQs and other limited access allocation³⁸ methods are identified in the regulations as appropriate methods, when necessary, to manage the common resource fisheries.³⁹ The first Fishery Management Plan (FMP) to adopt actual ITQs⁴⁰ under the Magnuson Act was for the surf clam and ocean quahog fishery, developed by the Mid-Atlantic Fishery Management Council.⁴¹

5 (1992).

35. 50 C.F.R. § 602.11(a) (1992).

36. 50 C.F.R. §§ 602.14(c), 602.15(c) (1992).

37. 50 C.F.R. § 602.14(c)(1) (1992). The definition continues: "Any management measure (or lack of management) has incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of standard 4 [Allocations]."

38. The regulations explain the relationship of allocations in respect to limited entry. "A system for limiting access, which is an optional measure under section 303(b) of the Act, is a type of allocation of fishing privileges that may be used to promote economic efficiency or conservation." 50 C.F.R. § 602.15 (1992).

39.

Limited access (or limited entry) is a management technique that attempts to limit units of effort in a fishery, usually for the purpose of reducing economic waste, improving net economic return to the fishermen, or capturing economic rent for the benefit of the taxpayer or the consumer. Common forms of limited access are licensing of vessels, gear, or fishermen to reduce the number of units of effort, and dividing the total allowable catch into fishermen's quotas (a stock-certificate system).

50 C.F.R. § 602.15(c)(1) (1992).

40. Allocations other than ITQs have been used in fisheries management: Direct allocations ... have been made by the several Councils in a variety of FMPs in the past: Quotas by classes of vessels (Atlantic groundfish), quotas for commercial and recreational fishermen (Atlantic mackerel), different fishing seasons for recreational and commercial fishermen (salmon), assignment of ocean areas to different gears (stone crab), and limiting permits to present users (surf clam).

50 C.F.R. pt. 602, subpt. B, app. A, Standard 4 (1992).

41. Atlantic Surf Clam and Ocean Quahog Fishery, 55 Fed. Reg. 24184 (June 14, 1990) (codified at 50 C.F.R. pt. 652.20 (1992)). Although it is too early to tell, at least initially the program seems to be working. See *Surf Clam ITQs*, COMMERCIAL FISHERIES NEWS, § 1 at 19 (July, 1991); Katherine A. Marvin, Note, *Protecting Common Property Resources Through The Marketplace: Individual Transferable Quotas For Surf Clams*

III. THE ANTITRUST IMPLICATIONS OF ITQS IN FISHERIES MANAGEMENT

Because ITQ systems require limited entry and resource allocation, they inherently create market situations conducive to anticompetitive activity prohibited by the antitrust laws.⁴² The Sherman Antitrust Act forbids combinations⁴³ and monopolies⁴⁴ in the restraint of trade, and makes price fixing a *per se* violation of the law.⁴⁵ One antitrust concern in ocean fisheries is that an individual or a group of individuals could monopolize the market, that is, obtain an excessive share of licenses or percentage of the quota, and subsequently use that position to exact unfair economic advantage over consumers.⁴⁶ This could happen if a particular quota holder were to accumulate an excessive market share.⁴⁷ Monopoly could also occur "vertically" where a fish processor or wholesaler could buy quotas and consequently control a substantial portion of the market at both the wholesale and the retail levels of the

And Ocean Quahogs, 16 VT. L. REV. 1127 (1992).

42. The antitrust laws relevant to this discussion include the Sherman Antitrust Act, 15 U.S.C. §§ 1-11 (1988); the Clayton Act, 15 U.S.C. §§ 12-27 (1988), and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1988).

43. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several states ... is declared to be illegal." 15 U.S.C. § 1 (1988).

44. "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states ... shall be deemed to have violated the law." 15 U.S.C. § 2 (1988).

45. The *per se* rule is not explicit in the Sherman Act, but rather has been developed by the courts in interpreting the Act. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 401 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

46. The Supreme Court has defined illegal monopolies as "[t]hose who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 221.

47. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 425 (2d Cir. 1945). The theory of monopoly power based solely on market share, however, has been given less weight by the courts in recent years. See *infra* note 63 and accompanying text.

industry.⁴⁸ Moreover, the collusion of several major holders of the market share, particularly at the processor level, could dominate competition and pricing in the industry, resulting in undesirable effects that the antitrust laws were designed to prevent.⁴⁹ The primary antitrust questions are first, whether market shares will become so concentrated as to reach levels approaching monopoly, and second, whether such greater concentration is likely to facilitate price fixing and other illegal restraints on competition.

A. Possibilities of Monopolization

Obviously, in an unrestricted ITQ system, there is a potential for an individual or vessel to obtain an excessive share of the allocations and thereby dominate the market. For an entity to obtain monopoly power in the legal sense, it must control a substantial portion of the "relevant market."⁵⁰ The relevant market encompasses all products that are so similar that one can be used as a replacement for the other.⁵¹ In recent years the process of determining market power has become quite complex.⁵² Also, the "area of effective competition" includes not only the product market, but the geographic market as well.⁵³

Both the Magnuson Act⁵⁴ and the NOAA regulations⁵⁵ mandate that FMPs guard against any one entity gaining a disproportionate share of

48. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948). Again, in recent years, courts have been reluctant to find illegal vertical monopolization without accompanying anti-competitive conduct and effects. See *infra* note 71 and accompanying text.

49. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

50. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 299-300 (1949).

51. See, e.g., *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 409 (1956) (holding that although duPont controlled a substantial portion of the cellophane market, it did not constitute a monopoly because cellophane can be easily replaced by other flexible wrapping such as wax paper).

52. See *Dept. of Justice and Federal Trade Commission Horizontal Merger Guidelines*, 62 BNA ANTITRUST & TRADE REGULATION REPORT S-1 (Apr. 2, 1992).

53. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

54. The Magnuson Act requires that any allocation made pursuant to an FMP be "carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." 16 U.S.C. § 1851(a)(4)(C) (1988).

55. Each FMP should contain the Council's judgment on fairness and equity, conservation promotion, and possible monopolistic or oligopolistic effects on the proposed allocation." 50 C.F.R. pt. 602, subpt. B, app. A (1992).

the market. An exchange in the comments attached to the final rule for the surf clam and the ocean quahog fishery shows that NOAA believes that illegal economic concentrations are unlikely to occur for two reasons: the high prices of the ITQs and the oversight by the government, including the fisheries councils and the United States Department of Justice.⁵⁶ NOAA commented in the surf clam/ocean quahog final rule that under the Magnuson Act, the FMP was not required to prevent an excess accumulation in the aftermarket after the initial distribution has been made,⁵⁷ but left open the question as to whether a court might find an aftermarket concentration in violation of the Sherman Act.⁵⁸

Concentration became an issue when the FMP was challenged in *Sea Watch International v. Mosbacher*.⁵⁹ In that case, the plaintiffs alleged that two fishermen held over 40% of the shares, and that fragmentation of the remaining shares would result in further consolidation as holders of small shares sold their interests, creating an impermissible restraint on competition.⁶⁰ The court was apparently not bothered by the figure of

56.

Comment: Amendment 8 will allow a massive consolidation of vessels, transferring control to just a few entities.

Response: Pursuant to 50 CFR 602.14, an allocation scheme must be designed to deter people from acquiring an excessive share of the resource, and to avoid conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist. The Amendment 8 allocation distribution system and the high prices expected for allocation shares will not be conducive to individuals acquiring excessive shares of the resource to any greater extent than the current circumstances of the fishery permit. Under current circumstances, someone with enough capital could achieve "massive consolidation" by buying most of the fleet. In addition, the Regional Director will review annually the allocation transfers and will advise the Council and the U.S. Department of Justice when it appears an excessive number of shares are held by one person.

55 Fed. Reg. 24184 (June 14, 1990).

57. "None of the allocation formulas allows anyone to get an excessive share of the fishery when it is initially divided. The Act does not intend that secondary economic forces in the aftermarket, which might concentrate the quota in a few individuals, must be prevented by the Amendment." *Id.*

58. This raises the question whether the Magnuson Act creates a possible exception to the antitrust laws. See *infra* note 95 and accompanying text.

59. 762 F. Supp. 370 (D.D.C. 1991).

60. *Id.* at 380.

40%,⁶¹ and ruled that in the absence of a definition of excessive shares it would defer to the discretion of the Secretary of Commerce.⁶² That ruling conforms to general antitrust standards, in which the courts are not likely to find market power unless concentrations approach monopoly levels.⁶³ Recently, the courts have been much more tolerant of large market shares, provided there is no evidence of impermissible abuse of market power.⁶⁴

In an attempt to address this problem when considering ITQs for the Atlantic sea scallop fishery, the New England Fishery Management Council proposed to limit the maximum number of permits any one single entity or individual may own to 10% of the total allocation for the fishery.⁶⁵ This was at least a facial attempt to prevent accumulation of

61. "Even if the raw number measured a true economic market—which is by no means clear—a judgment of undue concentration could not be based on the mere existence of such a share possessed by the two largest participants." *Id.* at n.16.

62. "[T]he Act contains no definition of 'excessive shares,' and the Secretary's judgment of what is excessive in this context deserves weight, especially where the regulations can be changed without the permission of the ITQ holders." *Id.* at 380.

63. In a seminal, but dated, market power case, Judge Hand concluded that a 90% market share would be enough, that 60%-64% is doubtful, and that 33% is definitely not enough. *United States v. Aluminum Co. of America*, 148 F.2d at 424. However, more recent cases have intimated that market or monopoly power must be evaluated by looking at a number of factors beyond market share, and the courts have not found impermissible monopolization even with large or dominant market shares. See *IBM v. Transamerica*, 481 F. Supp. 965, 986 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1377 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983) (IBM not in violation of Sherman Act with 77.1% of market share); *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (Kodak not in violation of Sherman Act with 61-90% of market share). But see *U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695, 703 (Fed. Cir. 1988) (alleged 90% market share coupled with sustained price reductions, which the jury might have found predatory, sufficient for finding market power). This subject is one of considerable controversy within antitrust circles. For a recent survey of the divergent views of calculating monopoly power, see Selected Articles, *The Cutting Edge of Antitrust: Market Power*, 60 ANTITRUST J. 799 (1991-92).

64. "Despite the generally recognized evils of monopoly power, it is well settled" that § 2 does not prohibit monopoly *simpliciter*...." *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d at 273 (citations omitted). Market power is defined as "whether [the entity] had the power to control prices in, or exclude competition from some relevant market...." *IBM v. Transamerica*, 481 F. Supp. at 974.

65. New England Fishery Management Council, PROPOSALS FOR AMENDMENT #4 TO THE ATLANTIC SEA SCALLOP FISHERY MANAGEMENT PLAN 4 (Public Hearing Summary Document, Draft July 17, 1990). The Council staff, in response to this provision, stated:

an excessive market share by one entity and thus avoid obvious antitrust implications. However, even without such a measure it is unlikely that the percentage of the quota one individual could amass in a fishery such as the sea scallop would rise to a level that the courts would consider a violation of section 2 of the Sherman Act without some concomitant abuse of that power.⁶⁶

B. Vertical Integration

Vertical integration⁶⁷ is created when an entity gains control of several levels of an industry, typically in a supplier-customer relationship. The primary vice of a vertical merger or other similar arrangements is that by foreclosing the competitors on either level from a segment of the market otherwise open to them, the entity may become very powerful and have an unfair advantage over competition.⁶⁸ An entity in that position may have access to more capital than single level

Obviously, there are numerous ways in which limits on quota holdings can be circumvented (e.g. formation of "holding companies", [sic] listings of quota holdings in the name of friends, relatives, etc.). It is probably impossible to account for all methods of augmenting quota holdings.

New England Fishery Management Council, *Option 2 for Scallop Management: Specifications for an ITQ System (Draft)*, Staff Memorandum to Scallop Committee 3 (July 26, 1989).

66. It should be noted that the ITQ plan for ocean quahogs and surf clams did result in a "shakeout" of that fishery. There has been continued concentration of the fishery since *Sea Watch*, with corporations owning many boats and so-called "big money" interests receiving a larger share of quotas. This, many believe, has "created clam barons out of a few fleet owners and processors." K. Moore, *New Plan Shakes Up Surf Clam Fishery*, NATIONAL FISHERMAN, March 1992, at 20-21. Although the loss of many small fishermen, many of whom own old and inefficient boats, is an unfortunate consequence, the courts most likely will not be sympathetic to an antitrust challenge if the end result is greater efficiency. Also, although § 7 of the Clayton Act, 15 U.S.C. § 7 (1988), was at one time held to protect small businesses from being swallowed up by larger competitors, see *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), that theory has been largely repudiated. See *Brown Shoe v. United States*, 370 U.S. 294, 344 (1962).

67. Vertical mergers are substantially regulated by § 7 of the Clayton Act, which forbids acquisitions of the assets of another person when the effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1988).

68. For the United States Supreme Court's theory on vertical integration and entry barriers, see *Ford Motor Co. v. United States*, 405 U.S. 562, 569-71 (1972). In *Brown Shoe Co. v. United States*, 370 U.S. at 323-24, the Court describes the use of market power to limit entry into the market as a "clog on competition."

competitors, may be able to limit entry into the market,⁶⁹ and may have inordinate control over market prices.⁷⁰ This situation is possible in a fishery such as scallops, where the market is relatively small and there are no constraints over processors acquiring scallop allocations. However, vertical integration is not prohibited *per se* under the antitrust laws,⁷¹ and the courts often will dismiss a charge of monopoly if the integration can be explained for efficiency reasons.⁷² To be sure, size is of concern because of its impact on competitors. However, if the bigger competitor can produce the product more efficiently,⁷³ the antitrust laws are not violated.⁷⁴

In an analogous situation to fisheries, an attempt by rice farmers to acquire a rice milling corporation in California was found to be an

69. By owning a sizeable portion of the allocations, a fish processor would necessarily foreclose that portion of the market from a would-be entrant into the fishery.

70. The fear is that the processors could use their size and power at the processor level to leverage power at the harvesting level by, for instance, pricing their catch below what the competition can afford to price in order to survive. "Predatory pricing is defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986). However, predatory pricing is difficult to prove. Processors can always argue that lower costs are due to increased efficiencies in harvesting capabilities. Recently, the Supreme Court has taken a skeptical approach to predatory pricing claims, stating, "predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

71. The Supreme Court in *Paramount Pictures* stated that the legality of vertical integration depends "on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose of intent." *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948).

72. *See Paschall v. Kansas City Star Co.*, 727 F.2d 692, 698 (8th Cir. 1984), *cert. denied*, 469 U.S. 872 (1984).

73. The Court has noted how companies may increase in size for efficiency reasons, and those reasons are not necessarily in violation of the antitrust laws.

The retail outlets of integrated companies by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected.

Id.

74. "It is competition, not competitors, which the Act protects." *Brown Shoe v. United States*, 370 U.S. at 344.

impermissible vertical restraint on competition in violation of section 7 of the Clayton Act.⁷⁵ The court found that milled California medium-grain rice was the relevant product market because the market for unmilled rice was limited to paddy feed, rendering it relatively valueless.⁷⁶ Therefore, by obtaining the mill, the growers would obtain too much control over the California medium-grain rice industry.⁷⁷ Fish processors and wholesalers could conceivably attempt to do the same.⁷⁸ To avoid this possibility, ITQ programs can and probably should include a maximum ownership provision. Assuming an ITQ management system has such a limitation, it is unlikely that the mere showing of some vertical integration, barring other anticompetitive activities, would be found to be an impermissible restraint on competition in violation of section 7 of the Clayton Act or of section 2 of the Sherman Act.⁷⁹

C. Tacit Collusion, Oligopoly, and Price Fixing

A far more likely violation of the Sherman Act could occur concerning section 1, which prohibits conspiracies and combinations in the restraint of trade.⁸⁰ This could happen in a fishery if several large holders of ITQs, or several processors who may or may not also hold

75. See *United States v. Rice Growers Association of California*, Civ. No. S-84-1066 EJG (E.D.Cal. 1986).

76. *Id.*

77. *Id.* The court determined that, based upon the historical distribution of the market, the grower's acquisition of the mill would substantially lessen the competition in the milling of California medium-grain rice.

78. Fish that is landed is only valuable if there is someone to purchase and/or process the catch. If a processor is able to acquire a large share of the quota, then competition would be lessened by loss of the smaller interests. The processor would also be able to exert undue pressure on the price of the fish at both the wholesale and the retail level.

79. In the past several decades there has been very little enforcement against vertical mergers. In one of the few recent cases brought by the federal government in the vertical area, the Second Circuit reversed the Federal Trade Commission ruling of an unlawful vertical arrangement, even though there was high concentration and high barriers to entry. See *Fruehof Corporations v. Federal Trade Commission*, 603 F.2d 345, 360-61 (2d Cir. 1979). The courts have been unwilling to find a § 2 violation unless it is shown that a firm used "its monopoly power in one market to gain competitive advantage in another." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (1979).

80. This depends, of course, on conscious decisions of those in the industry to violate the antitrust laws.

some share of ITQs, conspire together to control the market.⁸¹ For a conspiracy or collusion to exist under section 1, there must be more than one actor involved,⁸² and they must act in concert.⁸³ The concerted action may be proved by direct or circumstantial evidence⁸⁴ and need not be explicit; a tacit agreement, if proven, is enough to establish unlawful conduct.⁸⁵ Price fixing is illegal *per se*. If the conspirators engage in price fixing, even if the conspiracy does not substantially affect the market as a whole, the conspirators will be in violation of the antitrust laws.⁸⁶ Price fixing could occur in the fishing industry due to the oligopoly⁸⁷ that often exists at the processor level. It could also occur at the

81. *I.e.*, by fixing prices, dividing up customers, or other concerted actions.

82. For § 1 of the Sherman Act to apply, there must be a contract, combination or conspiracy between separate entities. Conduct that is "wholly unilateral" does not violate § 1. *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968). The Supreme Court has recently stated that parent companies and wholly owned subsidiaries have a unity of interest and cannot be reached by § 1 of the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).

83. A conspiracy may be found where "the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement...." *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946).

84. "[W]e think that ...[an] agreement...was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

85. *See Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *Theatre Enterprises v. Paramount Film Distribution Corp.*, 346 U.S. 537, 540-41 (1954).

86. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

87. An oligopoly is a situation in an industry where there are only a few sellers all selling a standardized product, and they necessarily become interdependent upon one another. *See* Richard Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969). For example, this is the situation that exists in New Bedford, where there are fewer than ten processors in the scallop market. Telephone interview with Lou Goodreau, Economist, New England Fishery Management Council, (Nov. 22, 1991). Whether interdependence can occur without collusion has been questioned by Professor Sullivan, who, however, admits that it still may rise to the level of unlawful combination. *See* L. SULLIVAN, LAW OF ANTITRUST § 122 (1977).

fisheries level, of course, if fishermen agree among each other to demand a certain price.⁸⁸

In fact, price fixing was found in Massachusetts in the 1940's and 1950's, where the Atlantic Fisherman's Union controlled the fresh fish market originating out of the ports of Gloucester, Boston, and New Bedford, including the harvest, marketing, sale, and price of the fish.⁸⁹ The case was brought in both federal⁹⁰ and state court. The Supreme Judicial Court of Massachusetts found that the actions of the union easily brought the defendants under the anti-monopoly laws of the state.⁹¹ Although it is not likely that a situation as extreme as that in the *McHugh* case will occur, there is the possibility that, under an ITQ system, a few entities could dominate the market in a concerted effort to control prices.⁹² The possibility of price fixing by processors is greatest because that is often the logical "narrows" in a fishery's stream of commerce.⁹³

88. Of course if a fisherman and a processor agree on a price, that is not price fixing but normal supplier-buyer bargaining.

89. *Commonwealth of Massachusetts v. McHugh*, 93 N.E.2d 751, 755 (Mass. 1950).

90. The federal court remanded the matter to Massachusetts Superior Court. *Commonwealth of Massachusetts v. McHugh*, 71 F. Supp. 516 (D. Mass. 1947).

91.

The combination of the defendants, embracing as it did practically all of the commercial fishermen operating over a wide area and bringing their catches into ports of this Commonwealth, fortified and directed toward control of the market by means of the votes, practices, and penalties hereinbefore described was sufficiently extensive, unified, and powerful and exhibited the purpose and tendency required to bring it within the foregoing definition and to constitute a monopoly....

Commonwealth v. McHugh, 93 N.E.2d at 760.

92. For discussion of an even earlier price fixing scheme related to the Massachusetts fish market, see *United States v. New England Fish Exchange*, 258 F. 732 (D. Mass. 1919).

93. The narrows have been described as such:

Each kind of commodity, as it passes through the many processes from the earth to the consumer, may be looked upon as a stream whose channel is broader at some points and narrow at others. Different streams of commodities narrow at different places. Some are narrowest and in fewest hands at the transport stage, others in one of the processes of manufacture, others in the hands of export merchants.... Just as a number of German barons planted their castles along the banks of the Rhine, in order to tax the commerce between East and West which was obliged to make use of this highway, so it is with these economic 'narrows.'

J.A. HOBSON, *THE EVOLUTION OF MODERN CAPITALISM* 142 (quoted in M. JOSEPHSON,

Although price fixing can certainly occur without ITQs, under an ITQ system processors would be dealing under the legitimacy of regulation and might assume that their actions were legal. Moreover, by limiting entry and allocating shares of the market, the government would be making it easier for an individual or group of individuals to obtain monopoly or oligopoly power at the harvesting level.⁹⁴ The government must be careful to prevent anticompetitive situations that could arise under market conditions created by its regulations.⁹⁵

THE ROBBER BARONS (1962)).

For example, the logical narrows of the scallop market falls at the processing level where the stream of commerce narrows between the multitude of fisherman on one side and the multitude of wholesale and retail purchasers and the consumers on the other.

94. With only a few large fishing concerns rather than a multitude of fishermen, the task of forming a cartel and maintaining discipline in what price the cartel will charge for scallops is made that much easier. Also, the possibility of oligopolies at both the harvesting and processing level make vertical conspiracies among several entities at both levels that much more effective and possible. Oligopolies are not in and of themselves illegal, but they certainly facilitate price fixing.

95. This raises another question, beyond the scope of this Article, as to whether the Magnuson Act has created an exception to the antitrust laws. Often with ITQs, the government itself is creating possible monopolistic conditions such as constructing entry barriers and dividing the market into allocations. Conflicts occur when the regulated industry acts under authority or permission of the regulating agency but also violates antitrust laws. It has long been a tenet of administrative law that agency regulation of an industry does not necessarily immunize that industry from antitrust laws. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 387 (1973); *United States v. Nat. Ass'n of SEC Dealers*, 422 U.S. 694, 719-20 (1975); *Silver v. New York*, 373 U.S. 341, 357 (1963). However, when the statute is unclear the court may find an implied exemption when it is necessary to carry out the regulatory scheme. *See United States v. Nat. Ass'n of SEC Dealers*, 422 U.S. 694, 734. On the other hand, there is a presumption against repeal by implication. *See Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978). The court will only find immunity through a "convincing showing" of the need for the immunity. *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981). Until this question is litigated, however, industries will often continue to engage in anticompetitive activities with the assumption that because the agency has allowed it, or has not condemned it, it must be lawful. *See, e.g., United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1347 (D.D.C. 1981) (court denied defendant's argument of implied immunity as unconvincing, and "[i]n the absence of a determination that the regulatory scheme confers antitrust immunity, the practical effect of regulation will therefore be considered ... simply as another fact of market life.")

It is unclear whether the Magnuson Act either expressly or implicitly exempts the FMPs from antitrust implications, and without such a showing, this Article will assume there is not. Of course, there is a danger that quota holders may make a contrary

If NOAA were to decide not to take action against or prevent any collusion or price fixing, it might be difficult for a private party to challenge pricing activities in court. Assuming that the violations are not as obvious as those of the defendants in *McHugh*, it may be difficult to prove that price fixing by several or all of the processors in a given fishery is intentional.⁹⁶ Although all of the processors may be following identical courses of conduct, lack of evidence of express or tacit agreement between the parties could preclude a finding of collusion or a conspiracy to fix prices.⁹⁷ Even public announcements of pricing decisions and individual decisions to follow price leadership⁹⁸ may not be enough, standing alone, to establish a conspiracy.⁹⁹ Situations such as these, without the oversight of the Secretary of Commerce, could cause severe problems if an ITQ-managed fishing industry were to develop characteristics adversely affecting consumers and restraining trade.¹⁰⁰

assumption.

96. To prove a violation of § 1 of the Sherman Act, it is necessary to prove the existence of the intent to conspire or combine in the restraint of trade. *See* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978); *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). If the potential conspirators are able to cover their tracks well enough, there may be no "smoking gun." However, hints of price fixing will draw the attention of the Justice Department, which certainly is able to investigate the matter thoroughly.

97. *See* *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). *See also* *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1983).

98. *See* *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927); *United States v. United States Steel Corp.*, 251 U.S. 417, 449 (1920).

99. *See* *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357-58 (9th Cir. 1982).

100. Sometimes some price communication is quite necessary for companies to operate. *See* M. Crane, *The Future Direction of Antitrust*, 56 ANTITRUST L.J. 3 (1987) [hereinafter Crane].

In transportation or communications, for example, several carriers may participate in the movement of goods or data from one location to another. If, for example, two pipelines cannot agree on a joint tariff to transport gas from A to B in the pipeline of one and from B to C in the pipeline of the other, they cannot compete against a longer pipeline that can transport the gas all the way from A and C. Under these circumstances, limited price conversations increase rather than decrease competition.

Id. at 5. *See also* *Boise Cascade Corporation v. Federal Trade Commission*, 637 F.2d 573 (9th Cir. 1980).

D. Government Control

Ultimately, antitrust becomes an issue in the regulation of a fishery if holders of excessive shares or processors can obtain monopoly power in the market, which could lead to the taking of monopoly profits. However, the primary purpose behind the regulations under the Magnuson Act are not to control price, but to promote conservation and an optimum yield.¹⁰¹ The antitrust concern arises as a corollary—incidental anti-competitive effects and monopolization may result from adoption of an ITQ program because the regulating agency has not considered the economic consequences of its conservation regulations. Such provisions as a maximum percentage of quota ownership, particularly for processors, may be adequate to protect the consumers from monopoly pricing.

The government can also control the concentration of the allocations either by buying back the allocations and then determining to whom they should be sold, or by auctioning quotas and giving the seller the proceeds.¹⁰² In this way, the market would be kept open and the cost of entry would not become prohibitive. Moreover, the government can retain control of disposition of the allocations by disapproving transfers to entities which appear to have a dominant position in the market.¹⁰³ This would ultimately protect the consumer by keeping the ex vessel prices competitive. A further control would be to require processors to obtain licenses in order to buy the product harvested under an ITQ system, thus preventing an excessive concentration on that level of the industry as well. Such a program may also result in benefits to the

101. 16 U.S.C. § 1801(b) (1988).

102. The potential problems of the allocations being sold too cheaply, that is, with buyers obtaining a "windfall" from public resources, is beyond the scope of this Article. For a discussion of an analogous situation with respect to public land grazing fees, see GEORGE C. COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* (2d ed. 1987). It appears that for the government to receive a fair market value for a fishery resource, the Magnuson Act would have to be amended. See 16 U.S.C. § 1854(d) (1988) (prohibiting fees above what are necessary to cover administrative costs).

103. Rather than buying the ITQs back, a Regional Council could retain ultimate control of the allocations by requiring Council approval of all transfers, much the way the State of Wisconsin regulates quota transfers in its fisheries. Wisconsin requires all transfers to obtain prior approval by state advisory boards. See WIS. STAT. ANN. § 29.33(2)(d) (West 1989).

public fisc by allowing the government to obtain profits in the sales, which could be used to further management efforts.¹⁰⁴

Governmental control over allocations would enable the Department of Commerce to fulfill its Magnuson Act responsibility to prevent the acquisition of an "excessive share." This action would also protect the industry from being challenged by the Antitrust Division of the Justice Department.¹⁰⁵ In this way, the Secretary of Commerce and regional fishery councils could retain control over the economic posture of the ITQ-managed industry and prevent anticompetitive behavior and results, rather than merely relying on the Justice Department to react to them. However, even if the Magnuson Act does not prohibit anticompetitive trade practices after the initial allocation, the Sherman Act does. Either way, the ultimate goal should be to maintain enough competition to allow the industry to remain efficient. It is clear that in drafting regulations to govern an ITQ program, the Councils and the Secretary must consider potential causes and effects of anticompetitive activities and adopt regulations to prevent them.

IV. CONCLUSION

Overall, ITQ systems are a practical way to manage a fishery in a constitutional, legal and effective manner. By anticipating antitrust concerns—for example, building quota ownership limits and processor licensing requirements into the systems—the government can design ITQ systems in which violations of antitrust laws are unlikely. Of course, fears that allocating private rights in fisheries will transform a traditional and individualized way of life into a large, impersonal and unfair corporate system should be squarely addressed in the plan development process. In the final analysis, however, under the Magnuson Act, the government is charged with protecting fishery resources, and it must

104. Under the Magnuson Act care must be taken, however, to prevent these revenues from exceeding costs. 16 U.S.C. § 1854(d) provides:

The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 1853(b)(1) of this title ... The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

The court in *Sea Watch*, described this measure as "designed to prevent the government from using quotas as a revenue-raising measure." *Sea Watch Int'l v. Mosbacher*, 762 F. Supp. 370, 376 (D.D.C. 1991).

105. A court, as in *Sea Watch* would likely defer to agency discretion in the enforcement of antitrust concerns. *See id.* at 380.

retain ultimate control of the fisheries. Adoption of ITQs, a management system that establishes enforceable private rights of individuals in access to certain fisheries, while simultaneously encouraging efficiency of harvest and protection for resources held in public trust, may be an option worth pursuing in many instances.

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