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# ITQS as Collateral Rightly Understood: Preserving Commerce and Conserving Fisheries

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## INTRODUCTION

The number of vessels comprising the United States' fishing fleets has, in many fisheries, grown to such great numbers that their fishing capacity far exceeds fishery productivity. This excess capacity perpetuates a cycle of overinvestment and overfishing, contributing to dangerous depletion of fish stocks. In unsuccessful efforts to conserve threatened fish stocks, the United States has reduced fishing seasons and allowable harvest limits.<sup>1</sup> The reduction of fishing seasons has itself contributed to overinvestment in fishing fleets. As fishing seasons were shortened, purchasing equipment capable of meeting quota limits in the shortest possible time became the business strategy of choice.

A proposed alternative to these unsuccessful fishery management practices is the implementation of transferable fishing quota schemes, which may provide incentives to conserve fish stocks and simultaneously reduce the excessive numbers of active vessels within U.S. fisheries. Individual Transferable Quotas ("ITQs"), are tradable fishing rights created by the National Marine Fisheries Service ("NMFS") and local fishery management councils in an attempt to alleviate the problem of overfishing, and achieve sustainable management in the United States.<sup>2</sup>

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1. Open access and limited access fishery management schemes have not worked due to problems with enforcement and the "race for fish" mentality that results from limited access schemes which set a total maximum annual catch, but no maximum on individual actors.

2. ITQ management was first introduced in this country with the ratification of Amendment 8 to the Surf Clam and Ocean Quahog fishery management plan. 55 Fed. Reg. 24184 (1990). While other countries including New Zealand, Australia,

Under ITQ management schemes, each qualifying fisher receives an individual quota, which is a specific percentage of the annual harvest limit—or total allowable catch (“TAC”)<sup>3</sup>—for a specific fishery. A fisher may use his percentage allocation to harvest fish himself, or he may transfer his allocation to someone else by lease or sale. “The primary feature of ITQs is the assignment of . . . property rights to harvest common property resources such as fish and shellfish . . . Usually, ITQs are fully transferable (buy, sell, lease) to allow operators to optimize their business.”<sup>4</sup>

Critics of market-based environmental solutions point out the difficulty of applying economic models to environmental questions because “[h]umans cannot . . . impose limited notions of order on a living world that, by its very nature, will not be pinned down.”<sup>5</sup> Regardless of the validity of this criticism, the reality is that current policies value market mechanisms as superior to other alternatives.<sup>6</sup> The implementation of transferable fishing quota schemes worldwide is evidence of this trend.<sup>7</sup>

Transferable quota systems have been implemented in various fisheries around the world with distinct consequences for the economic structure and the conservation of fisheries. For example, in the Icelandic cod fishery, the implementation of such a management system has resulted in the concentration of fishing quota among a few large market participants.<sup>8</sup> In fact:

This state of affairs has lead many to describe the quota system in feudal terms, with the “quota kings” or “lords of the sea” controlling most of the quota and profiting from renting it to “tenant” companies, who actually do much of the fishing. After paying the rental price, the “tenant” companies are left with only 60% of the

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Canada, and Iceland also have ITQ systems, this article will be limited to a discussion of domestic ITQ management.

3. TAC is derived from a scientific analysis of what the minimum sustainable population of a given fishery is, and what level of catch can be allowed to maintain that minimum population.

4. CHRISTOPHER M. DEWEES, SEA GRANT EXTENSION PROGRAM, FISHERIES MANAGEMENT: INDIVIDUAL TRANSFERABLE QUOTAS (ITQs) (1993).

5. R. EDWARD GUMBINE, GHOST BEARS 63 (1992).

6. DAVID W. PEARCE & R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 19 (1990).

7. See OECD, THE USE OF INDIVIDUAL QUOTAS IN FISHERIES MANAGEMENT (1993).

8. Gisli Palsson & Agnar Helgason, *Figuring Fish and Measuring Men: The Quota System in the Icelandic Cod Fishery*, in OCEAN AND COASTAL MANAGEMENT 19 (forthcoming) (on file with author).

value of the catch, while still bearing the normal expenses of fishing.<sup>9</sup>

Currently, there are three ITQ management systems in the United States. These regulate the Atlantic Surf Clam and Ocean Quahog fisheries,<sup>10</sup> the Wreckfish fishery,<sup>11</sup> and the Alaskan Halibut and Sablefish fisheries.<sup>12</sup> While the character of each of these three fisheries is unique, the theory behind their ITQ management is the same: to provide for more "efficient" and sustainable management of the fish stock by limiting access through tradable fishing rights—ITQs—which are a percentage share of total allowable catch.<sup>13</sup> In theory, transferability of the quota will encourage needed fleet downsizing by giving "marginal" actors an asset they can sell to exit the market.

Due to the nature of the initial quota allocation,<sup>14</sup> researchers point out that small actors, "lacking the financial backing to acquire extra permanent quota-shares," must sell out.<sup>15</sup> As in any industry, therefore, financing is a necessary component in the fishing industry. Financing allows for capital investment and business improvement, as well as easier market entry and exit. ITQs, which have monetary value and are transferable, could serve as a form of collateral to facilitate financing within the industry. However, interviews<sup>16</sup> with financial institutions, lenders, lawyers, and others involved with commercial fisheries reveal that ITQs are generally not accepted as collateral for loans.<sup>17</sup>

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9. *Id.*

10. 50 C.F.R. § 652 (1995).

11. 50 C.F.R. § 646 (1995). The Wreckfish fishery is part of the Snapper-Grouper fishery of the South Atlantic.

12. 50 C.F.R. § 676 (1995). In the North Pacific Halibut and Sablefish fishery, quota is referred to as IFQ, or Individual Fishing Quota. Throughout this paper, reference and analysis of ITQs will also refer to the IFQ system in Alaska.

13. Total allowable catch (TAC) is set annually by the National Marine Fisheries Service as a function of maximum sustainable yield for a specific fish stock.

14. As discussed in detail in the text, quota allocations are made on the basis of catch history, usually taking an average over a period of time. Small operators, however, are more likely to have fluctuating catch histories because setbacks (i.e., mechanical problems with vessels or gear) have a greater impact on them than on larger operators. Small operators' initial allocation are thus likely to be lower than what is sufficient to maintain their enterprise.

15. Palsson & Helgason, *supra* note 8, at 19.

16. Note however that this is not a statistical sample. Furthermore, all references to "lenders" and "financial institutions" refer to those that were interviewed and not lenders in general.

17. Palsson and Helgason point out that access to financing and collateral is a problem in Iceland as well and that this problem contributes to inequitable results in ITQ management.

Lenders are understandably hesitant towards any new form of collateral, but ITQs seem to pose certain risks which lenders appear unwilling to accept regardless of the recent creation of ITQs.

When lenders consider accepting collateral as a guarantee for a loan, a main concern is whether the collateral will be sufficient to cover the value of the loan should the borrower default. "[I]n every situation . . . underwriting goals remain the same: making sure the borrower is both able and willing to repay the . . . debt, and making sure the property would provide sufficient security . . . in the event of default."<sup>18</sup> The greater the risk of loss, the lower the loan-to-value ratio on the loan.<sup>19</sup>

ITQ management seems a promising approach to long-term conservation. ITQs, as an exclusive right, may create an incentive for quota holders to fish responsibly to maintain a sustainable fish stock, or even increase the fish population, and to increase the value of their quota. For others, the creation of exclusive rights may bar their participation in the industry or encourage the growth of fishing monopolies. Access to financing is key, however, because the incentive to fish responsibly is linked to the ability to fish profitably. For many small fishing outfits, financing is needed to purchase the requisite equipment. The large and typically over-equipped fishing outfits need financing to purchase the additional quota shares necessary for the outfits' vessels to make profitable use of their catch capacity, and thus remove the incentive to fish illegally. The inability of fishers to obtain loans on ITQs decreases the value of the fishers' quota rights (particularly when they lack the capacity to exercise them), and may frustrate the incentive-based management scheme. Financing is also essential to conservation efforts predicated on downsizing the fishing fleets, because even successful fishing outfits may require additional capital to buy out fishers wishing to exit the industry. Therefore, the acceptance of ITQs as collateral is important for conservation goals.

This comment explores the history and present use of ITQs as collateral, and attempts to explain the difficulty that some fishers

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18. CUSTOMER EDUCATION GROUP, FED. NAT'L MORTGAGE ASSOC, *BASICS OF SOUND UNDERWRITING* (1993).

19. Loans for real estate are usually made at about 70%-80% loan-to-value ratio; in the few instances where ITQs have been accepted as collateral (State of Alaska, Department of Investments, Alaska's Commercial Fishing and Agriculture Bank) the loan-to-value ratio has been approximately 20%.

have had in obtaining loans on ITQs. Additionally, this comment explores possible changes to current ITQ management to make ITQs more attractive as a form of collateral, while still maintaining the flexibility of the system for conservation purposes.<sup>20</sup> Finally, the comment makes the case that if ITQs are easier to use as collateral, ITQ systems will be fairer, and have fewer negative impacts.

The comment first provides an overview of the law governing secured transactions to establish a point of reference for analyzing the issue of lending and ITQs as collateral. The comment illustrates the necessity of establishing a national registry to facilitate lending on ITQs, and provide some possibilities for what such a registry might look like.<sup>21</sup> In addition to examining the need for a national registry, the comment discusses several other risks that lenders associate with ITQs. This comment asserts that the use of ITQs as collateral is beneficial for perpetuating ITQ management, for assisting smaller actors within a fishery, and as a tool for economic development. Finally, the comment asserts that a national registry system, while helpful, cannot be expected to guarantee lenders' acceptance of ITQs as collateral because the quality and character of the borrower is just as important as the quality and character of the collateral.

#### HISTORY OF ITQS AND THE PRESERVATION OF FISHERIES

The seafood industry is big international business. In 1992, U.S. commercial fisheries and their processing sectors earned \$3.7 billion in ex-vessel revenue after fishing for 4.8 million metric tons of fish and shellfish.<sup>22</sup> In 1943, the U.S. exported five times more fish than it imported.<sup>23</sup> However, following WWII, foreign governments, in an effort to develop export markets, heavily subsidized their fishing fleets. As a result, by 1974, the U.S. was importing 13 times more fish than it exported.<sup>24</sup>

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20. In examining the attractiveness of ITQs as collateral, the author assumes "a fair and equitable" allocation, as required by the Magnuson Fishery Conservation and Management Act, 16 U.S.C.A. § 1851(a)(4)(A) (West 1995).

21. Current bills under consideration in both the House of Representatives and the Senate propose establishing a national ITQ registry. These bills are discussed later in the text. See *infra* pp. 311-13.

22. NOAA. *Our Living Oceans*. (1993:3)

23. Cleave Snow, Farm Credit Bank of Springfield, *The Northeast Commercial Fishing Industry* (1990).

24. *Id.* By 1993 approximately 45% of the seafood consumed in the U.S. was imported.

As foreign fleets descended upon U.S. waters in the 1970's, the United States Congress passed the Magnuson Act,<sup>25</sup> a protectionist policy excluding foreign actors from fishing in U.S. waters (up to 200 nautical miles offshore, termed an Exclusive Economic Zone (EEZ)). Furthermore, in an effort to compete with foreign fleets, the NMFS provided large subsidies to the domestic fishing industry. These subsidies resulted in overcapitalization and advanced technology. These factors, in addition to the failure to consider long-term objectives, have caused overfishing and depletion of fish stocks. Currently, in the United States, about 40% of managed fish populations are overexploited; in the world, about 70% of the world's fish stocks are "depleted" or "almost depleted."<sup>26</sup>

Due to the existing crisis in stock depletion, even some environmental interests conclude that without the implementation of ITQ management, fish stocks and fishing communities face a dim future. In the late 1970's and early 1980's, the government gave large subsidies to the fishing industry, leading to overcapitalization. Overcapitalization, or overinvestment, is the excessive investment in high-capacity fishing gear resulting in high cost and oversized—in terms of the number of vessels—fishing fleets with enormous excess capacity to fish—the ability to fish far beyond what is permissible for stock preservation purposes. When fish stocks began to decline, the government lowered the TAC, but maintained open access<sup>27</sup> and limited access management systems,<sup>28</sup> neither of which has been successful in maintaining and conserving fish stocks. Currently, in the United States, about 40% of managed fish populations are overexploited.<sup>29</sup>

In open access fisheries there are few, if any, regulations governing either rights to fish or methods of fishing. In limited ac-

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25. 16 U.S.C.A § 1851(a)(4)(A) (West 1995).

26. Simon Fairlie et al., *The Politics of Overfishing*, 25 THE ECOLOGIST 42, 46 (1995).

27. Open access management refers to a system which has no regulations and allows fishers to take as much as they desire and are able to catch.

28. Limited access management usually refers to a system in which fishers must obtain some sort of license, which usually requires an annual fee, to participate in the fishery. Such management schemes typically set an annual TAC. However, once actors have gained entry into the fishery, each participant may catch as much fish as possible. This usually results in a "race for fish" where fishery participants catch as much, and as quickly, as they can, until the TAC for the fishery is reached.

29. NATIONAL MARINE FISHERIES SERVICE, NOAA TECH. MEMO. NMFS-F/SPO-15, OUR LIVING OCEANS: REPORT ON THE STATUS OF U.S. LIVING MARINE RESOURCES (1993).

cess fisheries, TAC and licensing are used to regulate the fishery. The TAC is set at the beginning of the season and the season closes when the TAC is reached. This results in a "race for fish" where fishers catch as much as they can, as quickly as they can, leading to unsafe and irresponsible fishing practices. Endangered species and fish that are illegal catch because of size or other restrictions are often caught along with the targeted fish, leading to further stock depletion.

One author provides a vivid picture of what happens when limited access management tools are unsuccessful.<sup>30</sup>

TACs steadily increased throughout the 1980s . . . despite the fact that cod stocks were still below the . . . level needed to replenish [the stocks] . . . Overfishing continued, and by 1990 the mortality rate of cod was at least 45% of the exploitable fish mass. . . . The result of this domestic and foreign overfishing was a 95% drop in cod stocks from 1990-1992.<sup>31</sup>

The fate of the Newfoundland cod fishery is typical of depleted fisheries around the world, and indicative of what can be expected to happen in depleted U.S. fisheries under open access and limited access management. The Newfoundland fishery once employed 44,000 people. Since 1990, with the continued depletion of the fish stock, 30,000 workers have lost their jobs. The fishing communities have been destroyed; people are no longer able to fish and have no industry to replace the jobs lost in the fishing industry.<sup>32</sup> Additionally, literacy and education rates among former fishery workers are extremely low,<sup>33</sup> making re-employment difficult.

If properly implemented, ITQs might offer a solution to the Newfoundland scenario. By creating ownership in a percentage of the annual catch, ITQs give fishers a vested future interest in the fish, rather than forcing fishers to be concerned only with current catch as under open access and limited access management systems. This interest can encourage more responsible and sustainable fishing practices and may also diminish the "race for fish" phenomenon because quota owners are guaranteed the right to fish up to a certain percentage of the allowable catch.

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30. Julie Philp, *Overfishing Horror Stories: The Social and Economic Repercussions of Short Term Thinking* (September 1995) (unpublished) (on file with author).

31. *Id.*

32. For a more thorough discussion of the situation in Newfoundland, see *id.*

33. As of 1994, 80% of unemployed fishery workers in Newfoundland had never graduated from high school, and 45% were illiterate. *Id.*



Additionally, transferability of the quota allows for fleet downsizing and decreased overcapitalization, theoretically, by the use of private financing rather than government buyouts. Put simply, an ITQ system allows those who wish to exit the fishing industry to sell their quota rights and use the resulting capital to enter a new industry. Overcapitalization is also diminished because higher quota shares per participant, coupled with a decrease in the number of market participants, will decrease the need to "race for fish." The remaining participants may exploit a greater portion of their vessels' fishing capacity, while the incentive to fish recklessly or with environmentally harmful fishing techniques is reduced.

However, two interrelated problems have arisen with the implementation of ITQ management schemes in the United States: 1) fleet downsizing has had a disproportionate affect on small actors and small fishing communities; and 2) private financing, related to ITQ ownership, has not been readily available. Both of these problems are in some way related to the seeming unwillingness of lenders to accept ITQs as collateral. It is therefore important to examine the reasons behind this apparent barrier to financing.

#### WHY ITQS AS COLLATERAL?

Financing allows for easier entry into and exit out of a market, as well as providing for capital investment and business improvement. Furthermore, by providing potential buyers with the needed capital, access to finance will help to facilitate the trading of ITQs, and thereby contribute to a more effective conservation effort. The importance of ITQs being accepted as collateral reaches beyond the economic needs of the fishing industry to the survival of the larger eco-system to which the fisheries belong.

The environmental justice movement illustrates that "poverty has become an increasingly environmental phenomenon."<sup>34</sup> Given this observation, it is no surprise that conservation efforts, which can result in the loss of jobs, affect small economic actors first and foremost. In implementing environmental policy, and more specifically fishery management policy, it must be realized that there are fishermen and communities dependent on com-

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34. Robert W. Collin & Robin Morris Collin, *Essay on Environmental Justice: Equity as the Basis of Implementing Sustainability: An Exploratory Essay*, 96 W. VA. L. REV. 1173, 1181 (1994).

mercial and recreational fishing. "Scientific analysis, advice, and regulations must incorporate human behavior and be aware of the potential ramifications to people . . . ."35

A principal argument for ITQ management is that it would reduce overcapitalization and therefore reduce total catch. In fact, data shows that ITQ systems do succeed in fleet and catch reduction.<sup>36</sup> However, as Creed and McCay recognize:

The rhetoric surrounding [ITQ management schemes] involve[s] the notions of "marginal" and "inefficient" fishermen. The large firms [take] quick advantage . . . by consolidating their fishing operations on fewer boats. The very small firms, with only one boat, [do] not have that option . . . [However], it is a mistake to assume that small operations are either marginal or inefficient . . . .<sup>37</sup>

Strict market-based approaches to environmental problems, which pursue economic efficiency as a primary goal, are inappropriately narrow in their perspective. The goal of efficiency often clashes with such goals as maintaining local communities, thus perpetuating the perceived dichotomy between jobs and the environment. If a market-based solution, such as ITQ management, could allow for protection of smaller actors and communities through economic development tools this dichotomy can be softened or possibly eliminated. One might also consider a Rawlsian approach in which overlapping interests including equity and efficiency are considered more appropriate than a strictly market-based approach.<sup>38</sup>

In addition to the difficulties of a market-based approach, there is a danger that ITQ management schemes may institutionalize a regime which excludes participants based on their financial resources.<sup>39</sup> Moreover, extreme industry consolidation may lead to dominant market share and possible collusion by large participants.<sup>40</sup> This possibility directly counters a stated goal of

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35. *Id.*

36. Julie Philp, *The Conservation Benefits of Individual Transferable Quotas* (September 1995) (unpublished) (on file with author).

37. BONNIE MCCAY & CAROLYN CREED, *N. J. SEA GRANT PROGRAM, SOCIAL IMPACTS OF ITQs IN THE SEA CLAM FISHERIES* 23 (1993).

38. See generally JOHN RAWLS, *THEORY OF JUSTICE* (1971).

39. Jed Greer, *The Big Business Takeover of U.S. Fisheries: Privatizing the Oceans Through Individual Transferable Quotas*, GREENPEACE (Greenpeace, Washington D.C.), April 1995.

40. Greer states that, "[d]ifficulties with identifying corporate ownership are one reason why the claim that ITQs in the U.S. will be subject to provisions of federal anti-trust laws offers little consolation to those worried about the effects of quota concentration under an ITQ system." *Id.* at 11.

ITQ management by creating economic inefficiency; consolidation may also undermine conservation goals because a few large actors will, most likely, exercise undue control over the setting of the TAC and the design of fishery management tools in general.

It is my hypothesis that smaller participants have an increased chance of remaining in ITQ fisheries if they are able to use their quota as collateral.<sup>41</sup> Collateral will give small actors an economic tool with which to bargain, improve their vessels and gear, obtain loans to develop other economic options before exiting the fishery, or at least exit the fishery with money from the sale of a valuable asset. Conceivably, the advent of ITQ-based loans could allow small fishing outfits to form a syndicate to compete with larger fishing outfits. Acceptance of ITQs as collateral will not only help sustain small actors and communities that are economically dependent on the fishing industry, but such acceptance may also help prevent exclusion on the basis of financial resources.

Furthermore, with fisheries comprised of more diverse actors (i.e., small and large), the conservation goals of ITQs are more likely to succeed. If fisheries are reduced to only a few large actors, the possibility of collusion and undue control over the setting of the TAC is imminent. Because successful collusion requires the cooperation of each participating party, collusion is more difficult to maintain as the number of participants increases. Moreover, from the conspirator's perspective, each additional member in a conspiracy to collude is potentially a cheat or an informer. Retaining the presence of small actors in a market therefore provides a check on possible collusion by maintaining a more competitive environment and protecting the integrity of fishing management. Finally, ITQs as collateral may provide some form of economic development to fishery-dependent communities, thus making it easier for smaller actors to exit the fishery, because other employment options become available with economic development.

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41. Already, smaller fishermen are trying to compete with larger actors who have more capital and resources. Most smaller fishermen have "used up" whatever sources of collateral they may have—houses, vessels, etc., are already mortgaged or have collateral liens placed on them. If smaller actors, who receive quota allocations, could use this quota to obtain financing either to improve their business or to purchase more quota, this may give them a way to stay in the fishery.

## SECURED TRANSACTIONS AND U.C.C., ARTICLE 9

Before examining how ITQs have been used as collateral for secured transactions in the United States, an overview of the law governing secured transactions is needed to illustrate the particular risks lenders confront. A secured transaction is any transaction which involves collateral as security for payment or performance of an obligation.<sup>42</sup> In the absence of preemptive legislation, and subject to certain exclusions,<sup>43</sup> Uniform Commercial Code, Article 9 applies to "any transaction which is intended to create a security interest in personal property or fixtures."<sup>44</sup>

The Uniform Commercial Code is prepared jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws with the objective of providing an example for uniform commercial law throughout American jurisdictions.<sup>45</sup> States must enact laws adopting the U.C.C. and incorporate such laws into state-based commercial regulation. All fifty states plus the Virgin Islands and the District of Columbia have done so.

The aim of U.C.C. Article 9 is to provide a simple and uniform structure for secured transactions. The rules set forth in Article 9 are primarily concerned with the limits of the secured party's protection against purchasers from the debtor and creditors of the debtor, and with a secured party's protection against the debtor in case of default.

### *Scope*

Article 9 applies to all consensual transactions intended to create a security interest in personal property or fixtures, unless the transaction is excluded under section 9-104. A security interest attaches when it becomes enforceable against the debtor with respect to collateral. Once a security interest has attached and is perfected, the secured party has priority over all other subsequent and unsecured claims by third parties against the debtor.

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42. U.C.C. § 1-201 (1991).

43. See Appendix A.

44. U.C.C. § 9-201(1)(a-b) (1991).

45. *General Comment to U. C. C.*, 1 U.L.A. XVI (1988).

### *Collateral*

To create a security interest, some type of collateral must be provided by the debtor to the creditor. Article 9 defines five different types of collateral: goods, documents evidencing title, chattel paper, instruments, and general intangibles, which are basically things that do not fall into one of the above categories.<sup>46</sup> This categorization is important for purposes of perfection, but ITQs do not fall clearly into any one of the categories of collateral. Rather, ITQs are most similar to a license, giving the owner permission to catch fish, but not the right to any specific fish. Because ITQs resemble other property rights, such as copyrights and contract rights which are classified as general intangibles for purposes of collateral perfection, it is most reasonable for ITQs also to be classified as general intangibles. General intangibles are the most difficult class of collateral to perfect, precisely because they are intangible.<sup>47</sup> Unlike a title, goods, or other physical forms of property, banks cannot take physical possession of an ITQ if the borrower defaults. Even when banks can take effective control of ITQs by withholding the actual quota permits, the permits are of limited value to lenders because they cannot legally exercise the right to fish.

### *Perfection*

Perfection of a security interest by a secured party provides protection against third parties who may also have an interest in the collateral that is the subject of the security interest. Perfection is achieved in different ways depending on the type of collateral at issue. A security interest in goods, documents, or chattel paper subject to Article 9 can be perfected either by filing with the local or state agency or by the secured party taking possession of the collateral.<sup>48</sup> However, a security interest in general intangibles can only be perfected by filing because it is not possible to take possession in most cases. Because ITQs should be categorized as "general intangibles," a security interest involving ITQs should be perfected by filing.

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46. For further definition of the different types of collateral, see Appendix A.

47. See Appendix A.

48. U.C.C. §§ 9-302(1), 9-305 (1991).

### Exclusion

Article 9 does not apply to a “security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property.”<sup>49</sup> In addition, any statute or treaty of the United States that provides for national or international registration of, or certification of title to, property or that specifies a filing location other than that specified by Article 9 governs the perfection of a security interest in that property; in all other respects, however, the security interest is subject to Article 9.<sup>50</sup> In other words, transactions are excluded from Article 9 if preemptive federal or international law exists to govern such transactions.<sup>51</sup>

### Article 9 and ITQs

Although ITQs were created by federal legislation, there is currently no national registry governing their ownership or possible security interests, leaving Article 9 as the only option for establishing priority. In the few instances where financiers have accepted ITQs as collateral, they have filed their security inter-

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49. U.C.C. § 9-104(a) (1991). See Appendix A for other transactions exempt from Article 9 coverage.

50. U.C.C. §§ 9-302(3)(a), 9-302(4) (1991).

51. Secured transactions which fall under the following federal statutes are examples of exclusions under Article 9:

a. Vessel mortgages, 46 U.S.C.A. §§ 911-61 (West 1995), 46 C.F.R. § 67 (1995), in which mortgages on federally registered vessels must be recorded with the Coast Guard at the home port of the vessel. *In re Alberto*, 823 F.2d 712, (3d Cir. 1987);

b. Aircraft, Federal Aviation Act, 49 U.S.C.A. § 1401 (West 1995), 14 C.F.R. §§ 47, 49 (1995), in which all interests must be recorded with the FAA in Oklahoma City to obtain priority under state law. *Philco Aviation, Inc. v. Shecket*, 462 U.S. 406 (1983); *Aircraft Trading & Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227 (2d Cir. 1987), *cert. denied*, 484 U.S. 856; *Condren v. Aircraft Trading & Services, Inc.*, 484 U.S. 856 (1987);

c. Copyrights. A security interest in copyrights and related accounts may only be perfected through a recording of the security interest with United States Copyright Office. *In re Peregrine Entertainment Ltd.*, 116 B.R. 194 (Bankr. C.D. Cal.1990); *In re AEG Acquisition Corp.*, 127 B.R. 34 (Bankr. C.D. Ca. 1991); 37 C.F.R. § 201.4 (1995). The federal Copyright Act, 17 U.S.C.A. §§ 101 *et. seq.* (West 1995), provides for the recording in the Copyright Office of any “transfer” of copyright ownership, including the granting of a mortgage on a copyright.

ests under Article 9,<sup>52</sup> or chosen other methods to avoid the uncertainty which currently exists.<sup>53</sup>

In determining Article 9's application to secured transactions involving ITQs, it is important to examine the exception to Article 9 for security interests subject to federal statute. However, under the current state of the law it is unclear how a creditor can perfect an interest in a property right subject to federal statute in certain instances. The issue was inconclusively addressed in the *In re Peregrine Entertainment Ltd.*<sup>54</sup> decision dealing with the treatment of copyrights as security interests. The *Peregrine* exclusion simply reiterates the Supremacy Clause of the Constitution, i.e., to the extent that a federal statute supersedes a state statute, the federal statute will prevail.<sup>55</sup>

Because Article 9 is preempted by the Copyright Act, and is therefore inapplicable,<sup>56</sup> the court in *Peregrine* held that "recording in the [Copyright Office], rather than filing a financing statement . . . is the proper method for perfecting a security interest in a copyright."<sup>57</sup> However, the court in *Peregrine* did not indicate to what extent its broad preemption analysis should be applied to other federal filing schemes, causing broad disparities in judicial application of the *Peregrine* decision. Thus, under the current state of the law, it is unclear how a creditor can perfect an interest in a property right subject to federal statute in certain instances. The issue was inconclusively addressed in the the *In re Peregrine* decision, as this decision only dealt with the treatment of copyrights as security interests. For example, although it would seem that secured transactions involving patents and trademarks should be excluded from Article 9 coverage because ownership of trademark and patent rights may be registered with the United States Patent and Trademark Office pursuant to the

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52. Interviews with Lela Hart, Executive Vice President, Alaska Commercial Fishing and Agriculture Bank (June 1995) and Martin Richards, Director, State of Alaska, Department of Investments (June 1995). Note that in instances in which ITQs have been accepted as collateral, they are always part of a larger portfolio, and seem to be used only as an extra guarantee on the loan. See discussion in text below.

53. In the SCOQ fishery, the National Westminster Bank and Bank of New Jersey have fashioned agreements with fishers in which ITQs used as loan guarantee are actually transferred to the bank with the understanding that they will be transferred back to the borrower when the loan is repaid. See discussion in text below.

54. 116 B.R. 194 (Bankr. C.D. Cal. 1990).

55. *Id.*

56. *Id.*

57. *Id.* at 203.

Lanham Act,<sup>58</sup> it is not clear whether the Lanham Act also governs security interests in federally registered trademarks.<sup>59</sup> The court reasoned that: “[w]hile many of the characteristics of copyright supporting federal preemption of state law . . . are equally applicable to trademarks . . . [t]he Copyright Act provides expressly for the . . . pledge of the copyright as security or collateral for a debt [while the Lanham Act does not].”<sup>60</sup>

Given the uncertain application of the *Peregrine* decision to other property rights governed by federal schemes, and the similarity of ITQs to such federally created property rights, banks are unsure whether a levy—or collection upon default—based on an Article 9 perfection will be recognized by the courts.<sup>61</sup> In instances of uncertainty, The Practising Law Institute recommends that a secured party both register the transaction with the designated federal agency and comply with Article 9 to ensure perfection.<sup>62</sup> With other security interests, banks have been able to do just that—ensure perfection by meeting both requirements, but dual perfection with ITQs is not currently possible because there is no national registry for recording interests in ITQs.

#### THE THREE ITQ SYSTEMS IN THE UNITED STATES

An examination of the three U.S. fisheries with ITQ management schemes illustrates the extent to which ITQs are accepted as collateral for loans. The individual characteristics of each fishery may either exacerbate or alleviate this problem. A brief examination of each fishery will help to illustrate the factors, aside from the main structure of the ITQ system, which also affect the use of ITQs as collateral. Examination of each fishery will also

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58. 15 U.S.C.A. §§ 1051-1127 (West 1995).

59. See *Inc. v. 1200 Valencia, Inc. (In re 199Z)*, 137 B.R. 778 (Bankr. C.D. Cal. 1992) (distinguishing the case from *Peregrine* and holding that the grant of a security interest in a trademark is not the equivalent of an assignment of the trademark and that the trademark constituted a general intangible requiring the application of U.C.C. Article 9). Other examples of ambiguity regarding the application of Article 9 include the Patent Act, 35 U.S.C.A. § 101 *et seq.* (West 1995), the Plant Variety Protection Act, 7 U.S.C.A. §§ 2321-2583 (West 1995), the Perishable Agricultural Commodities Act, 7 U.S.C.A. §§ 499a-499s (West 1995), and the Packers and Stockyards Act, 7 U.S.C.A. §§ 181-229 (West 1995).

60. *In re 199Z, Inc.*, 137 B.R. at 781.

61. This information is derived mostly from interviews.

62. David A. Rosinus, *Perfection of Security Interests Under Article 9 of the Uniform Commercial Code*, in *INTRODUCTION TO SECURED TRANSACTIONS AND LETTERS OF CREDIT: U.C.C. ARTICLES 9 AND 5* (PLI Commercial Law & Practice Course Handbook Series No. A4-4431, 1993).



demonstrate that ITQs have been treated differently by banks in each of these three fisheries, as banks have either declined to consider ITQs as a basis for credit, or have developed means to address the Article 9 perfection problem.

In each of the three fisheries ITQs have a dual characteristic, and represent dual interests for the possessor. The percentage allocation (the actual quota — ITQ), which does not expire, represents a long-term interest. The percentage allocation is evidenced by an allocation certificate or permit, which is issued at the time of initial allocation and is transferable. The yearly quota, represented differently in each fishery (coupons, cage tags, poundage certificates, poundage credit card), is a short-term interest which expires at the end of each fishing season. In each fishery, this short-term interest cannot be used by anyone other than a qualified fisher, while the possession and transfer rules of the long-term interest differ in each fishery. This variation will be described below and may help to explain the differing actions of lenders in each fishery.

### *The Wreckfish Fishery*

The Wreckfish fishery, which is part of the Snapper-Grouper fishery of the South Atlantic, currently has only eleven participating vessels.<sup>63</sup> This fishery is relatively new, as wreckfish were “discovered” only a few years ago off the Southern-Atlantic coast. Fishers of wreckfish became interested in implementing an ITQ management system to protect their new “discovery” from the overfishing that has plagued many other open-access and limited-access fisheries.<sup>64</sup>

To be eligible for initial quota allocation, fishers were required to document wreckfish landings in aggregate of 5000 pounds between January 1, 1989 and September 24, 1990.<sup>65</sup> Two distinct methods were employed in combination to allocate fishing quotas. One-half of the allowable catch was allocated based upon

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63. SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL, AMENDMENT 5 (WRECKFISH), REGULATORY IMPACT REVIEW, INITIAL REGULATORY FLEXIBILITY DETERMINATION AND ENVIRONMENTAL ASSESSMENT FOR THE FISHERY MANAGEMENT PLAN FOR THE SNAPPER-GROUPER FISHERY OF THE SOUTH ATLANTIC REGION (1991).

64. Note that while wreckfish fishers may well have been interested in protecting the fish stock, they were likely also motivated by immediate economic self-interest because they received exclusive rights to the new fishery.

65. SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL, *supra* note 63.

the participants' catch history,<sup>66</sup> and the other half of the allowable catch was divided equally among eligible participants.<sup>67</sup>

Once individual allocation was determined by the Director of the Regional Fishery Management Council, applicants were notified in writing of their percentage share, and ITQs were issued to the shareholders in the form of coupons to evidence their percentage share of TAC.<sup>68</sup> These coupons are reissued to wreckfish shareholders at the beginning of each fishing year once the TAC for that year has been established.<sup>69</sup> ITQ coupons are issued in various denominations representing eviscerated weight, the total of which equals a shareholder's ITQ—or percentage share.<sup>70</sup> Any fishing vessel in possession of wreckfish must carry ITQs on board.<sup>71</sup>

A transfer of a percentage share (ITQ) to any U.S. citizen is permissible, and requires the filing of a form with the Regional Director of the local fishery management council. The Regional Director then confirms the transfer in writing.<sup>72</sup> While the transfer of a shareholder's percentage of the TAC completely transfers the right to that percentage (potentially in perpetuity) the transfer of an ITQ coupon is a transfer of some denomination (measured in eviscerated weight) for the current season. Because C.F.R. regulations permit only eligible fishers to possess ITQ coupons,<sup>73</sup> the coupons may only be transferred from one wreckfish shareholder to another. Coupon transfers are achieved by completing the sale endorsement on the coupon.<sup>74</sup>

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66. In using catch history to allocate quota shares, allocation was based upon the percentage of total wreckfish catch between January 1, 1987 and August 8, 1990.

67. SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL, *supra* note 63.

68. Each coupon is coded to indicate the initial recipient. Additionally, there are two parts to each wreckfish coupon. The "Fisherman" part of each coupon must be signed and submitted to the Regional Director, along with a daily log book required for each fishing trip. 50 C.F.R. § 646.10 (c)(5) (1995). The "Fish House" part of each coupon must be given to the dealer to whom the wreckfish are transferred, and the dealer must then submit this half of the coupon to the Regional Director. 50 C.F.R. § 646.10 (c)(6-7) (1995).

69. 50 C.F.R. § 646.10(c) (1995).

70. *Id.* To clarify, ITQ refers to the entire percentage share, while the ITQ coupons simply represent the translation of that percentage share into a specific amount of fish for a given year.

71. 50 C.F.R. § 646.10(c)(4) (1995).

72. 50 C.F.R. § 646.10(a)(2) (1995).

73. There is a distinct difference between holding percentage shares versus coupons. In order to possess coupons, a person must already be a shareholder in the system. Coupons cannot be transferred to a U.S. citizen who is not already a shareholder in the Wreckfish fishery.

74. 50 C.F.R. § 646.10(c)(3) (1995).

Financial institutions do not seem to be accepting wreckfish ITQs as collateral. There are at least two possible explanations for this. First, financial institutions cannot accept ITQ coupons as collateral because coupons may only be possessed by eligible shareholders. If a borrower defaulted on a loan secured by an ITQ coupon as collateral, the lender would not be able to possess the coupons in order to liquidate them. The coupons, however, are of short term value, while the percentage allocation, which anyone may possess, is a long term asset.

Lenders might be willing to forego the loss of coupon value, if they could easily perfect their long-term interest in the percentage allocation. But with no document of title to take possession of, no actual transfer of percentage share to the lender, and no certainty about how a court would rule on the issue, ensuring perfection is not an easy task. Furthermore, because the wreckfish fishery consists of small participants, the small size of loans requested may not be worth the risk to the lender. It is also possible that lenders are concerned the fisheries will collapse and that the quota shares will not be worth anything.

Another explanation for the unavailability of lending on ITQs in the wreckfish fishery is that the "culture" of the fishery is not conducive to lending. The Wreckfish fishery is not a corporate fishery; it is made up of small individual, fishers. Even in the absence of ITQs, banks and financial institutions do not make loans to fishers. More often, fish houses (recipients of wreckfish) and fishers have fostered mutual loan-business agreements. While there is little information available on the cooperative business practices of fish houses and wreckfish shareholders, it is likely that any lending using the ITQs as "collateral"<sup>75</sup> has been through these agreements (formal and informal) rather than through financial institutions.

### *Atlantic Surf Clam and Ocean Quahog Fishery*

The Surf Clam and Ocean Quahog (SCOQ) Fishery was the first U.S. fishery to adopt ITQ management system.<sup>76</sup> The quota was initially divided only among vessel owners who reported landings of surf clams or ocean quahogs between January 1, 1979

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75. This "collateral" is obviously not legal collateral due to the difficulties with perfection discussed, but it is some sort of loan guarantee.

76. MID-ATLANTIC FISHERY MANAGEMENT COUNCIL, AMENDMENT 8 TO THE FISHERY MANAGEMENT PLAN FOR THE ATLANTIC SURF CLAM AND OCEAN QUAHOG FISHERY (1990). See also 55 Fed. Reg. 24184 (1990).

and December 31, 1988.<sup>77</sup> Once individual allocation (ITQ) was determined, the Regional Director issued final allocation permits, which specified the total number of bushels a vessel owner was entitled to harvest based on the allocation percentage.<sup>78</sup> Furthermore, "the Regional Director shall issue annual allocation permits . . . to the registered holders of allocation . . . . The annual allocation permit shall specify the allocation percentage and allocation of surf clam and/or ocean quahogs in bushels, by species, which the allocation holder is authorized to harvest."<sup>79</sup>

Once the annual bushel allocation amount is established, a corresponding number of cage tags must be issued to the fisher.<sup>80</sup> Before offloading,<sup>81</sup> all cages that contain surf clams or ocean quahogs must be tagged with these cage tags, which are then collected by the Regional Director.<sup>82</sup>

All or part of a fisher's allocation percentage may be transferred to any person eligible to own a documented vessel under 46 U.C.C. 12102(a).<sup>83</sup> An owner of an allocation percentage who wishes to transfer his ownership must submit an application for approval to the Regional Director, who then issues a new annual allocation permit to the new owner, making the transfer effective.<sup>84</sup> Cage tags have been similarly transferred subject to the conditions discussed below.<sup>85</sup>

While financial institutions have not been willing to accept ITQs as collateral under Article 9, they have been able to circumvent the problem of uncertain perfection. Described as "the standard in ITQ financing"<sup>86</sup>, lenders have fashioned a sort of trust instrument for ITQs. In exchange for financing, an ITQ owner will transfer ownership of his quota to the lender with the understanding that the asset will be maintained (i.e., the lender

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77. 50 C.F.R. § 652.20 (a) (1995). Initial allocation was calculated based on a formula which considered historical performance and vessel size. See 50 C.F.R. § 652.20(b) (1995). Allocation represents a percentage of TAC. The regulations specify that TAC must remain within the range of 1,850,000 - 3,400,000 bushels for surf clams and 4,000,000 - 6,000,000 for ocean quahogs.

78. 50 C.F.R. § 652.20(e) (1995).

79. 50 C.F.R. § 652.20(a)(1) (1995).

80. 50 C.F.R. § 652.20 (1995).

81. The transfer of clams or quahogs from vessel to processor.

82. 50 C.F.R. § 652.12 (1995).

83. 50 C.F.R. § 652.20(f) (1995).

84. *Id.*

85. *Id.*

86. Interview with Ed Catell, Esq. of Clark, Ladner, Fortenbaugh, & Young in Cherry Hill, N.J. (June 29, 1995).

will continue to fulfill all requirements of ITQ ownership).<sup>87</sup> Cage tags are issued to the lender who then turns them over to the fisher for use. As the loan is repaid, the percentage allocation is proportionately transferred back to the original owner.

These agreements allow lenders to avoid the problem of uncertain perfection. If a borrower defaults, there is no need for the bank to foreclose and risk an adverse judgment; it can simply sell its quota to cover the loan. However, this solution may not be available to fishers under other ITQ management regimes.<sup>88</sup>

In 1992, a total of 54 relatively large firms held SCOQ ITQs.<sup>89</sup> It is likely banks are more willing to negotiate with the large participants of the SCOQ fishery than they would be with smaller participants seeking smaller loans.<sup>90</sup> Additionally, the mechanism which allows banks to take ownership of ITQs in the SCOQ Fishery may not be available under other ITQ systems. For example, under ITQ management in the Alaska Halibut and Sablefish fishery, only vessel owners, IFQ crew members, or those who leased vessels in certain years are eligible to own quota.<sup>91</sup>

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87. Currently about 9% of SCOQ quota is owned by National Westminster Bank and 3% by the Bank of New Jersey (National Marine Fisheries Service, list of registered owners of SCOQ quota). This means that these financial institutions collectively own a relatively large share of total quota since the average percentage allocation held by any one owner is less than 2%. For further discussion of the possible concerns regarding banks' possession of ITQs, see Greer, *supra* note 39.

88. See North Pacific Halibut and Sablefish discussion *infra* pp. 305-10 regarding restrictions on the sale and ownership of quota.

89. Since the implementation of ITQ management, the SCOQ fishery, which was already a large firm fishery, has become more concentrated with large corporate actors. See McCay & Creed, *supra* note 37, at 23. This study by sociologists provides an in depth analysis of the SCOQ fishery under ITQ management, finding that ITQ management did indeed reduce the size of the fishery and that this was achieved by the consolidation of larger firms and the departure of smaller fishermen from the fishery. "The large firms took quick advantage of Amendment 8 by consolidating their fishing operations on fewer boats. The very small firms with only one boat, did not have that option. Some of the small firms also found themselves with less ITQ than they had been catching before Amendment 8. They are the majority of those who sold out after Amendment 8. Nonetheless . . . [i]t is a mistake to assume that small operations are either marginal or inefficient . . ." *Id.*

90. Large firms are often more stable than smaller ones. They usually seek larger loans, translating into potentially larger profits for financial institutions. Furthermore, large firms usually have various types of collateral to offer, while smaller firms are more limited.

91. 50 C.F.R. § 676.20(a)(1) (1995).

*North Pacific Halibut and Sablefish Fishery*

The IFQ<sup>92</sup> program was approved by the Secretary of Commerce in November 1993, and the National Marine Fisheries Service began issuing Quota Share ("QS"—percentage allocation) a year later.<sup>93</sup> With 6,600 fishermen receiving QS, the Halibut and Sablefish Fishery is much larger than either of the other U.S. fisheries with ITQ management schemes.

Similar to the other IFQ management fisheries, QS is evidenced by a permit and is based on an applicant's historical catch.<sup>94</sup>

There are several types of permits based on QS<sup>95</sup> IFQ regulatory area,<sup>96</sup> vessel category,<sup>97</sup> and block status.<sup>98</sup> Only United States' citizens (or corporations) who are either vessel owners, IFQ crew members, or had leased vessels from 1988-1990 qualify for IFQ ownership.

IFQs are permits which display the number of pounds a QS holder is allowed to catch within a given year and within a given area.<sup>99</sup> Fishermen must carry these permits on their vessels at all times when IFQ fish are landed.<sup>100</sup> A QS holder is also issued an IFQ card which authorizes the individual to land halibut or sable-

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92. IFQs, or Individual Fishing Quotas, are the equivalent of ITQs for the Alaska Halibut and Sablefish fishery.

93. ALASKA REGION, NATIONAL MARINE FISHERIES SERVICE, THE IFQ PROGRAM UNDERWAY (1995).

94. 50 C.F.R. § 676.20 (1995). The initial allocation of IFQs was based on an applicant's highest total legal landings of fish in each IFQ area for any five years out of the total period considered (1984-1990 for halibut/1985-1990 for sablefish).

95. For each IFQ species and regulatory area there is a Quota Share Pool (QSP) which represents the total of all QS issued for that area. In other words, QSP is the Total Allowable Catch (TAC) for a specific area.

96. QS share is allocated based on geographic areas in order to ensure an even distribution of catch.

97. Each qualified person's QS is assigned to a vessel category based on the length of the vessel, and the vessel's ability to simply catch (catcher vessel) or actually process (freezer vessel) fish.

98. 50 C.F.R. § 676.20 (1995). QS permits are issued as blocked or unblocked. If the QS issued represents the equivalent of less than 20,000 pounds of IFQ it is blocked, meaning that it cannot be combined or divided; any allocation equivalent to greater than 20,000 pounds is unblocked. Unblocked QS can be divided into smaller amounts, or combined with newly purchased QS. The purpose of blocked and unblocked status is "to ensure that relatively small blocks of QS will always be available, and cannot ultimately be controlled by large corporations or a few individuals. Combined with the assignment of vessel categories, the block amendment is designed to keep the character of the fishing fleet much as it now" ALASKA REGION, *supra* note 93.

99. 50 C.F.R. § 676.20 (1995).

100. *Id.*

fish. Similar in appearance to an ATM card, this card represents the total number of pounds that an IFQ holder may catch for the year. Each time fish are brought in, an official from NMFS will debit the card by the amount (in pounds) that the individual has landed. This card is issued annually, and the card itself is not transferable.<sup>101</sup>

QS and IFQ permits, however, may be transferred.<sup>102</sup> Therefore, the card can only be used by the original permit holder, unless permit ownership is transferred. Transfer is achieved through submission of a Transfer Eligibility Certificate (TEC) to the NMFS (Restricted Access Management Division — Alaska Region) and subsequent approval by the Regional Director.<sup>103</sup> Additionally, QS and IFQs are only transferable within a given regulatory area and vessel category. This restriction is meant to maintain the Quota Share Pool<sup>104</sup> for that area so that catch limits are geographically specific. The quotas, therefore, achieve conservation goals for specific fish species located in specific areas. As stated above, a transferee (of either QS or IFQ) must be a United States citizen, and have received QS initially and/or qualify as an IFQ crew member.<sup>105</sup> However, NMFS may approve some transfers of QS by operation of law or security agreement that result in QS being issued to persons who are not eligible to fish the IFQ.<sup>106</sup>

The Regional Director must be notified of any transfer of QS or IFQ by inheritance, court order, security agreement, or other operation of law. Any person that receives QS in this manner may not use the IFQ resulting from it to harvest . . . without first obtaining the approval of the Regional Director . . . . Any person that receives QS in this manner may apply to transfer QS to an eligible applicant subject to the transfer restrictions and procedures described . . . .<sup>107</sup>

With the exception of two Alaska state institutions—the State of Alaska, Department of Investments and the Alaska Commercial Fishing and Agriculture Bank, a state-chartered cooperative bank—QS/IFQs are not currently accepted as collateral. Interviews with lenders in Alaska reveal that concern about perfec-

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101. ALASKA REGION, *supra* note 93.

102. C.F.R. § 676.21 (1995).

103. *Id.*

104. *See supra* note 88.

105. 50 C.F.R. § 676.21 (1995).

106. *Id.*

107. 50 C.F.R. § 676.21(c) (1995).

tion under Article 9 is the main barrier to the acceptance of QS/IFQs as collateral.<sup>108</sup>

Despite others' hesitancy to lend, the Department of Investments and the Commercial Fishing and Agriculture Bank (CFAB) have used Article 9, on a limited basis, to protect their interests. However, officials from these institutions also express concern over the certainty of such perfection; when questioned on what they will do with QS/IFQs collateral in the event of default, they are unsure.<sup>109</sup> When QS/IFQs have been accepted as collateral, they are part of a larger "basket" of collateral. Lenders take QS/IFQs as an extra assurance for repayment of the loan, and plan to foreclose and liquidate other parts of the "basket" first in the hopes that these will sufficiently cover the loan. Possibly because these are state-based institutions and exist in large part for the purpose of making such loans they have been more willing to accept the risk of uncertain perfection.

One unique feature of the Halibut and Sablefish IFQ system is the restriction placed on aggregation of quota, both in terms of blocked IFQs and established Quota Share Pools for each area. This feature may be another reason why banks are hesitant to accept QS/IFQs as collateral. In the event of default, a lender's only option is to liquidate her collateral asset (i.e., sell her QS/IFQs). Restrictions on transferability—the fact that QS/IFQs can only be transferred within the same regulatory area and vessel category<sup>110</sup>—may limit the number of potential buyers. If a lender believes the liquidation of an asset will be difficult, she may discount the value of the collateral or simply be unwilling to accept such an asset as collateral.<sup>111</sup>

A second unique feature of the IFQ program is the Community Development Quota (CDQ) program, which was implemented in 1992.<sup>112</sup> The program is structured to reserve a certain

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108. The National Bank of Alaska (NBA) and Key Bank are the two largest private financial institutions in the State. Interviews with Greg Deal, Loan Officer, NBA, Petersburg (June 8, 1995); David Swalling, Loan Director, NBA, Anchorage (June, July, August 1995); Brian Nerland, Manager, Key Bank, Anchorage (June 8, 1995); and Dan Mogck, Loan Officer, Key Bank, Anchorage (June 27, 1995), were helpful in elucidating the concerns of lenders interested in IFQs.

109. Interviews with Lela Hart, Executive Vice President, CFAB (June 1995), and Martin Richards, Director, State of Alaska, Department of Investments (June 1995).

110. 50 C.F.R. § 676.21 (1995).

111. The author is not recommending that such restrictions be removed. These restrictions serve a distinct conservation purpose as well as attempting to protect the "culture" of the fishery and its smaller participants.

112. 50 C.F.R. § 676 (1995).



percentage of TAC for purposes of economic development in Alaskan Native Communities.<sup>113</sup> The stated goal of the CDQ program is to bring Natives into the industry as major participants.<sup>114</sup>

In contrast to their traditional subsistence and small boat commercial fisheries, western Alaska residents will now have opportunities to work on factory trawlers . . . in shoreside processing plants, and in related seafood industry operations. With CDQs, Bering Sea coastal communities are partners with established corporations in industrial-scale seafood production. . . .<sup>115</sup>

Currently, six CDQ groups comprising 56 communities in Western Alaska have received quota allocation.<sup>116</sup> These groups hold an aggregate of 7.5% of annual quota share.<sup>117</sup> To receive allocation, all applicants must develop detailed business plans and programs for developing self-sustaining and independent fisheries. The content of these plans emphasizes the apparent necessity for available financing for the survival and growth of smaller actors in the fishing industry. All six groups which received CDQs have stated that financing and access to lending is imperative to participation in the industry.<sup>118</sup> Furthermore, one of the goals of the CDQ program is to afford western Alaska Natives a "fair and reasonable opportunity to participate in the . . . fisheries which have been closed to them because of the high capital investments involved."<sup>119</sup>

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113. The community must be certified under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601.

114. *BERING SEA FISHERMEN'S ASSOCIATION, THE CDQ PROGRAM: NEW ECONOMIC POTENTIAL FOR WESTERN ALASKA* (1993).

115. *Id.* at 1.

116. To be eligible for CDQs, Native communities must be in partnership with corporate actors and must establish separate community development organizations specifically for the purpose of designing or implementing community fisheries development plans. 50 C.F.R. § 676.24 (1995) and *BERING SEA FISHERMEN'S ASSOCIATION, supra* note 114.

117. *STATE OF ALASKA, ECONOMIC IMPACTS OF THE POLLACK COMMUNITY DEVELOPMENT QUOTA PROGRAM 1* (Revised Draft Report) (1995).

118. *See BERING SEA FISHERMEN'S ASSOCIATION, supra* note 106, and *STATE OF ALASKA, supra* note 117, in which CDQ group plans are outlined. Some excerpts from these plans follow: ". . . [to] make funds available for the purchase of fishing vessels, Individual Fishing Quotas, and other opportunities." (Aleutian Pribilof Island Community Development Association); ". . . to provide matching funds for infrastructure construction, and financing for the acquisition of Individual Fishing Quotas." (Bristol Bay Economic Development Corporation); ". . . [to] establish a boat loan program for the purchase and construction of vessels." (Central Bering Sea Fishermen's Association).

119. *BERING SEA FISHERMEN'S ASSOCIATION, supra* note 114, at 3.

While the CDQ program is relatively new and data is limited, initial statistics indicate that the program is having some success. Prior to implementation of the CDQ program, unemployment was as high as 31%, the majority of jobs were with federal, state, and local governments, and virtually none of the value of the fishery was captured by Native Alaskans.<sup>120</sup> In the first two years of the program local jobs have doubled with 57% of all non-government related jobs being associated with the CDQ program.<sup>121</sup> Furthermore, CDQ wages and benefits represent a 2.4% increase in regional income.<sup>122</sup> The CDQ program has successfully integrated a large number of Native Alaskans into the local economy, demonstrating the importance of financing to market participation and related employment.

While a stated goal of the CDQ program is eventual self-sufficiency of Native communities, the reality of reaching this goal is questionable given the current means, i.e., that Native groups must be in partnership with (and therefore dependent upon) corporate entities to be eligible for quota allocation. Furthermore, "[i]t is not uncommon for western Alaskans to value subsistence harvest participation as a priority over wage labor."<sup>123</sup> More importantly, one study notes that: "Although the necessity for conservation is widely recognized; and despite increased commitments to cooperatively manage fisheries; the respective obligations of national fishing fleets, domestic industries, and the Native tribes is likely to continue to spark disputes" and cautions that "[n]ational and international regulations may not fully contemplate the impact of conservation measures upon tribal fishing, and may fail to make distinctions between tribal and non-tribal fishing. When this important distinction is not made, tribal treaty obligations may be overlooked, and . . . may frustrate Indian treaty fishing rights."<sup>124</sup>

While there are important cultural and legal issues unique to Native Alaskans and the implementation of the CDQ program, parallels can be made between these communities and small fisher communities for purposes of this analysis. Small fishers have a similar necessity for financing, and seem to face similar

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120. STATE OF ALASKA, *supra* note 117, at 1.

121. *Id.*

122. *Id.*

123. *Id.* at 6.

124. CRAIG SINCLAIR KEYS, NEW THREATS TO TRIBAL SUBSISTENCE ECONOMIES (Working Paper, 1995).

difficulties in terms of access to finance and lending. Furthermore, small fishing communities, while not nearly as impoverished as Native communities, also are usually quite poor and are dependent upon the fishing industry for their survival. If QS/IFQs were used as collateral, small participants might gain additional access to the fisheries. QS/IFQ collateral might also provide economic development benefits, thus providing small fishers who do exit the industry other employment opportunities in their communities.

#### THE NEED FOR A FEDERAL REGISTRY FOR ITQs

Recognizing that Congress has promulgated complex regulations tailored to govern transactions in a number of specialized industries, Article 9 expressly excludes from its coverage security interests subject to federal statutes, "to the extent that" the federal statute governs the rights of the parties involved in the transaction and of third parties.<sup>125</sup> While several types of transactions, those with regard to vessel mortgages, aircraft, and copyrights, are decidedly excluded from Article 9, recall that the law is unclear regarding the application of Article 9 to other transactions—those whose subject matter is patents or trademarks, for example.

With secured transactions involving patents and trademarks it is possible for lenders to perfect their interests both locally and nationally in order to ensure priority; this option is not available to those who might lend on ITQs because there is currently no national system for recording interests in ITQs.

In addition to the issues discussed above and the unique characteristics of each ITQ management scheme, the state-based nature of Article 9 poses special problems for financial institutions considering lending on ITQs. Recall that the Uniform Commercial Code must be enacted by the states to be enforced. While the law governing mobile collateral has evolved<sup>126</sup>, lenders are unclear about where ITQs are actually "located", and therefore where they should perfect their interests.<sup>127</sup> An interview with a

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125. U.C.C. § 9-104 (1991).

126. See Appendix A.

127. The provisions for mobile collateral and mobile debtors within Article 9 (see Appendix A) address general intangibles consisting of equipment or inventory leased or held for lease (e.g., rolling stock, shipping containers, and commercial machinery), U.C.C. §§ 9-103(3)(a), 9-103(4) (1991); ITQs do not fall under either of these categories.

New Jersey lawyer familiar with the SCOQ fishery<sup>128</sup> reveals that there are several unanswered questions with regard to the location of ITQs: Are ITQs located at the regional fishery management council office where they are initially allocated and where transfers are approved? Are they located where the permit or certificate of percentage allocation is held? Are they located on vessels, where the actual individual quota (in the form of cage tags or poundage credit cards) is used? It should be noted that difficulty in perfection of mobile collateral is not a problem unique to ITQs.<sup>129</sup> However, this problem, coupled with the uncertainty of how courts will deal with a U.C.C.-perfected security interest in ITQs, may translate into an unwillingness by lenders to loan on ITQs.

Because of the multi-state characteristic of the fisheries, and some uncertainty about where ITQs are "located" and therefore where to perfect, it is conceivable that security interests could be placed on ITQs in various states with no easy way for a lender to determine this. With no easy way to determine whether earlier perfected security interests in the same collateral exist, a financial institution cannot be sure that it has established priority over other third parties, and thus may be unwilling to forward the loan.

In testimony submitted before the Subcommittee on Fisheries Management, Mr. David Wallace stated that "Since [Surf Clam and Ocean Quahog ITQs are] not a property right, financial institutions cannot *by law*, place a lien on the allocation."<sup>130</sup> (emphasis added) In fact, as discussed, some banks have accepted ITQs as collateral under Article 9.<sup>131</sup> Therefore, it is not that banks are unable to accept ITQs as collateral, rather because of the inability to secure liens, banks may be unwilling to take the risk.

All persons<sup>132</sup> interviewed for this article—both those who were familiar with lending in the commercial fishing market and

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128. Ed Catell, Esq., *supra* note 86.

129. *Id.*

130. *Transferable Quotas under the Magnuson Act: Hearing Before the Subcommittee on Fisheries Management of the Committee on Merchant Marine and Fisheries*, 103rd Cong., 1st Sess. (1994) (statement of David Wallace, Jr., Surf Clam Ocean Quahog Ad Hoc Committee).

131. Alaska Commercial Fishing and Agriculture Bank and the State of Alaska, Department of Investments.

132. Lenders, legal experts, quota share holders, and others familiar with the ITQ system.

those who were familiar with lending in other markets—expressed the importance of a central registry system as a prerequisite for secure lending on ITQs.

At the time of this writing there were two bills pending in Congress to reauthorize and amend the Magnuson Fishery Conservation and Management Act, the federal law that governs U.S. fisheries management. These bills propose the establishment of a national lien registry system for ITQs.<sup>133</sup> The Senate bill, the “Sustainable Fisheries Act”, proposes the establishment of mandatory guidelines for ITQ systems:

The guidelines shall ensure that any individual transferable quota system . . . establishes a national lien registry system for the identification, perfection, determination of lien priorities, and nonjudicial foreclosure of encumbrances or individual transferable quotas.<sup>134</sup>

In comparison, the House bill, the “Fishery Conservation and Management Amendments of 1995,” states that:

[T]he Secretary shall issue regulations which establish requirements for establishing an individual quota system. . . . The regulations shall . . . establish a central lien registry system for the identification, perfection, and determination of lien priorities, and nonjudicial foreclosure of encumbrances, on individual quotas.<sup>135</sup>

While the wording for the proposed lien registry is practically the same for both bills, there are significant differences in other portions of the bills. For example, the House bill includes provisions for reauthorization of any ITQ management scheme every seven years.<sup>136</sup>

The House bill also contemplates eliminating the transferability of ITQs, making them simply Individual Quotas renewable every seven years. Eliminating the transferability could have adverse effects on conservation. Because fishers will still have a vested future interest in the fish stock, they will have an incentive to fish responsibly despite the fact that their vessels have fishing

133. H.R. 39, 104th Cong. 1st Sess. (1995) and S. 39, 104th Cong. 1st Sess. (1995).

134. S. 39.

135. H.R. 39. Since the writing of this article, H.R. has been approved by the House with the inclusion of national lien registry provisions — The Senate has not yet acted on this bill.

136. H.R. 39. Although there is strong support among industry participants and lenders alike for a national lien registry, there is some opposition to this sunset provision. Quota holders feel that a reauthorization clause will diminish confidence in the longevity of the system. However, Steve Schwartz, Esq., from FannieMae, on June 2, 1995, stated that periodic reauthorization may actually make the system more stable and attractive to lenders.

capacity in excess of their quota shares. However, elimination of transferability minimizes the ability of fishers to exit the industry and thereby reduce the number of active vessels in the fishing fleet. Without transferability, fishers wishing to exit the industry cannot sell their ITQs, and therefore may not have the capital to enter into a new line of business.

Lawmakers should be cognizant of the fact that several factors contribute to the calculation of risk for a piece of collateral. The establishment of a central lien registry provides increased security in perfection and therefore decreased risk in lending; but if other aspects of the proposed bills lead to an increased perception of risk, the gains from a central registry may be undercut.

It is not the purpose of this article to advocate or oppose these other provisions. It is important, however, to acknowledge that any provision altering the current ITQ system will affect lenders' perceptions of risk, and therefore the use of ITQs as collateral. The more stable the asset—ITQs—appears, the more attractive it will be to lenders, and the more it will benefit conservation and economic development efforts. Given this point, it must once again be emphasized that the ability of a national registry to create certainty in the perfection of secured transactions involving ITQs depends upon the clarity of writing (i.e., how clear it is that national recording is the only valid method of perfection) and upon judicial interpretation of the legislation if challenged.

#### WHAT WOULD A NATIONAL REGISTRY LOOK LIKE?

For purposes of secured transactions involving ITQs, a federal lien registry must clearly define the steps lenders are required to take to perfect their interest in ITQs as collateral. It must be clear that the federal lien registry would take the place of perfection under Article 9, and that Article 9 would no longer apply to secured transactions involving ITQs.

It is helpful to examine some other national registry systems to determine what is best for an ITQ registry. Secured transactions involving copyrights, aircraft, and vessels provide useful examples because they are explicitly excluded from Article 9.<sup>137</sup>

#### *Copyrights*

A copyright is an exclusive legal right to reproduce, publish, and sell a creative work. In order to perfect a security interest in

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137. *Supra* note 51.

a copyright, the security interest must be recorded with the U.S. Copyright Office. The copyright registry system is administered under a federally funded entity, with a national scope. While the Copyright Office is the only place where a security interest in copyrights can be perfected, recording with the U.S. Copyright Office is not required for purposes of ownership, lease, or transfer of title.<sup>138</sup> Furthermore, while adequate notice is the only condition for legal standing,<sup>139</sup> registration and recordation of a copyright are prerequisites for bringing an infringement suit.<sup>140</sup> The U.S. Copyright Office reflects the basic essentials needed in a national fishing registry: the U.S. Copyright Office is government-financed, has a jurisdiction encompassing U.S. territories, and centralizes perfection of such security interests.

### *Aircraft*

With certain exceptions (mainly military), a person may own and operate a U.S. aircraft only when it has been registered with the Federal Aviation Administration (F.A.A.).<sup>141</sup> Furthermore, the F.A.A., through authorization from the Federal Aviation Act has established a recording system for: 1) all conveyances affecting an interest in civil U.S. aircraft; 2) all leases and instruments executed for security purposes; and 3) all releases, cancellations, discharges, and satisfactions related to a conveyance, lease, or instrument recorded under (1) and (2) above.<sup>142</sup>

Unlike copyrights, which are required to be federally recorded for purposes of secured transactions, but not for purposes of ownership or transfer of ownership, all transactions concerning aircraft must be federally recorded.<sup>143</sup>

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138. 17 U.S.C.A. §§ 201, 204 (West 1995).

139. 17 U.S.C.A. §§ 401-407 (West 1995).

140. 17 U.S.C.A. §§ 205, 411-12 (West 1995). Personal communication with Curtis Smith, Public Information Specialist, U.S. Copyright Office, June 20, 1995, also verifies this point. Registration pertains to the declaration of original ownership; recordation pertains to transfers of ownership and other documents pertaining to the copyright.

141. Federal Aviation Act, 49 U.S.C.A. § 21 (West 1995).

142. 49 U.S.C.A. § 1403 (West Supp. 1976).

143. See also 49 U.S.C.A. § 1403 (West Supp. 1976). "The Secretary of Transportation "shall establish and maintain a system for the recording of . . . any conveyance which affects title to, or any interest in any civil aircraft of the United States," and "any lease . . . or other instrument executed for security purposes." Furthermore, no conveyance or other instrument such as a secured transaction "shall be valid . . . until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation."

Note that despite the clarity of language regarding the validity of conveyances,<sup>144</sup> courts are split over whether the F.A.A. or Article 9 governs perfection of security interests in leases of aircraft.<sup>145</sup> This difference in court interpretation, even with clear statutory provision, illustrates the necessity of explicitly stating that perfection of security interests in ITQs is *only* valid if federally recorded, and that Article 9 no longer applies to such secured transactions.

### *Vessels*

Perfection of a security interest in United States vessels is governed by 46 U.S.C.A. sections 911-984:

[N]o sale, conveyance, or mortgage which . . . includes a vessel of the United States . . . shall be valid . . . until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port . . . of such vessel . . . .<sup>146</sup>

Furthermore, the implementing regulation, 46 C.F.R. section 67, Subparts O-S, meticulously describes the restrictions and requirements for filing and recording of instruments, including bills of sale, mortgages, and liens. The level of detail which the C.F.R. provides for the filing and recording of transactions involving vessels is far greater than the level of detail provided for transactions involving other forms of collateral (aircraft, copyrights, patents, and trademarks); this more explicit regulation may explain why there has not been the same level of litigation regarding the perfection of vessel collateral as compared to other forms of collateral.

In addition to being able to establish whether there are existing liens on ITQs, several lenders have expressed the desire to be able to track the ownership history of ITQs, for purposes of assessing the value of ITQs and risk involved.<sup>147</sup> In designing a national registry for ITQs it is important to consider the differences between two system alternatives—requiring national re-

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144. 49 U.S.C.A. § 1403(c) (West Supp. 1976).

145. See *Feldman v. Chase Manhattan Bank*, 368 F. Supp. 1327 (S.D.N.Y. 1974) (holding that the Federal Aviation Act governs the perfection of a security in aircraft leases) and *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24 (E.D. Pa. 1976) (holding that the U.C.C. governs the perfection of a security interest in aircraft leases). For a more thorough discussion of these two cases see Rosinus, *supra* note 62.

146. 46 U.S.C.A. § 921 (West Supp. 1976).

147. This information comes from interviews with lenders in the areas of all three fisheries.



ording of secured transactions only, or requiring registration and recording of all conveyances and transactions.

Recording transactions may provide a means to monitor fishing practices, and to gather information that may inform conservation efforts. Requiring all transactions to be recorded would also allow lenders to track ownership, making lenders feel more secure about accepting ITQs as collateral. However, there must be some comfort-level threshold for lenders above which added security is beneficial (resulting in a higher loan-to-value ratio), but not required to grant the loan. Can this threshold for ITQs be reached simply with a lien registry, or is full registration of all transactions necessary?

Requiring all transactions to be federally recorded may result in a net increase in administrative costs, necessarily translating into increased costs for quota holders.<sup>148</sup> While only requiring the federal recording of secured transactions involving ITQs will also result in increased administrative costs, the costs of recording secured transactions alone are presumably lower than the costs of recording all transactions. Additionally, because a national lien registry would benefit both fishers and financial institutions, the costs could be reasonably allocated between the lending institution and the borrower, and could be factored into the costs of obtaining and providing a loan.

On the other hand, when considering how the federal registry for ITQs should be structured, it may be beneficial to emulate a system that fishers and financial institutions involved with fisheries are already familiar with, namely the vessel registry which requires registration of transactions regarding ownership as well as recording of security interests. The C.F.R. provides significant detail regarding the registration and recording of U.S. vessels; such a system could be duplicated for ITQs with relative ease.<sup>149</sup>

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148. This increased cost would probably result in increased fees for possession and transfer of quota shares, and the Magnuson Act provides for the assessment of fees to cover administrative costs. Given the recent arguments about consolidation in ITQ systems and the disadvantaged position of small fishers relative to large corporate fishers, this increase in fees may put small fishermen at an even greater disadvantage and further push corporate consolidation in the fishing industry if there is no attempt to counterbalance its affect. In other words, the same change in fees may have a greater impact on firms with fewer financial resources.

149. See Appendix B for possible wording for a national registry.

## OTHER ELEMENTS OF PERCEIVED (OR REAL) RISK WITH ITQs

Aside from an expressed need for a national registry system, there are several other factors which concern lenders regarding the use of ITQs as collateral. It must be remembered that there is a level of risk in lending which lenders are not willing to go beyond and that a national lien registry alone may not completely alleviate the difficulty of using ITQs as collateral.

*Pending Litigation*

For lending purposes, the question of whether the value of ITQs outweighs the risk is of primary importance. The value and risk of real estate, stock, or other forms of collateral can be, at least theoretically, assessed easily. Similarly, without much difficulty, a lender can ascertain the current price of ITQs by contacting brokerage offices directly. However, the perception of many lenders is that the risk of ITQs cannot be assessed reliably.<sup>150</sup>

Additionally, the current uncertainty regarding the legal validity of ITQ systems may affect how lenders perceive the risk involved with accepting ITQs as collateral. Several lawsuits still pending in federal court challenge the validity of part or all of specific ITQ systems.<sup>151</sup> Some lenders are concerned about the outcomes of these cases, which may possibly overturn the ITQ system, or at least significantly change the value of ITQs. Therefore, some lenders are unwilling to accept collateral which may later be devalued or deemed invalid and valueless.

It is inevitable that there will be challenges to the ITQ management systems, and the hesitancy of some lenders may be less a function of their unfamiliarity with a new market than of pending litigation. Many lenders, particularly in Alaska, have stated that they will be more willing to lend on IFQs after these cases have been adjudicated.<sup>152</sup>

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150. Interviews with lenders indicate that this is the case.

151. See Erik Fry, *Fisheries Ready Legal Fund against IFQs*, 17 ALASKA J. COM., Sept. 20, 1993, available in WESTLAW, News, Business and Industry Information Directory, ALLNEWS Database; Scott Harper, *Nine Seafood Companies Sue Over Clam Quota*, THE LEDGER-STAR (Norfolk, Va.), June 13, 1995, at D1.

152. Conversations with David Swalling, Loan Director, National Bank of Alaska (June 13, 1995); Lela Hart, Executive Vice President, Alaskan Commercial Fishing and Agriculture Bank (June 3, 1995); Dan Mogck, Loan Officer, Key Bank (June 27, 1995).

If the courts uphold the validity of ITQs<sup>153</sup>, it will help to alleviate lenders' fears, even though future litigation may occur. In fact, litigation may strengthen confidence in the system, as favorable judgments support the system and unfavorable judgments force the system to be refined and improved.

### *ITQs as a Quasi-Property Right*

Because ITQs are government-created property rights, the government may define ITQs so as to avoid the creation of a compensable property interest under the Takings Clause of the Fifth Amendment of the U.S. Constitution.<sup>154</sup> Thus far, ITQ systems have defined quota as merely rights to catch fish, and not rights to a specific quantity or value of fish. The system has been fashioned this way so that the NMFS and the Department of Commerce are not subject to takings claims in instances of TAC adjustment or changes in the system altogether.

Quota shares allocated or permits issued . . . do not represent either an absolute right to the resource or any interest that is subject to the "takings" provision of the Fifth Amendment of the U.S. Constitution. Rather, such quota shares or permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson Fishery Conservation and Management Act and other applicable law.<sup>155</sup>

At least one ITQ holder believes that lenders are hesitant to lend on ITQs specifically because of their quasi-property right status.<sup>156</sup> Furthermore, some opponents of current ITQ management systems would like to make ITQs a "true" property right subject to the takings clause, and thus irrevocable. This would render ITQ systems immutable, because any TAC adjustment could potentially be subject to litigation by every quota holder, thus destroying the flexibility required to achieve sustainable management.<sup>157</sup> Advocates of a "true" property right system

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153. See *Sea Watch International v. Mosbacher*, 762 F.Supp. 370 (1991) (upholding the Surf Clam and Ocean Quahog ITQ management scheme).

154. The Fifth Amendment states that private property may not "be taken for public use, without just compensation." U.S. CONST. amend. V.

155. 50 C.F.R. § 676.20(g)(1995). While this is the wording for the IFQ system in the Alaska Halibut and Sablefish fishery, all three fishery management plans are similarly revocable.

156. See *supra* note 130.

157. The Ninth Circuit has recently upheld the decision of Commerce Secretary Ronald H. Brown to adjust the TAC for fish stock conservation purposes. See *Paravano v. Babbit*, 861 F. Supp. 914, 924 (N.D. Cal. 1995); see also *J.H. Miles & Co., Inc. v. Brown*, 910 F. Supp. 1138 (E.D. Va. 1995).

maintain that ITQs should not be subject to revocation and blame this aspect of the system for the "non-bankability" of ITQs. Interviews with lenders, however, reveal that the property "status" of ITQs is of little concern to them.<sup>158</sup> Of greater concern is the unqualified revocability of the system, which is discussed below.

### *Political Climate and Revocability*

Currently, the ITQ systems in the United States are completely revocable. While bankers are not concerned about the quasi-property status of ITQs, they do seem to be concerned about the political vulnerability of the system,<sup>159</sup> particularly given the recent Congressional trend of budget and program cuts.

As discussed above, the current value of an ITQ in an active market can be relatively easily ascertained by looking at the current trading price, which is available through brokers. However, the apparent risk of ITQs is more difficult to assess. When accepting real estate or stocks as collateral, banks have an established system of appraisal with which to determine risk; the risk of a change in real estate value, or a change in stock value can, at least theoretically, be assessed; a bank can then establish an appropriate loan-to-value ratio based on that assessment. With a system that is completely revocable based solely on politics lenders have little basis for assessing the risk of revocability, and may therefore be unwilling to accept ITQs as collateral.

Under current ITQ management systems, even with a national lien registry, lenders will still be concerned about the political climate. Knowing that the system may be revoked, not based on any predictable measure but simply because of changing political forces, lenders may be unwilling to forward a loan based on ITQs.

While politics will affect any fishery management plan, creating an ITQ system in which revocability is not merely a function of politics will alleviate some of the political vulnerability of the system and create a more stable environment for lending. Certain oil and gas leases containing no surface occupancy (NSO) provisions provide a useful example for possible change to the

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158. This information comes from interviews with lenders as well as from e-mail correspondence with Bonnie McCay, Professor, Rutgers University, through Fishfolk (June 12, 1995).

159. Derived from interviews with lenders.

current revocability scheme for ITQs. An NSO stipulation allows the Department of Interior to prohibit access to surface lands and to revoke oil and gas leases where environmental damage is imminent.<sup>160</sup>

ITQs can be analogized to oil and gas leases with NSO stipulations because ITQs, like NSO leases, are non-compensable under the Takings clause.<sup>161</sup> Applying the logic of NSO stipulations, ITQ's revocability could be based on environmental concerns, such as a decline in the fish stock below established sustainable population levels. Basing revocability not only on politics, but also environmental necessity, would create a higher level of stability, resulting in increased confidence in ITQ management systems by both lenders and participants alike.

The "Fishery Conservation and Management Amendments of 1995" currently under consideration, state:

A fishery management plan which establishes an individual quota system for a fishery . . . may be revoked or limited at any time by the Secretary or the Council having authority over the fishery for which it is issued, if necessary for the conservation and management of the fishery . . . .<sup>162</sup>

This general statement creates an NSO-like system for ITQ revocability, emphasizing the importance of conservation in fishery management.

#### AGAIN, WHY ITQS AS COLLATERAL?

Given the in-depth analysis of collateral, and the perceived and real risks of accepting ITQs as collateral, will a national registry and an environmentally based revocation standard alleviate these risks? Can economic development and community and fishery protection result?

The application of market-based solutions to environmental problems has been criticized on many levels, the most common criticisms being those regarding the difficulty in environmental valuation<sup>163</sup> and inequitable consequences and results. However,

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160. Mary A. Viviano, *The Takings Clause: A Protection to Private Property Rights In Federal Oil and Gas Leases*, 24 TULSA L.J. 43, 48 (1988).

161. See *supra* pp. 318-19.

162. H.R. 39, Sec. 16 (g)(2)(B).

163. See generally DAVID W. PEARCE & KENNY TURNER, *ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT* (1990). See also David Ehrenfeld, *Why Put A Value on Diversity?*, in *BIODIVERSITY* 212 (E.O. Wilson ed., 1988); THEODORE PANAYOTOU, *GREEN MARKETS: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT* (1993).

regardless of how valid these criticisms may be, national and international regimes do use such valuation for the implementation of environmental policy. ITQ management itself is an expression of this dominant policy choice. While it is uncertain whether the acceptance of ITQs as collateral can speak to the valuation problems, acceptance can speak to equity concerns. Although ITQ systems may pose some threat to small actors and local communities, the acceptance of ITQs as collateral will necessarily create more options for small actors. Additionally, if the system were reformed to emulate the newly-successful IFQ program in Alaska, and were aimed at small actors and fishing communities, the reform, coupled with the acceptance of ITQs as collateral, may work well as a tool for economic development and may help to protect such communities from inequitable outcomes from market-based policies.

#### CONCLUSION

There is evidence ITQs provide a boon to conservation efforts by reducing industry pressure to overfish. In theory, fashioning fishing rights as a percentage of TAC creates an incentive for those in the fishing industry to behave cooperatively and responsibly because it is in their long term interest to preserve the fish stock. The more valuable ITQs are to those who own them, the more likely it is for the incentive-based management scheme to work in practice as well as in theory. Acceptance of ITQs as collateral will make ITQs a more valuable asset because they can then be used to help fishers obtain financing as well as giving them the right to fish.

In assessing the benefits of ITQs and their use as collateral, it is important to balance the original goal of the ITQ system—to provide for the market-based distribution of TAC among participants to achieve sustainable management—with the desire to make ITQs more attractive to lenders. If making ITQs more attractive to lenders means reducing the flexibility of the system, it may compromise conservation goals and therefore not be worthwhile. For example, if ITQs were compensable property interests subject to takings claims under the Fifth Amendment they would be more attractive to lenders. However, this change would also eliminate, or at least severely limit, the ability of the government to adjust TAC, thus defeating conservation goals.

A national registry, whether it be a full registry (covering ownership and security interests), or a partial registry (covering only

security interests), will eliminate the current difficulties of ITQ perfection under Article 9. The decision about the type of registry to implement depends on the availability of funding, the ease of administration, and the preferences of industry participants. But regardless of which type of registry is established, a central registry, if clearly defined to exclusively cover secured transactions involving ITQs, will make ITQs more attractive as collateral while simultaneously maintaining the flexibility of the system.

A national registry will not solve all problems that individual fishers may have with the use of ITQs as collateral. Lenders evaluate risk based on multiple factors— ease in perfection, although an important factor, is only one factor in the equation. "Knowing the borrower, seniority, protection, and control are the important considerations of lending against collateral."<sup>164</sup> Because lenders look at other factors in addition to perfection for evaluating the risk of collateral, pending litigation and the political vulnerability of the system also affect lender's perceptions of ITQ risk. However, the stability of the individual or organization applying for a loan is an equally important factor in a lender's evaluation of risk.

Recall that in the SCOQ fishery, large firms have remained active under ITQ management, while many smaller actors have left the fishery. These same large actors were able to negotiate with lenders and work out a method for lending on ITQs despite the absence of a central registry. Smaller actors, who are usually considered less stable and inevitably seek smaller loans, have not been able to achieve the same level of negotiation and agreement. Furthermore, in the Wreckfish fishery, a fishery of only small participants, no loans are being forwarded to fishers, despite the ITQ system.

Once litigation challenging the Halibut and Sablefish IFQ management scheme is resolved (assuming it is decided in favor of the system), even with a central registry, one can expect fishing organizations with greater assets and capital will have an easier time negotiating loans. Large participants have other forms of collateral to offer while smaller participants in many cases, have already placed liens on their vessels, their homes, and all other personal property, so that all they have to offer is their QS/

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164. Peter Larr, *Two Sides of Collateral: Security and Danger*, 76 JOURNAL OF COMM LENDING 8 (1994).

IFQs. This scenario further illustrates the necessity for a national lien registry, which will allow smaller fishers at least some possibility of obtaining loans.

Finally, while the size and stability of a borrower are important to the lender, any improvement in the perceived risk of ITQs will help to improve their use as collateral. A central registry, which explicitly covers the perfection of ITQ security interests, will alleviate the current problem of perfection under Article 9 providing smaller fishermen with another form of collateral. Furthermore, basing revocability of ITQ management on an environmental standard, rather than politics alone, will reduce perceptions of risk and remind those involved that conservation, not commerce, is imperative to fishery management.

Regardless of institutional barriers which may exist with regard to lending in general, the acceptance of ITQs as collateral will have larger social equity and conservation implications. Smaller actors may be provided with the extra means necessary to stay in the fishery. The presence of these smaller fishers will help to prevent industry consolidation and possible collusion, thus also helping to maintain conservation goals. Furthermore, the acceptance of ITQs as collateral may provide small fishing communities with a tool for economic development similar to the CDQ program. This will not only help these communities, but will also aid the stated ITQ management goal of fleet downsizing as smaller actors who do chose to exit the fishery will have other employment options as a result of economic development.



APPENDIX A  
ELEMENTS OF U.C.C., ARTICLE 9

*Different types of collateral:*

- a. Goods. Goods are defined as "all things which are movable at the time the security interest attaches or which are fixtures, . . . standing timber which is to be cut and removed . . . , the unborn young of animals, and growing crops."
- b. Documents, i.e., documents of title.
- c. Chattel paper. For purposes of Article 9, chattel paper is defined as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods."
- d. Instruments. Instruments are defined as any writing which evidences a right to the payment of money, but is not itself a security agreement. The most common type of instrument is a promissory note.
- g. General intangibles. General intangibles basically include everything that does not fall within one of the above categories.

*Transactions expressly excluded from Article Nine coverage:*

- a. Security interests subject to Federal statute,
- b. Landlord liens and interests in real estate,
- c. Mechanics' liens
- d. Wage Assignments,
- e. Transfers of certain accounts or chattel,
  1. sale of accounts or chattel paper as part of the sale of the business out of which they arose;
  2. assignment of accounts or chattel paper for collection purposes
  3. transfer of a right to payment under a contract to an assignee who will also perform the burdens of the contract
  4. transfer of a single account to an assignee in satisfaction of a preexisting debt,
- f. Insurance policies,
- g. Judgments,
- h. Deposit accounts,
- i. Setoffs and tort claims,
- j. Subrogation rights.

### *Change in Location of Collateral*

Under Article 9, if collateral is located in one state when the security interest is first perfected and is subsequently moved to another state, the security interest will only remain perfected until the earlier of (i) four months after the move or (ii) the time at which the original perfection would otherwise expire, unless the secured party perfects again in accordance with the applicable legal requirements of the new state before the original security interest becomes unperfected.<sup>165</sup>

Furthermore, perfection of a security interest in general intangibles and mobile goods normally used in more than one state (which constitute equipment or inventory leased or held for lease; e.g., rolling stock, shipping containers, and commercial machinery) are governed by the law of the state in which the debtor is located.<sup>166</sup> A debtor is deemed to be "located" at its place of business, if one exists, at its chief executive office, if the debtor has more than one place of business, and otherwise at the debtor's residence.<sup>167</sup>

### *Change in Location of Debtor*

If state in which the debtor was located changes, the security interest will only remain perfected until the earlier of (i) four months after the change or (ii) the time at which the original perfection would otherwise expire. Unless the secured party perfects again in accordance with the applicable legal requirements of the new state before the original security interest expires, the security interest becomes unperfected and is deemed to be unperfected as to all persons who became purchasers after the change of location.<sup>168</sup>

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165. U.C.C. § 9-103(1)(d) (1991).

166. U.C.C. §§ 9-103(3)(b), 9-103(4) (1991).

167. U.C.C. § 9-103(d) (1991).

168. U.C.C. § 9-103(3)(e). *See also* Mellon Bank, N.A. v. Metro Communications, Inc. (*In re* Metro Communications, Inc.) 945 F.2d 635 (Bankr. 3rd Cir. 1991).

APPENDIX B  
POSSIBLE WORDING FOR A NATIONAL ITQ  
REGISTRY<sup>169</sup>

A) The National Marine Fisheries Service, under the Secretary of Commerce, shall establish and maintain a system of recording for each and all of the following:

- 1) Any conveyance which affects ownership, or any interest in, Individual Transferable Quotas, Individual Fishing Quotas, or similar tradable fishing rights.
- 2) Any lease, transfer, or other instrument executed for security purposes, which affects any interest in ITQs/IFQs.

B) No conveyance, transfer, or other instrument involving ITQs/IFQs shall be valid until such conveyance, transfer, or other instrument is filed for recordation with the National Marine Fisheries Service, U.S. Department of Commerce.

C) State legislation of perfection of security interests based on Uniform Commercial Code, Article 9 no longer applies to the transactions described above; for purposes of perfecting a secured transaction involving ITQs/IFQs as collateral, such transaction must be recorded with the National Marine Fisheries Service. Previous recording of secured transactions involving ITQs/IFQs under U.C.C., Article 9 must be re-recorded with the NMFS within (*some designated amount of time*).

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169. Wording from the Federal Aviation Act, 49 U.S.C.A. § 1401 *et. seq.* (West 1995), the Copyright Act, 17 U.S.C.A. § 201 *et. seq.* (West 1995), and the Ship Mortgage Act, 46 U.S.C.A. § 1401 *et. seq.* (West 1995) was used as examples for this model.