

North Pacific Fishery Management Council

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MEMORANDUM

TO: Council, SSC, and AP Members

FROM: Mark Fina

DATE: September 16, 2002

SUBJECT: Binding Arbitration Committee

At its April 2002 meeting, the North Pacific Fishery Management Council (Council) directed the Council Chair to appoint an industry workgroup to develop a framework program to implement the provisions of a binding arbitration program to resolve price disputes between harvesters and processors. Over the summer of 2002, the workgroup developed a set of options for such a program. The options developed by the workgroup, the draft report of the workgroup, and a description of the general arbitration structures are attached.

Options for a System of Binding Arbitration

Problem Statement

Issuing harvesting and processing quota raised concerns regarding changes in bargaining power between the harvesting and processing sectors in ex-vessel price formation. Binding arbitration is a mechanism intended to address that issue, and to help achieve the goals articulated in the North Pacific Council's Crab Rationalization Problem Statement.

Alternative Binding Arbitration Structures

The following alternative arbitration structures were developed by the committee for consideration. Strawman descriptions of each structure are provided in Appendix A.

2.8.3.1

- I. *A structure of one arbitration per processing firm, with harvesters using one mandated collective bargaining association that would submit one last and final offer on behalf of all IFQ holders. Sub-options for this structure include*
 - a. *Can either be pre-season or at any time the processor is first forced to arbitration.*
 - b. *Instead of mandating a collective bargaining association, the structure could require one last best offer from all IFQ holders (without mandating belonging to the association).*
 - c. *IFQ holders not participating can either have the protection of the arbitration (last man standing is protected) or not (last man standing does not receive the benefit of the arbitration).*

- II. *A structure of one arbitration event per processing firm, but with multiple arbitrations allowed. Under this system, arbitration would occur at one time, using one arbitrator, per processor, but any individual IFQ holder or group of IFQ holders could force arbitration of their individual last/best offer. Sub-options for this structure include:*
 - a. *Can be collective bargaining by harvesters or individual or both. If individuals can arbitrate, there would be a notice and joinder opportunity for all harvesters to join into arbitration.*
 - b. *Can either be pre-season (only) or at any time the processor is first forced to arbitration.*
 - c. *If an IFQ holder is not part of the arbitration, it can still get the benefit of the minimum price established. The sub-options are the lowest, mean or highest arbitrated price.*

- III. *A structure of multiple arbitration events per processing firm only at firm times.*
 - a. *The sub-options for when arbitration is allowed include temporal (such as every two months, or one event one month before the end of the season) or market related (if the market changes up or down over 5%, for example).*
 - b. *It is assumed that any IFQ holder may join in the arbitration.*
 - c. *It is assumed that any IFQ holder has the benefit of the last arbitration. The sub-options are the same as I.c.*

- IV. *A structure of multiple arbitration events per processing firm. Under this structure, arbitration could occur at the election of any quota holder at any time. Sub-options for this structure include:*
 - a. *Can be collective bargaining by harvesters or individual or both.*
 - b. *There may be standards that must be met in order to require arbitration, such as a minimum amount of IFQ to cause arbitration.*

- V. *A structure establishing a "fleet wide" single arbitration event.*
 - a. *The system would not use "last best offer" but rather the arbitrator could pick any final price the arbitrator wanted.*
 - b. *It would require that the arbitrator develop a formula pricing system*

- c. *It would require revenue by processor be given to the arbitrator to use in developing the formula. It could require costs by processor be given to the arbitrator to use in developing the formula. Cost information from both sectors could be required to determine the distribution of revenues from product developments and innovations.*
- d. *The formula could either adjust weekly with changes in market prices or establish a base or minimum price paid at the time of delivery and adjustment after product sales are completed.*

Options for Consideration

The committee developed the options listed below for consideration. After each option, the alternative structures to which the option applies to are identified. The fleet wide structure (Structure V) was developed independently from the other structures. The options that formulate that alternative structure appear at the end of the listed options.

2.8.3.2

Market Report

Within 30 days prior to the opening of each crab fishery an independent market analyst selected by the mutual agreement of the sectors will present to both sectors and all designated arbitrators an analysis of the market for products of that fishery. (Applies to all alternatives)

2.8.3.3

Selection of the Administrator, Arbitrator (and Market Analyst, if applicable)

The market analyst and administrator will be selected by mutual agreement of the PQS holders and the QS holders. PQS holders collectively must agree and QS holders collectively must agree. (Applies to all alternatives)

A single arbitrator will be selected for each IPQ holder to arbitrate all price disputes between that IPQ holder and any IFQ holder. The arbitrator will be selected by the agreement of the IPQ holder and

- a) *the IFQ holders that made deliveries to the IPQ holder in the preceding fishery or*
- b) *IFQ holders that have committed deliveries to the IPQ holder in the upcoming season. (Applies to Alternatives I, II, III, and IV)*

Suboption: If the two sectors are unable to agree on an arbitrator, administrator, or market analyst, each sector will choose an arbitrator, and the two so chosen will choose a third arbitrator, market analyst, and administrator. The three arbitrators will make arbitration decisions as a panel. (Applies to all alternatives)

Agreement of a group of IFQ (or all IPQ) holders will be by a majority vote with:

- 1. *one vote per IFQ (or IPQ)*
- 2. *one vote per IFQ (or IPQ) holder (Applies to all alternatives)*

*The arbitrator, administrator, and market analyst will be selected ____ * days before the beginning of the season. (Applies to all alternatives)*

**The timing of the selection will depend on the model selected.*

2.8.3.4

Shares subject to binding arbitration

This binding arbitration system shall address price disputes between holders of Class A IFQ and holders of IPQ. Binding arbitration does not apply to the negotiation of price for deliveries under the IFQ class B shares. (Applies to all alternatives)

2.8.3.5

Shares of processor affiliates

Option 1

Holders of IFQs that are affiliated with processors are not eligible to participate in the arbitration process. Processor affiliation will be determined using the threshold rule with percent thresholds of 10, 25, and 50 percent.

Option 2

Entities that are partially owned by processor affiliates will be permitted to participate in arbitration, however, the participation will apply only to a share of IFQs equal to the ownership share of owners not affiliated with a processor (e.g., if an entity owning any part of a processor owns a 75 percent interest in 100 IFQs, the nonaffiliated owner of those IFQs may participate in arbitration with 25 shares).

Option 3

Participation of processor affiliates in binding arbitration as IFQ holders will be determined by any applicable rules governing anti-trust. Any parties eligible for collective bargaining under the Fishermen's Marketing Act of 1934 will be eligible to participate in binding arbitration. (Applies to all alternatives)

2.8.3.6

Timing of Arbitration

2.8.3.6.1

Share Matching Period

The process of binding arbitration will begin 45 days prior to the beginning of each crab season. On that date, a share matching period will begin between IFQ holders that have agreed to deliver and IPQ holders that have agreed to accept crab to be harvested with Class A IFQs.. During the share matching period, the parties will negotiate the terms of delivery of crab harvested with the committed Class A IFQs. This share matching period will expire 14 days prior to the beginning of the applicable season. (Applies to Alternatives I, II, III, and IV)

Suboption A

IFQ holders that have agreed to deliver crab to an IPQ holder may, but are not required to negotiate collectively during the share matching period. (Applies to Alternatives I, II, III, and IV)

Suboption B

IFQ holders that have agreed to deliver crab to an IPQ holder will negotiate collectively by a representative selected by a majority vote of the committed IFQ holders with:

- 1. one vote per IFQ*
- 2. one vote per IFQ holder (Applies to Alternative I)*

2.8.3.6.2

Notice of Unsubscribed IPQs

If the share matching period expires without agreements subscribing all IPQs held by an IPQ holder, the IPQ holder must notify the administrator of the amount of IPQs which are not subscribed. The administrator will notify all IFQ holders of the number of unsubscribed IPQs for each IPQ holder. (Applies to Alternatives I, II, III, and IV)

2.8.3.6.3

Commitment of IFQs

At the end of the share matching period, an IFQ holder that has not agreed to deliver all of its shares to a processor may commit any uncommitted shares to any processor that holds unsubscribed IPQs by notifying the IPQ holder of the intent to commit shares. Receipt of the notice shall result in the subscription of IPQs. The IPQ holder shall notify the administrator on receipt of commitments for all of its IPQs. The administrator shall then notify all IFQ holders that the IPQ holder is fully subscribed. (Applies to Alternatives I, II, III, and IV)

2.8.3.6.4

Initiation of Arbitration

Option 1

Any time after the end of the share matching period a committed IFQ holder can initiate arbitration by notice to the administrator and the IPQ holder. The administrator will notify all IFQ holders of impending arbitration. (Applies to Alternatives II, III, and IV)

Option 2

Arbitration may be initiated by any committed IFQ holder at any time between the expiration of the share matching period and

- 1. 14 days prior to the opening date of the season or*
- 2. 30 days prior to the end of the season. (Applies to Alternative IV)*

Option 3

On conclusion of a negotiated price for any shares, the IFQ and IPQ holders will notify the administrator of the completion of the contract (but not the terms). Any shares for which contracts have not been completed 14 days prior to the opening date of the season will automatically be subject to arbitration. (Applies to Alternatives I and II)

2.8.3.6.5

Joining and Exiting Arbitration

Any IFQ holder with uncommitted shares may join arbitration by notice to an IPQ holder of commitment of IFQs by providing notice to the administrator and the IPQ holder within 20 days of the date of the notice of impending arbitration. Entry of new IFQ holders to the arbitration will be limited to the amount of unsubscribed IPQs. (Applies to Alternatives I, II, III, and IV)

At no time after entry to the arbitration process may an IFQ holder withdraw from participation in the arbitration. (Applies to Alternatives I, II, III, and IV)

2.8.3.7

Standard for Arbitration (all options apply to all alternatives)

Option 1

The arbitration decision will attempt to make an equitable division of rents in the fishery (using the historic division of revenues as a surrogate for the division of rents for existing product forms).

Option 2

The arbitration decision will attempt to set a competitive or fair market price for crab delivered.

Option 3

The arbitrator shall consider relevant factors in making an arbitration decision, including but not limited to:

- a. Historical ex vessel prices and division of revenues*
- b. Current ex vessel prices (including prices for Class A and Class B shares recognizing the different nature of the different share classes)*
- c. Consumer and wholesale product prices for the processing sector and the participants in the arbitration (recognizing the impact of sales to affiliates on wholesale pricing)*
- d. Innovations and developments of the different sectors and the participants in the arbitration (including new product forms)*
- e. Efficiency and productivity of the different sectors (recognizing the limitations on efficiency and productivity arising out of the management program structure)*
- f. Quality (including quality standards of markets served by the fishery and recognizing the influence of harvest strategies on the quality of landings)*
- g. The interest of maintaining financially healthy and stable harvesting and processing sectors*
- h. Safety*
- i. Timing and location of deliveries*

Option 4

The primary role of the arbitrator shall be to establish a price that preserves the historical division of revenues in the fisheries while considering the following factors:

- a. Current ex vessel prices (including prices for Class A and Class B shares recognizing the different nature of the different share classes)*
- b. Consumer and wholesale product prices for the processing sector and the participants in the arbitration (recognizing the impact of sales to affiliates on wholesale pricing)*
- c. Innovations and developments of the different sectors and the participants in the arbitration (including new product forms)*
- d. Efficiency and productivity of the different sectors (recognizing the limitations on efficiency and productivity arising out of the management program structure)*
- e. Quality (including quality standards of markets served by the fishery and recognizing the influence of harvest strategies on the quality of landings)*
- f. The interest of maintaining financially healthy and stable harvesting and processing sectors*
- g. Safety*
- h. Timing and location of deliveries*

2.8.3.8

Arbitration Proceedings and Findings

Terms included in the Final Offer and Evidence Considered

Option 1

Each final offer shall include the following terms plus any other pertinent terms identified by the parties:

- 1. Price*
- 2. Quantity*
- 3. Quality*
- 4. Acceptable delivery dates*
- 5. Location of delivery*
- 6. Product outputs of the processor and their prices*

(Select any or all of 1. to 6.)

The final offer shall be:

- 1. fixed values of each term, or*
- 2. a formula that includes each term as a variable or fixed term and may be a revenue sharing formula.*

Each party will be permitted to submit any evidence that that party believes is relevant to the arbitration proceeding. (Applies to Alternatives I, II, III, and IV)

Option 2

Within 3 days after the decision to arbitrate the parties will meet with the arbitrator to determine:

- a. The terms to be included in the final offers to the arbitrator and any terms that can be stipulated by the parties. Terms could include the amount of crab to be delivered, the date of the deliveries, the price (which could subject to vary with delivery date, quality, and possibly other factors), quality, and any other terms deemed pertinent by the parties and the arbitrator. In addition, the form of the final offers shall be agreed. Possible forms are a fixed minimum price for crab delivered subject to the applicable terms or a price formula that includes each applicable term as a variable.*
- b. Appropriate evidence to be considered in the arbitration. This evidence could include historical ex vessel and market prices, historical division of revenues and rents, costs of harvesting and production, and any other evidence deemed relevant by the parties and the arbitrator.*

If the parties do not agree on the terms to be included in the final offers and the evidence to be submitted at arbitration, the arbitrator will decide those terms and that evidence. (Applies to Alternatives I, II, III, and IV)

3.8.3.9

Submission and Selection of Final Offers

Option 1

The IPQ holder and each IFQ holder participating in an arbitration proceeding will submit a final offer. For each IFQ holder, the arbitrator will select from the IPQ holder's final offer and the final offer of that IFQ holder. IFQ holders may submit collective bids at their discretion. (Applies to Alternatives II, III, and IV)

Option 2

The IPQ holder will submit a final offer to the arbitrator. All IFQ holders participating in the arbitration will collectively submit a final offer to the arbitrator. The arbitrator will choose one of these two final offers, which will apply to all participants in the arbitration. The terms of the offer submitted by the IFQ holders will be determined by a majority vote of the IFQ holders participating with:

- 1. one vote per IFQ*
- 3. one vote per IFQ holder (Applies to Alternative I)*

Option 3

Once 50 percent of the unaffiliated IPQs of a processor are subscribed, committed IFQ holders will have the option of collectively entering binding arbitration by selection of an agent to represent the IFQ holders. To proceed collectively, the agent must be selected by a 50-75 percent vote of subscribed IFQ holders with:

- 1. one vote per IFQ*
- 2. one vote per IFQ holder*

The IPQ holder and the agent of the IFQ holders will each submit a final offer. The arbitrator will select from the IPQ holder's final offer and the final offer of the IFQ holder's agent. The processor and all IFQ holders delivering to the processor will be bound by the finding of the arbitration. (Applies to Alternative I)

Suboption: In the event that the IFQ holders have not selected an agent to represent them in arbitration within 14 days of the opening of a season, IFQ holders may individually initiate binding arbitration subject to the rules of Option 1. (Applies to Alternative I)

2.8.3.10

Transferability of benefits of arbitration to other IFQ holders

If an IFQ holder does not join in an arbitration with an IPQ holder, but ultimately delivers crab to the IPQ holder, the IFQ holder will receive at a minimum, the terms of the

- 1. lowest arbitrated price with that IPQ holder*
- 2. mean arbitrated price with that IPQ holder*
- 3. highest arbitrated price with that IPQ holder*
- 4. the IFQ holder's choice of the final offers selected at the arbitration with that IPQ holder.*

Any price applied to deliveries by an IFQ holder not participating in arbitration will be subject to time and delivery limitations and other terms specified in the selected final offer. (Applies to Alternatives I, II, III, and IV)

Suboption: In addition, the IPQ holder shall retain 2 percent or \$0.05 per pound, which shall be used to defer the shared costs of administration of the program. (Applies to Alternatives I, II, III, and IV)

2.8.3.11

Limits on the Use of Binding Arbitration

Option 1

Each IPQ holder shall be limited to one arbitration per season with one arbitrator. (Applies to Alternatives I and II)

Option 2

Each IPQ holder can be subject to arbitration initiated by any IFQ holder that commits to deliver to the IPQ holder 0-40 percent of the IFQs held regardless of whether that IPQ holder has participated in other binding arbitration proceedings in that season. All arbitration proceedings will be decided by the single arbitrator selected for that IPQ holder. (Applies to Alternative IV)

Option 3

An IPQ holder is required to participate in only one arbitration per season, unless the season exceeds 60-90 days in which case the IPQ holder may be required to participate in a second arbitration 30 days before the end of the season, if the IPQ holder has unsubscribed shares. (Applies to Alternative III)

Option 4

An IPQ holder may be brought to arbitration at least once in any season, but no more than twice in a season. A second arbitration may be initiated at any time 60-90 days or more after the decision in the first arbitration provided the IPQ holder has:

- 1. received commitments for less than 80-90 percent of its unaffiliated IPQs at the time of the first arbitration and/or*
- 2. has in excess of:*
 - a. less than 75,000 pounds of unaffiliated, uncontracted IPQ for a of TAC < 3 million pounds,*
 - b. 75,000 to 150,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 3-8 million pounds,*
 - c. 150,000-250,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 8-10 million pounds,*
 - d. 250,000-500,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 10-25 million pounds,*
 - e. 500,000-1,000,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 25-75 million pounds,*
 - f. 1,000,000-2,000,000 pounds of unaffiliated, uncontracted IPQ for a of more than TAC 75 million pounds*

The IFQ holder initiating the arbitration has committed to deliver to the IPQ holder at least 0-40 percent of that IFQ holders total (or uncommitted) IFQ holdings and/or at least:

- g. 20,000 pounds of unaffiliated, uncontracted IPQ for a of TAC < 3 million pounds,*
- h. 20,000 to 40,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 3-8 million pounds,*
- i. 40,000-60,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 8-10 million pounds,*
- j. 60,000-75,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 10-25 million pounds,*
- k. 75,000-150,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 25-75 million pounds,*
- l. 150,000-250,000 pounds of unaffiliated, uncontracted IPQ for a of more than TAC 75 million pounds*

In the second arbitration, all notice of rules and joinder of additional IFQ holders rules applicable to the first arbitration shall apply. (Applies to Alternatives III)

2.8.3.12

Payment for the Arbitration and Market Analysis

The payment for the market analysis, the arbitrators, and the administrator will be shared equally by the two sectors. Within each sector the analysis shall be paid for on a pro rated basis

determined by the shares held by the members of the sector. Cost shall be shared by all participants in all fisheries. (Applies to all alternatives)

Participants in the binding arbitration will each pay the costs of their own participation. Within the harvest sector, payment shall be pro rated based on the number of IFQs committed to the participating processor. (Applies to all alternatives)

Option 1

For shared costs, the payment of those costs shall be advanced by IPQ holders. The IPQ holders will collect the IFQ holders' portion of the shared costs by adding a pro rated surcharge to all deliveries of Class A crab. (Applies to all alternatives)

Option 2

Administration of payments will be accomplished by allocation of a share of the cost recovery funds to the binding arbitration program. (Applies to all alternatives)

2.8.3.13

Enforcement of the Arbitration Decision

The decision of the arbitrator will be enforced by:

- 1. civil damages*
- 2. specific performance*
- 3. forfeiture of unused IFQs or IPQs in the fishery for the following season (1 year use-it-or-lose-it) subject to hardship exceptions (Applies to all alternatives)*

2.8.3.14

Oversight and Administration of the Binding Arbitration Program

Oversight and administration of the binding arbitration should be conducted in a manner similar to the AFA cooperative administration and oversight. System reporting requirements and administrative rules should be developed in conjunction with the Council and NOAA Fisheries after selection of the preferred program. (Applies to all alternatives)

2.8.3.15

Fleet Wide Arbitration Structure Options (Alternative V)

- 1. Arbitrator. Representatives of the harvesting and processing sectors select an arbitrator. If the two sectors are not able to agree, each sector will choose an arbitrator, and the two so chosen will choose a third arbitrator.*
- 2. Market Analyst. The arbitrator(s) select a market analyst, in consultation with representatives of the harvesting and processing sectors.*
- 3. Data Gathering. The arbitrator(s) and the market analyst gather data relevant to determining the historical distribution of crab product revenues between harvesters and processors.*

Option 1: They also determine (i) the vertical integration of each IPQ holder, and value accrued by the processor at each point up to and including the first point at which it sells on an arm's length basis to a third party (which will serve as the basis for the weekly composite price); and (ii) the variety of crab product forms being produced and the market percentage represented by each product form.

Option 2: The arbitrator(s) and the market analyst gather data they determine necessary for the task, including: (i) crab processing cost structures for each IPQ holder; (ii) vertical integration of each IPQ holder, and value accrued by the processor at each point up to and including the first point at which it sells on an arm's length basis to a third party (which will serve as the basis for the weekly composite price); and (iii) the variety of crab product forms being produced and the market percentage represented by each product form.

Suboption: Cost information from both sectors could be required to determine the distribution of revenues from product developments and innovations.

4. *Initial Discussions/Mediation. Not less than 90 days before the opening of the first crab fishery of the upcoming year, the arbitrator(s) meet with each processor individually (to address antitrust concerns) and with fleet representatives collectively to discuss the information gathered and to receive any additional information the parties consider relevant.*

Option 1: The arbitrator(s) seek consensus among representatives of the harvesting and processing sectors regarding: (i) the third party transactions that will establish the weekly composite price; and (ii) the historical revenue share per sector.

Option 2: The arbitrator(s) seek consensus among representatives of the harvesting and processing sectors regarding: (i) the third party transactions that will establish the weekly composite price; (ii) a formula under which a scaled percentage of the weekly composite price is allocated to the processor component, with the balance being allocated as the ex vessel price to fishers; and (iii) a seasonal advance amount, which is paid by the processor at delivery.

5. *Arbitration. Not less than 30 days before the first crab fishery opens, the arbitrator(s) stipulate the above-referenced components, if they have not been determined through mediated negotiation.*

6. *Implementation. Throughout the year, the market analyst surveys the crab product market, and produces a weekly composite price based on the survey structure developed by the arbitrator(s). The weekly composite price is a single price per species, based on the weighted average of the arm's length transactions in products produced from that species.*

Option 1: For deliveries not subject to a contract, the fisher receives the stipulated percentage of the most recently announced weekly composite price.

Option 2: For deliveries not subject to a contract, the fisher receives the stipulated advance per pound at delivery, and receives a per pound settlement based on the composite price in effect for the week(s) within which products from the fisher's delivery are sold.

Draft Report of the Working Group on Binding Arbitration

Principles Behind Binding Arbitration

Problem Statement

The working group on binding arbitration has proposed the following problem statement justifying the development of the binding arbitration system:

Issuing harvesting and processing quota raised concerns regarding changes in bargaining power between the harvesting and processing sectors in ex-vessel price formation. Binding arbitration is a mechanism intended to address that issue, and to help achieve the goals articulated in the North Pacific Council's Crab Rationalization Problem Statement.

The fundamental issue to be addressed by a system of binding arbitration is the change in bargaining power between the harvest and processing sectors in a rationalized fishery. The Council intends to develop a rationalization program that "maintains healthy harvesting and processing sectors." In addition, "the system should seek to achieve equity between the harvesting and processing sectors, including healthy, stable and competitive markets."

In the current crab fisheries, harvesters often negotiate prices collectively at the beginning of each season. Harvesters have used two strategies for leverage during these price negotiations. In some seasons, harvesters have delayed the beginning of fishing after the opening of the season to pressure processors to pay a higher price for harvests. At other times harvesters have promised additional deliveries to the processor that offered an acceptable price to induce higher offers. The ability of harvesters to use these collective inducements could be limited in a fishery with an extended season and processor allocations. In addition, neither harvesters nor processors believe that delaying fishing is in the best interest of either sector. Binding arbitration is intended to provide an additional method of determining an equitable or competitive price is obtained for sales of crab in a rationalized fishery, given the limited harvesting and processing markets that would be available under a system that allocates both harvest and processing privileges.

The system of binding arbitration should protect all participants in the crab fisheries. Harvesters and processors alike should trust the system of binding arbitration. The system should also provide both parties with effective means of enforcing an arbitrator's decision.

Because the protection of harvesters and processors with a system of binding arbitration could be accomplished in many ways, the committee views its charge as developing a set of alternative arbitration structures and options within those structures that provide for effective system of arbitration. To that end, the committee has developed the alternative structures and options that appear below. The brief discussion is intended to clarify the intent of the committee in the development of the options. Because these structures and options would protect participants in different ways, each with its own merits, selection of the preferred method is not simple and will require full analysis. It is the committee's intention to provide these as potential structures and options for analysis and possible adoption after deliberation.

The document concludes with a discussion of the administration of the system of binding arbitration and the oversight role of NOAA Fisheries.

Alternative Binding Arbitration Structures

The committee developed the following 5 binding arbitration alternatives for Council consideration:

- I. *A structure of one arbitration per processing firm, with harvesters using one mandated collective bargaining association that would submit one last and final offer on behalf of all IFQ holders. Sub-options for this structure include*
 - a. *Can either be pre-season or at any time the processor is first forced to arbitration.*
 - b. *Instead of mandating a collective bargaining association, the structure could require one last best offer from all IFQ holders (without mandating belonging to the association).*
 - c. *IFQ holders not participating can either have the protection of the arbitration (last man standing is protected) or not (last man standing does not receive the benefit of the arbitration).*

- II. *A structure of one arbitration event per processing firm, but with multiple arbitrations allowed. Under this system, arbitration would occur at one time, using one arbitrator, per processor, but any individual IFQ holder or group of IFQ holders could force arbitration of their individual last/best offer. Sub-options for this structure include:*
 - a. *Can be collective bargaining by harvesters or individual or both. If individuals can arbitrate, there would be a notice and joinder opportunity for all harvesters to join into arbitration.*
 - b. *Can either be pre-season (only) or at any time the processor is first forced to arbitration.*
 - c. *If an IFQ holder is not part of the arbitration, it can still get the benefit of the minimum price established. The sub-options are the lowest, mean or highest arbitrated price.*

- III. *A structure of multiple arbitration events per processing firm only at firm times.*
 - a. *The sub-options for when arbitration is allowed include temporal (such as every two months, or one event one month before the end of the season) or market related (if the market changes up or down over 5%, for example).*
 - b. *It is assumed that any IFQ holder may join in the arbitration.*
 - c. *It is assumed that any IFQ holder has the benefit of the last arbitration. The sub-options are the same as I.c.*

- IV. *A structure of multiple arbitration events per processing firm. Under this structure, arbitration could occur at the election of any quota holder at any time. Sub-options for this structure include:*
 - a. *Can be collective bargaining by harvesters or individual or both.*
 - b. *There may be standards that must be met in order to require arbitration, such as a minimum amount of IFQ to cause arbitration.*

- V. *A structure establishing a "fleet wide" single arbitration event.*
 - a. *The system would not use "last best offer" but rather the arbitrator could pick any final price the arbitrator wanted.*
 - b. *It would require that the arbitrator develop a formula pricing system*
 - c. *It would require revenue by processor be given to the arbitrator to use in developing the formula. It could require costs by processor be given to the*

arbitrator to use in developing the formula. Cost information from both sectors could be required to determine the distribution of revenues from product developments and improvements.

- d. *The formula could either adjust weekly with changes in market prices or establish a base or minimum price paid at the time of delivery and adjustment after product sales are completed.*

The committee believes that alternative IV, which permits IFQ holders to initiate numerous different arbitration proceedings with each IPQ holder is an unworkable option. Allowing unlimited proceedings is likely to be very costly and disruptive to the fisheries.

Options for Consideration

This section presents the options developed by the committee in italics and a brief discussion of those options in standard font.

Market Report

Within 30 days prior to the opening of each crab fishery an independent market analyst selected by the mutual agreement of the sectors will present to both sectors and all designated arbitrators an analysis of the market for products of that fishery.

The market analysis is intended to provide transparency of markets and form the basis for negotiations. The analysis should reduce posturing by the parties in negotiations and provide an arbitrator with background on market conditions. Class B share ex vessel prices, once established, should also constitute a part of the information of the report. The timing of the report should be decided at a later date because season openings may change and the value of the report is likely to depend on markets that are time sensitive. The committee, as a whole, supports the use of a market report for the developing transparency in the price negotiations.

Selection of the Administrator, Arbitrator (and Market Analyst, if applicable)

The market analyst and administrator will be selected by mutual agreement of the PQS holders and the QS holders. PQS holders collectively must agree and QS holders collectively must agree.

A single arbitrator will be selected for each IPQ holder to arbitrate all price disputes between that IPQ holder and any IFQ holder. The arbitrator will be selected by the agreement of the IPQ holder and

- a) *the IFQ holders that made deliveries to the IPQ holder in the preceding fishery or*
- b) *IFQ holders that have committed deliveries to the IPQ holder in the upcoming season.*

Suboption: If a program is selected that provides for a single arbitration event with all IPQ holders participating, the selection of the arbitrator will require the agreement of all IPQ holders.

Suboption: If the two sectors are unable to agree on an arbitrator, administrator, or market analyst, each sector will choose an arbitrator, and the two so chosen will choose a third arbitrator, market analyst, and administrator. The three arbitrators will make arbitration decisions as a panel.

Agreement of a group of IFQ (or all IPQ) holders will be by a majority vote with:

- 1. one vote per IFQ (or IPQ)*
- 2. one vote per IFQ (or IPQ) holder*

*The arbitrator, administrator, and market analyst will be selected ___ * days before the beginning of the season.*

**The timing of the selection will depend on the model selected.*

The administrator, market analyst, and arbitrators should be independent persons agreed to by the parties. The appropriate rule for identifying the IFQ holders participate in the selection of an arbitrator for proceedings with a single IPQ holder depend on the timing of the selection and the stability of participation and delivery patterns. The committee supports a system for selection of the arbitrator, market analyst, and administrator (if necessary), which requires the agreement of both sectors or the selection by two arbitrators, one chosen by each sector.

Shares subject to binding arbitration (1st paragraph of Structure)

This binding arbitration system shall address price disputes between holders of Class A IFQ and holders of IPQ. Binding arbitration does not apply to the negotiation of price for deliveries under the IFQ class B shares.

Because of the allocation of both harvesting and processing shares for crab harvested with Class A shares, the committee believes that transactions for delivery of Class A crab are most in need of arbitration to establish a fair, equitable, or competitive price.

Shares of processor affiliates

Option 1

Holders of IFQs that are affiliated with processors are not eligible to participate in the arbitration process. Processor affiliation will be determined using the threshold rule with percent thresholds of 10, 25, and 50 percent.

Option 2

Entities that are partially owned by processor affiliates will be permitted to participate in arbitration, however, the participation will apply only to a share of IFQs equal to the ownership share of owners not affiliated with a processor (e.g., if an entity owning any part of a processor owns a 75 percent interest in 100 IFQs, the nonaffiliated owner of those IFQs may participate in arbitration with 25 shares.

Option 3

Participation of processor affiliates in binding arbitration as IFQ holders will be determined by any applicable rules governing anti-trust. Any parties eligible for collective bargaining under the Fishermen's Marketing Act of 1934 will be eligible to participate in binding arbitration.

The intention of this provision is to prevent IPQ holders from participating in arbitration as IFQ holders. Participation of processor affiliates in binding arbitration as IFQ holders could influence the arbitrator's decision and raise antitrust concerns. Option 1 would use a threshold rule for determining processor affiliation that would prevent participation as an IFQ holder. Option 2

would allow IFQ holders that own shares collectively with processors to participate in the arbitration with respect to their interest in the commonly held shares. Option 3, the preferred alternative of the committee, would rely on anti-trust rules for determining whether a processor affiliate could participate in arbitration. The committee believes that the current anti-trust exemption should be adequate for ensuring the separation of sector interests required for an effective binding arbitration program. In addition, any other rule would require an anti-trust exemption, which could be politically sensitive and should be the subject of extensive debate and potential revision at several levels. Reliance on current anti-trust exemptions would be a more certain, reliable protection against the conflicting interests of participation of processors in arbitration as IFQ holders.

The Committee recognizes that option 3 may prevent some IFQ holders that are affiliated with processors from participating in the price formation process even though they have historically done so through the collective bargaining association. While acknowledging the interest of those IFQ holders, the need to protect the interests of independent IFQ holders is paramount.

Timing of Arbitration

The volatile markets for crab products require that the arbitration process be conducted very close to the beginning of the season. Consequently, many time sensitive elements of the program, such as notices and responses, have relatively short time periods.

Share Matching Period

The process of binding arbitration will begin 45 days prior to the beginning of each crab season. On that date, a share matching period will begin between IFQ holders that have agreed to deliver and IPQ holders that have agreed to accept crab to be harvested with Class A IFQs.. During the share matching period, the parties will negotiate the terms of delivery of crab harvested with the committed Class A IFQs. This share matching period will expire 14 days prior to the beginning of the applicable season.

Suboption A

IFQ holders that have agreed to deliver crab to an IPQ holder may, but are not required to negotiate collectively during the share matching period.

Suboption B

IFQ holders that have agreed to deliver crab to an IPQ holder will negotiate collectively by a representative selected by a majority vote of the committed IFQ holders with:

- 1. one vote per IFQ*
- 2. one vote per IFQ holder*

This share matching period is intended to induce IFQ holders and IPQ holders to match shares. The two suboptions represent alternative approaches to the negotiation.

Notice of Unsubscribed IPQs

If the share matching period expires without agreements subscribing all IPQs held by an IPQ holder, the IPQ holder must notify the administrator of the amount of IPQs which are not subscribed. The administrator will notify all IFQ holders of the number of unsubscribed IPQs for each IPQ holder.

Commitment of IFQs

At the end of the share matching period, an IFQ holder that has not agreed to deliver all of its shares to a processor may commit any uncommitted shares to any processor that holds unsubscribed IPQs by notifying the IPQ holder of the intent to commit shares. Receipt of the notice shall result in the subscription of IPQs. The IPQ holder shall notify the administrator on receipt of commitments for all of its IPQs. The administrator shall then notify all IFQ holders that the IPQ holder is fully subscribed.

After the share matching period, any IFQ holder may commit shares to an IPQ holder by notice to the IPQ holder. The IPQ holders will be subscribed on a first come-first served basis until the IPQ holder is fully subscribed. The notice requirement is intended to provide the administrator and all IFQ holders with notice that the IPQ holder has no available IPQs.

Initiation of Arbitration

Option 1

Any time after the end of the share matching period a committed IFQ holder can initiate arbitration by notice to the administrator and the IPQ holder. The administrator will notify all IFQ holders of impending arbitration.

Option 2

Arbitration may be initiated by any committed IFQ holder at any time between the expiration of the share matching period and

- 1. 14 days prior to the opening date of the season or*
- 2. 30 days prior to the end of the season.*

Option 3

On conclusion of a negotiated price for any shares, the IFQ and IPQ holders will notify the administrator of the completion of the contract (but not the terms). Any shares for which contracts have not been completed 14 days prior to the opening date of the season will automatically be subject to arbitration.

Joining and Exiting Arbitration

Any IFQ holder with uncommitted shares may join arbitration by notice to an IPQ holder of commitment of IFQs by providing notice to the administrator and the IPQ holder within 20 days of the date of the notice of impending arbitration. Entry of new IFQ holders to the arbitration will be limited to the amount of unsubscribed IPQs.

At no time after entry to the arbitration process may an IFQ holder withdraw from participation in the arbitration.

Arbitration could be requested at any time after a specified number of days before an opening. The process would be started by a harvester that commits to deliver harvests to a processor holding unsubscribed IPQs. To broaden the number of participants, all harvesters with IFQs that are not committed to a processor will be notified of the pending arbitration. A window of time will be designated during which harvesters will be permitted to join the arbitration by committing deliveries to the IPQ holder.

Standard for Arbitration

Option 1

The arbitration decision will attempt to make an equitable division of rents in the fishery (using the historic division of revenues as a surrogate for the division of rents for existing product forms).

Option 2

The arbitration decision will attempt to set a competitive or fair market price for crab delivered.

Option 3

The arbitrator shall consider relevant factors in making an arbitration decision, including but not limited to:

- a. Historical ex vessel prices and division of revenues*
- b. Current ex vessel prices (including prices for Class A and Class B shares recognizing the different nature of the different share classes)*
- c. Consumer and wholesale product prices for the processing sector and the participants in the arbitration (recognizing the impact of sales to affiliates on wholesale pricing)*
- d. Innovations and developments of the different sectors and the participants in the arbitration (including new product forms)*
- e. Efficiency and productivity of the different sectors (recognizing the limitations on efficiency and productivity arising out of the management program structure)*
- f. Quality (including quality standards of markets served by the fishery and recognizing the influence of harvest strategies on the quality of landings)*
- g. The interest of maintaining financially healthy and stable harvesting and processing sectors*
- h. Safety*
- i. Timing and location of deliveries*

Option 4

The primary role of the arbitrator shall be to establish a price that preserves the historical division of revenues in the fisheries while considering the following factors:

- a. Current ex vessel prices (including prices for Class A and Class B shares recognizing the different nature of the different share classes)*
- b. Consumer and wholesale product prices for the processing sector and the participants in the arbitration (recognizing the impact of sales to affiliates on wholesale pricing)*
- c. Innovations and developments of the different sectors and the participants in the arbitration (including new product forms)*
- d. Efficiency and productivity of the different sectors (recognizing the limitations on efficiency and productivity arising out of the management program structure)*
- e. Quality (including quality standards of markets served by the fishery and recognizing the influence of harvest strategies on the quality of landings)*
- f. The interest of maintaining financially healthy and stable harvesting and processing sectors*
- g. Safety*
- h. Timing and location of deliveries*

The committee discussed the standard to be applied by the arbitrator for making a decision. As a precursor to the discussion, the committee discussed the purpose of arbitration. The committee generally supports the use of arbitration as a means to protect all participants in the fishery. This end could be accomplished by establishing a base price or a formula price that could include several variables. The committee has discussed the issue at several meetings but has struggled with developing a standard that would effectively protect both parties while accommodating innovations in the fisheries. The discussion focused on a few specific standards, particularly “a competitive price” and “an equitable division of rents”. Attempting to arrive at a competitive price or an equitable division of rents was thought to be an abstraction that might be difficult for an arbitrator working with a fishery where participation is limited by fishing and processing privileges. A potential way to overcome this difficulty in dividing rents would be to use the division of revenues as a surrogate for rents. Applying an “equitable division of rents” standard, however, was also thought to have the potential to deter innovation by ensuring rents for inefficient participants. Because of the difficulties with using rents or competitive prices for the standard, Option 3 or Option 4 are proposed as alternatives by the committee. Applying an “equitable division of rents” standard, however, was also thought to have the potential to deter innovation by ensuring rents for inefficient participants. Because of the difficulties with these standards, Option 3 or Option 4 are proposed as alternatives by the committee. Both contain a non-comprehensive list of pertinent information that would be relied upon by the arbitrator in reaching a decision in place of a particular standard. The list of pertinent factors would not constrain the arbitrator from consideration of other relevant factors but would provide a starting point and foundation which could be extended by other pertinent information. Option 4 provides additional definition by directing the arbitrator to decide a price that maintains the historical division of revenues in the fishery, while considering several other factors. These additional factors would include product developments and efficiency gains, the benefits of which should generally be distributed to each sector based on the contribution of the sector to those benefits.

Terms included in the Final Offer and Evidence Considered

Option 1

Each final offer shall include the following terms plus any other pertinent terms identified by the parties:

1. *Price*
 2. *Quantity*
 3. *Quality*
 4. *Acceptable delivery dates*
 5. *Location of delivery*
 6. *Product outputs of the processor and their prices*
- (Select any or all of 1. to 6.)*

The final offer shall be:

1. *fixed values of each term, or*
2. *a formula that includes each term as a variable or fixed term and may be a revenue sharing formula.*

Each party will be permitted to submit any evidence that that party believes is relevant to the arbitration proceeding.

Option 2

Within 3 days after the decision to arbitrate the parties will meet with the arbitrator to determine:

- a. The terms to be included in the final offers to the arbitrator and any terms that can be stipulated by the parties. Terms could include the amount of crab to be delivered, the date of the deliveries, the price (which could subject to vary with delivery date, quality, and possibly other factors), quality, and any other terms deemed pertinent by the parties and the arbitrator. In addition, the form of the final offers shall be agreed. Possible forms are a fixed minimum price for crab delivered subject to the applicable terms or a price formula that includes each applicable term as a variable.*
- b. Appropriate evidence to be considered in the arbitration. This evidence could include historical ex vessel and market prices, historical division of revenues and rents, costs of harvesting and production, and any other evidence deemed relevant by the parties and the arbitrator.*

If the parties do not agree on the terms to be included in the final offers and the evidence to be submitted at arbitration, the arbitrator will decide those terms and that evidence.

The committee favors a formula price (possibly a revenue sharing arrangement) over a fixed price. A fixed price could be a barrier to the arbitration decision effectively protecting IFQ holders that do not participate in the arbitration but make share commitments after completion of the arbitration process. A formula could accommodate changes in circumstances (such as delivery times and market changes) that might be relevant in price setting but cannot be captured by a fixed price.

The nature of the final offers and evidence to be considered in final arbitration must be decided. The two options reflect different philosophy as to the development of those offers and evidence. The first option would establish a set of specific terms to be included in final offers and specific evidence to be considered by the arbitrator. The committee believes that the terms listed in Option 1 are appropriate terms to arbitrate. The second option would allow the parties together with the arbitrator develop the terms of the final offers and the relevant offers on a case-by-case basis.

Submission and Selection of Final Offers

Option 1

The IPQ holder and each IFQ holder participating in an arbitration proceeding will submit a final offer. For each IFQ holder, the arbitrator will select from the IPQ holder's final offer and the final offer of that IFQ holder. IFQ holders may submit collective bids at their discretion.

Option 2

The IPQ holder will submit a final offer to the arbitrator. All IFQ holders participating in the arbitration will collectively submit a final offer to the arbitrator. The arbitrator will choose one of these two final offers, which will apply to all participants in the arbitration. The terms of the offer submitted by the IFQ holders will be determined by a majority vote of the IFQ holders participating with:

1. one vote per IFQ
3. one vote per IFQ holder

Option 3

Once 50 percent of the unaffiliated IPQs of a processor are subscribed, committed IFQ holders will have the option of collectively entering binding arbitration by selection of an agent to represent the IFQ holders. To proceed collectively, the agent must be selected by a 50-75 percent vote of subscribed IFQ holders with:

1. one vote per IFQ
2. one vote per IFQ holder

The IPQ holder and the agent of the IFQ holders will each submit a final offer. The arbitrator will select from the IPQ holder's final offer and the final offer of the IFQ holder's agent. The processor and all IFQ holders delivering to the processor will be bound by the finding of the arbitration.

Suboption: In the event that the IFQ holders have not selected an agent to represent them in arbitration within 14 days of the opening of a season, IFQ holders may individually initiate binding arbitration subject to the rules of Option 1.

Under Option 1 all IFQ holders participating in binding arbitration can act as an individual, with one final offer per IFQ holder. After the participating harvesters are fully identified, the arbitration will occur, with each participant submitting a single best offer. The IPQ holder will submit a single offer and each IFQ holder will submit a single offer. For each IFQ holder, the arbitrator must choose between the last offer of the IFQ holder and the IPQ holder.

Option 2 would require all IFQ holders to act collectively submitting a single bid applicable to all shares involved in the proceeding. Two rules are proposed for defining the selection of a final offer by participating IFQ holders.

Under Option 3, arbitration is conducted collectively by IFQ holders, once a specified number of IFQ holders consent to the identified agent. All IFQ holders that deliver to a processor after binding arbitration are bound by the findings of the arbitration.

Transferability of benefits of arbitration to other IFQ holders

If an IFQ holder does not join in an arbitration with an IPQ holder, but ultimately delivers crab to the IPQ holder, the IFQ holder will receive at a minimum, the terms of the:

1. lowest arbitrated price with that IPQ holder
2. mean arbitrated price with that IPQ holder
3. highest arbitrated price with that IPQ holder
4. the IFQ holder's choice of the final offers selected at the arbitration with that IPQ holder.

Any price applied to deliveries by an IFQ holder not participating in arbitration will be subject to time and delivery limitations and other terms specified in the selected final offer.

Suboption: In addition, the IPQ holder shall retain 2 percent or \$0.05 per pound, which shall be used to defer the shared costs of administration of the program.

Any IFQ holder that does not join the arbitration proceeding will be entitled to deliver harvests to the IPQ holder receiving a minimum price established by the arbitration. Allowing non-participants (who hold Class A IFQs) the benefit of the arbitrator's decision has the effect of dispersing the benefits of arbitration across the fleet. An arbitration decision, however, would bind only the participating IPQ holder. If arbitration system is adopted that permits IFQ holders to submit several different offers several different arbitrated prices could exist. The choice of which offer will apply to an IFQ holder that did not participate in the arbitration process is important in establishing the protection of IFQ holders (particularly if a system with a single arbitration each season is adopted). A few alternatives are proposed. The highest, lowest or mean price could be applied. The difficulty with these prices is that if arbitration establishes formula prices, the highest, lowest, and mean offer could vary over time subject to changes in the different parameters of the formula. Allowing the IFQ holder to select the applicable price would overcome this difficulty. In addition, the chosen price would permit the IFQ holder to obtain the full benefits of the arbitration process without participating. Arguments that this is excessive might not be appropriate since the offer was in fact selected by the arbitrator. Any offer applied to a nonparticipating IFQ holder would be applied to the IFQ holder subject to any limitations and other terms in the offer. For example, if a price is contingent on delivery during a certain window of time or a limited quantity, those terms would apply. These limitations could be critical to an IPQ holder purchasing crab for a particular customer who demands a limited quantity of crab at a specific time. The suboption could be applied in the case of the fleet collectively arbitrating the price in a single proceeding. This provision would be used to compel an IFQ holder to participate in arbitration. Since the person would benefit from arbitration, the provision is intended to provide some compensation to those that participate.

Limits on the Use of Binding Arbitration

Option 1

Each IPQ holder shall be limited to one arbitration per season with one arbitrator.

Option 2

Each IPQ holder can be subject to arbitration initiated by any IFQ holder that commits to deliver to the IPQ holder 0-40 percent of the IFQs held regardless of whether that IPQ holder has participated in other binding arbitration proceedings in that season. All arbitration proceedings will be decided by the single arbitrator selected for that IPQ holder.

Option 3

An IPQ holder is required to participate in only one arbitration per season, unless the season exceeds 60-90 days in which case the IPQ holder may be required to participate in a second arbitration 30 days before the end of the season, if the IPQ holder has unsubscribed shares.

Option 4

An IPQ holder may be brought to arbitration at least once in any season, but no more than twice in a season. A second arbitration may be initiated at any time 60-90 days or more after the decision in the first arbitration provided the IPQ holder has:

- 1. received commitments for less than 80-90 percent of its unaffiliated IPQs at the time of the first arbitration and/or*
- 2. has in excess of:*
 - a. less than 75,000 pounds of unaffiliated, uncontracted IPQ for a of TAC < 3 million pounds,*

- b. 75,000 to 150,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 3-8 million pounds,
- c. 150,000-250,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 8-10 million pounds,
- d. 250,000-500,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 10-25 million pounds,
- e. 500,000-1,000,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 25-75 million pounds,
- f. 1,000,000-2,000,000 pounds of unaffiliated, uncontracted IPQ for a of more than TAC 75 million pounds

The IFQ holder initiating the arbitration has committed to deliver to the IPQ holder at least 0-40 percent of that IFQ holders total (or uncommitted) IFQ holdings and/or at least

- a. 20,000 pounds of unaffiliated, uncontracted IPQ for a of TAC < 3 million pounds,
- b. 20,000 to 40,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 3-8 million pounds,
- c. 40,000-60,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 8-10 million pounds,
- d. 60,000-75,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 10-25 million pounds,
- e. 75,000-150,000 pounds of unaffiliated, uncontracted IPQ for a of TAC 25-75 million pounds,
- f. 150,000-250,000 pounds of unaffiliated, uncontracted IPQ for a of more than TAC 75 million pounds

In the second arbitration, all notice of rules and joinder of additional IFQ holders rules applicable to the first arbitration shall apply.

The first option contemplates a single arbitration for each IPQ holder. This could be used to limit the expense of arbitration to processors. The second option is intended to provide a more individual protection to each harvester's interests. The second option might be preferable if non-participating IFQ holders cannot derive benefits from arbitration proceedings undertaken by others. The third option is intended to overcome disruptions to business planning that could occur if the IPQ holder has to participate in multiple arbitrations. In most fisheries, one arbitration per IPQ holder should be sufficient to establish a fair price. In a long fishery, a second arbitration might be reasonable. In a long fishery, the parties might even wish to revisit a price (even a formula price) if changes in the market or fishery justify a price change. The fourth option is intended to permit a second arbitration for IFQ holders that are late to commit. The requirement of outstanding unsubscribed IPQs would ensure that the arbitration is for a significant amount of deliveries. In addition, the requirements are intended to allow arbitration in cases where the first arbitration could be for a limited amount of the processors IPQs and therefore may be inadequate for establishing a price for all IFQ holders.

Payment for the Arbitration and Market Analysis

The payment for the market analysis, the arbitrators, and the administrator will be shared equally by the two sectors. Within each sector the analysis shall be paid for on a pro rated basis determined by the shares held by the members of the sector. Cost shall be shared by all participants in all fisheries.

Participants in the binding arbitration will each pay the costs of their own participation. Within the harvest sector, payment shall be pro rated based on the number of IFQs committed to the participating processor.

Option 1

For shared costs, the payment of those costs shall be advanced by IPQ holders. The IPQ holders will collect the IFQ holders' portion of the shared costs by adding a pro rated surcharge to all deliveries of Class A crab.

Option 2

Administration of payments will be accomplished by allocation of a share of the cost recovery funds to the binding arbitration program.

Costs of the arbitration program should be shared by the sectors. Each sector, however, should bear the cost of its own participation and representation. The committee favors the use of Option 1 to avoid unnecessary complications and administrative burdens of involving RAM or another agency in the collection and disbursement of arbitration funds. If private administration of this option proves unworkable, industry may request that the Council revisit this issue.

Enforcement of the Arbitration Decision

The decision of the arbitrator will be enforced by:

- 1. civil damages*
- 2. specific performance*
- 3. forfeiture of unused IFQs or IPQs in the fishery for the following season (1 year use-it-or-lose-it) subject to hardship exceptions*

Effective protection will also require careful identification of available remedies for enforcement of the arbitration. Both harvesters and processors could benefit from the certainty that arbitrated findings may provide, if enforcement is adequate and available to both sides. The committee discussed three potential forms of damages that could be made available to parties suffering a breach of the arbitrator's decision B civil damages, specific performance, or loss of IFQs or IPQs. The committee concluded that civil damages should be adequate for enforcing arbitration decisions. Under civil law damages would be based on harm and therefore would be determined based on the specific circumstances. In addition, civil damages would require parties to take reasonable steps to mitigate damages, so participants could not take advantage of a breach by another party. The use of specific performance receive little discussion as most of the committee believed that forcing a harvester to fish or a processor to process would be infeasible. A use-it-or-lose-it provision was thought to be a potentially elegant solution to the problem. Such a provision could be implemented in two ways. First, a No fault@provision would result in both parties losing their shares for a year. The committee, however, concluded that the loss of shares could impact the two parties differently, offsetting the bargaining positions and balance of market power. Alternatively, a system could forfeit the shares of the breaching party for a year. A fault based system, however, could be difficult to administer since adjudication and appeals processes could be time consuming. In addition, adjudications could overly complicate administration of annual share allocations for RAM. For these reasons, the A use-it-or-lose-it@provision was viewed as potentially problematic. The committee, however, believes that the Council might be interested in having the ability to implement a use-it-or-lose-it@provision in the future should problems arise in the enforcing arbitrated prices through civil damage claims.

Oversight and Administration of the Binding Arbitration Program

An effective binding arbitration program will require careful oversight and administration. A system of rules will define the program. The realization of the program's goals will depend in large part on whether these rules function effectively and have their intended effects. To mitigate unintended effects, the program will need to be adaptable. Adaptation is particularly important given the novelty of the program. Two general approaches to administration of the program are possible. Under the first approach, NOAA Fisheries and the Council would have a very active role in administering and monitoring the details of the program. Under the second approach, favored by the committee, industry would be required to comply with reporting requirements providing NOAA Fisheries and the Council with the information necessary to assess the success of the program and to rectify fundamental shortcomings in the program. Administration would be undertaken primarily by industry, avoiding government involvement in pricing setting and providing greater flexibility to adopt agreed to modifications without government action. The committee supports the following statement concerning administration and oversight:

Oversight and administration of the binding arbitration should be conducted in a manner similar to the AFA cooperative administration and oversight. System reporting requirements and administrative rules should be developed in conjunction with the Council and NOAA Fisheries after selection of the preferred program.

Under the first administration alternative, NOAA Fisheries would oversee the details of the program. Administration under this approach presents several problems, many of which are raised in the legal analysis of binding arbitration that appears in Section 3.7.1 of the Bering Sea/Aleutian Islands Crab Rationalization Program Alternatives. First, the Council and NOAA Fisheries would be required to develop detailed rules governing the binding arbitration process, using the standard APA regulatory process. Once the program is implemented, NOAA Fisheries would oversee the day-to-day operation of the program, attending to the details of any required notices and possibly overseeing hearings. The agency would be required to follow the public process requirements of the APA, resulting in very long response times. This level of oversight is likely to be expensive for the agency and could result in significant agency involvement in the details of price negotiations. Extensive government involvement in private contracts could be viewed as overly intrusive. This approach would also require the Council and NOAA Fisheries to fine tune the rules of the program. Some of these changes could be fundamental to the program and therefore are the province of the Council and are best decided through the Council process. Other provisions, however, are likely to be less controversial and pertain to the general operation of the program. For example, the parties may decide that a notice period is either too long or short, interfering with the parties' ability to reach a negotiated agreement. Altering such a provision through the Council process or through some other procedure administered through NOAA Fisheries would likely be costly, cumbersome, and time consuming and could be an obstacle to the program achieving its objectives.

The second alternative for administration and oversight would be patterned after NOAA Fisheries administration of the AFA cooperatives. NOAA Fisheries oversight of the cooperatives focuses on elements of that program that are important to public management of the fisheries. Cooperatives are required to report harvests, bycatch, discards, monitoring procedures, and penalties in an annual report to the Council and NOAA Fisheries. On a more general level operations of the cooperatives are overseen by requiring cooperatives to file a copy of the cooperative's contract 30 days prior to beginning fishing under the contract. These reporting requirements provide NOAA Fisheries and the Council with information necessary for

determining whether the program is functioning effectively. In the case of binding arbitration, requirements could be developed for the filing of signed arbitration agreements and price contracts, best offers, identifying the agreed upon arbitrator and independent market analyst, and similar general requirements of the program. General reporting requirements and a general oversight role for NOAA Fisheries should provide both NOAA Fisheries and the Council with the information necessary to determine whether the program is serving its stated purpose without creating cumbersome requirements for modification and operation of the program. Under this model, minor modifications could be adopted by the parties without direct involvement of NOAA Fisheries or the Council. The scope of these permitted changes could be defined by the Council and NOAA Fisheries and could be limited to aspects of the program that are less appropriate for government involvement. Limiting government involvement will remove some of the restrictive requirements of public decision making. The parties could petition the Council for changes in the program, if they believed that it was not serving its purpose or needed modification. This approach should be favored because it will limit government involvement in price formation and simplify modifications that are agreeable to both parties.

Alternative Structures for Binding Arbitration

Alternative Structure I

Summary of the Model: Single arbitration for each IPQ holder with a mandatory collective bargaining association for all IFQ holders delivering to that IPQ holder.

Steps

1. Early preseason - IFQ holders commit the delivery of shares to IPQ holders. Matching of shares will occur on a first come-first served basis.
2. Early preseason – IFQ holders and IPQ holders select market analyst by mutual agreement of the two sectors.
3. 45 days prior to the season - IFQ holders committed to a processor meet to select a representative. Voting rules for the selection process must be defined. IFQ holders that participate in the vote or commit shares after this date may not revoke share commitment.
4. 40 days prior to the season - Representatives of the IPQ holder and IFQ holders meet to select an arbitrator.
5. 30 days prior to the season - Market report is presented by the market analyst. Followed by a negotiation period between the two representatives.
6. 20 days prior to the season - Arbitration is commenced if no agreement is reached. The first meeting with the arbitrator is conducted to discuss evidence to be considered and the form of the two offers. Negotiations proceed after this initial meeting. The arbitrator need not be involved in the negotiations, but if the parties agree then the arbitrator may attend some of the negotiation sessions.
7. 20 days to 10 days prior to the season - IFQ holders with uncommitted shares may join the proceedings by notifying representatives of intent to commit shares to the processor.
8. 10 days prior to the season - If no agreement is reached the two representatives submit their best and final offers.
9. 7 days prior to the season - The arbitrator chooses one of the two final offers.
10. Thereafter - Option - IFQ holders without committed shares may commit shares to the processor, receiving the benefit of the arbitrator's findings (possible charge on each pound delivered to recoup costs of arbitration).

Alternative Structure II

Summary of the Model: Any QS Holder, or group of QS Holders, may arbitrate ex-vessel price with one processor. All arbitrations with that processor will occur at one time and will use a single arbitrator.

Steps

1. Arbitrator. All QS Holders interested in negotiating price with Icicle will get together and talk with Icicle about the selection of the arbitrator. An arbitrator will be selected by the QS Holders and Icicle together. The Arbitrator will do all arbitrations that occur with Icicle.

2. Pre-season. Assume that four QS Holders decide among themselves to negotiate a price with Icicle Seafoods for opilio. (Any number of QS Holders may negotiate and arbitrate together with Icicle, up to the level of Icicle's PQ).
3. Negotiations. The Four QS Holders contact Icicle and begin price discussions. If they are successful, they agree on a deal with Icicle and sign a contract containing the price, quantity of opilio, place and time of delivery and similar conditions. If they are not successful by fourteen days before the season opening (assume January 20), they go to Step Four.
4. Contact Arbitrator (January 6). The four QS Holders call the Arbitrator, tell him that their negotiations with Icicle have failed and that they want to go to arbitration. (If no QS Holders notify the arbitrator at this point, the arbitration can be triggered later by a QS Holder or not used at all if no QS Holder wants to do so).
5. Notice and Schedule. The Arbitrator notifies, in writing, all QS Holders that there will be an Icicle arbitration beginning on January 10. Some other QS Holders decide that they want to arbitrate with Icicle also. The Arbitrator allows other QS Holders to arbitrate, up to the level of Icicle PQ pounds. Once the arbitration begins on January 10, Icicle and the QS Holders who have decided to arbitrate with Icicle are bound to the arbitration decision.
6. Arbitration. On January 10, the Arbitrator meets with the four QS Holders to hear their proposal and any supporting arguments. He may offer them the chance to submit something in writing. The Arbitrator also meets separately with any other QS Holders who want to arbitrate with Icicle, and he meets separately with Icicle. The Arbitrator must choose between the final offers of the Four QS Holders and of Icicle; he may not compromise in the middle. By January 16, the Arbitrator makes his decision and notifies the Four QS Holders and Icicle. The Arbitrator also makes the decisions for all other QS Holders who will deliver to Icicle.
7. Later Opt-In. Assume that another QS Holder did not arbitrate with any processor, but wants to deliver to Icicle. He may simply negotiate a price with Icicle. If negotiations fail, he may notify the Arbitrator that he wants to be covered by an arbitration decision already made with regard to Icicle. If he meets the conditions (Icicle has sufficient PQ to cover the opilio he wants to deliver; place and time of delivery fit, etc.), the Arbitrator will authorize him to be covered. He would not have an opportunity to arbitrate at that point. (There are sub-options on whether this QS Holder could pick and choose among all of the Icicle arbitration decisions, only the lowest, or only a middle price).

Alternative Structure III

Summary of the Model: Any QS-holder may call for multiple arbitrations per processor at designated times agreed upon before the season opens

Steps

1. Cooperative price negotiations: Commence 29-days before season opens
 - Alt. 1: Pre-season price negotiations are completed successfully (contract includes provision for new binding arbitration on 1st of each month if triggered by either QS-holder or PQS-holder)
 - Alt. 2: Pre-season price negotiations break down and Arbitrator is selected and hired at least 2-weeks before season opens. QS-holder and PQS-holder agree up front to allow binding arbitration

on the 1st of every month that the season remains open and the PQS-holder still has unused PQS.

2. Pre-season binding arbitration: Begins at least 15-days before season opens using latest market report. Parties formally agree to abide by arbitrators decision, which includes, up front, the right to invoke further binding arbitrations on the first of each month. Arbitrator immediately publishes roster of the parties bound by the arbitration. All parties submit data to arbitrator by 10-days before season opens. Arbitrator interviews all parties by 7-days before season opens. Arbitrator accepts final bid from each party by 6-days before season opens. Arbitrator announces results of binding arbitration by end of the 5th day before season opens.
3. Opt-in: With the consent of the PQS-holder, any QS-holder may opt- in to the binding arbitration agreement (which provides for new binding arbitrations at the 1st of each month) as long as the season remains open and the PQS-holder still has unused PQS. The QS-holder commits to the binding arbitration one delivery at a time and reserves his right to deliver subsequent loads to whoever offers the best overall price.
4. In-season, scheduled arbitrations: Either party may invoke further binding arbitration on the 1st of each month if dissatisfied with their advance price or final compensation for deliveries made during the previous month. No backward price adjustments will be made for either party, however. By the 3rd day of the new month all parties will submit to the arbitrator any new price data. The Arbitrator will be authorized to select any price within 10%, up or down, of the last price paid before the newest arbitration began. By the 5th day of the new month, the Arbitrator will announce the new ex-vessel price, which will prevail at least until the end of the new month.

Alternative Structure IV

Summary of the Model: Any QS Holder, or group of QS Holders, may call for arbitration of ex-vessel price with one processor who holds IPQs. (Assume season starts January 20th.)

Steps

1. Market Report: Market report 30 days before season. (December 24th).
2. Arbitrator: The arbitrator will be selected by mutual agreement between the QS holders or IPQ holder 45 days before the start of the season. QS holders that have committed to deliver to the PQ holder will be the only ones to be able to select the arbitrator. (What per cent of QS holders have to be committed to select arbitrator?) (December 9th)
3. Pre-Season: Any QS holder or group of QS holders may settle a price with an IPQ holder.
4. Contact Arbitrator: Any QS holder or group of QS holders can contract and request arbitration 14 days before the season begins. (January 6th)

Sub options are noted below:

- a. Arbitration with that processor may be requested by any QS holder or group of QS holders.
- b. Arbitration may only occur when ___% of committed QS request arbitration.

5. Notice and Schedule : No more than 5 business days after arbitrator is contacted, the Arbitrator must notify all QS holders there will be an arbitration with an IPQ holder. Any QS holder that commits to deliver to the IPQ holder may join the arbitration. (January 13th)
6. Arbitration Deadline : Immediately following the date deadline for contacting all QS holders, the Arbitrator meets with any QS holder or groups QS holders to hear their proposal and any supporting arguments. He may offer them the chance to submit something in writing. He meets separately with the IPQ holders to hear their proposal and any supporting arguments. The Arbitrator must choose one final offer for each arbitration. (pick one final for each QS holder that submitted a price or group of QS holders and the IPQ holder offer). Four days prior to the season opening date, January 16th, the Arbitrator makes his decision and notifies QS Holders and the IPQ holder. (January 16th)
7. Initiation of Arbitration: At any time during the season a QS holder may commit to deliver to an IPQ holder and request arbitration. The arbitration schedule would follow Notice and Schedule time frame identified here.

Arbitration Structure V

Summary of the Model: A single annual fleet-wide arbitration will be used to establish a revenue sharing formula under which the revenue generated at the first arm's length sale of crab products is distributed between the affected harvester(s) and processor(s).

Steps

1. Arbitrator. Representatives of the harvesting and processing sectors select an arbitrator. If the two sectors are not able to agree, each sector will choose an arbitrator, and the two so chosen will choose a third arbitrator.
2. Market Analyst. The arbitrator(s) select a market analyst, in consultation with representatives of the harvesting and processing sectors.
3. Data Gathering. The arbitrator(s) and the market analyst gather data relevant to determining the historical distribution of crab product revenues between harvesters and processors.

Option 1: They also determine (i) the vertical integration of each IPQ holder, and value accrued by the processor at each point up to and including the first point at which it sells on an arm's length basis to a third party (which will serve as the basis for the weekly composite price); and (ii) the variety of crab product forms being produced and the market percentage represented by each product form.

Option 2: The arbitrator(s) and the market analyst gather data they determine necessary for the task, including: (i) crab processing cost structures for each IPQ holder; (ii) vertical integration of each IPQ holder, and value accrued by the processor at each point up to and including the first point at which it sells on an arm's length basis to a third party (which will serve as the basis for the weekly composite price); and (iii) the variety of crab product forms being produced and the market percentage represented by each product form.

Suboption: Cost information from both sectors could be required to determine the distribution of revenues from product developments and innovations.

4. Initial Discussions/Mediation. Not less than 90 days before the opening of the first crab fishery of the upcoming year, the arbitrator(s) meet with each processor individually (to address antitrust concerns) and with fleet representatives collectively to discuss the information gathered and to receive any additional information the parties consider relevant.

Option 1: The arbitrator(s) seek consensus among representatives of the harvesting and processing sectors regarding: (i) the third party transactions that will establish the weekly composite price; and (ii) the historical revenue share per sector.

Option 2: The arbitrator(s) seek consensus among representatives of the harvesting and processing sectors regarding: (i) the third party transactions that will establish the weekly composite price; (ii) a formula under which a scaled percentage of the weekly composite price is allocated to the processor component, with the balance being allocated as the ex vessel price to fishers; and (iii) a seasonal advance amount, which is paid by the processor at delivery.

5. Arbitration. Not less than 30 days before the first crab fishery opens, the arbitrator(s) stipulate the above-referenced components, if they have not been determined through mediated negotiation.
6. Implementation. Throughout the year, the market analyst surveys the crab product market, and produces a weekly composite price based on the survey structure developed by the arbitrator(s). The weekly composite price is a single price per species, based on the weighted average of the arm's length transactions in products produced from that species.

Option 1: For deliveries not subject to a contract, the fisher receives the stipulated percentage of the most recently announced weekly composite price.

Option 2: For deliveries not subject to a contract, the fisher receives the stipulated advance per pound at delivery, and receives a per pound settlement based on the composite price in effect for the week(s) within which products from the fisher's delivery are sold.