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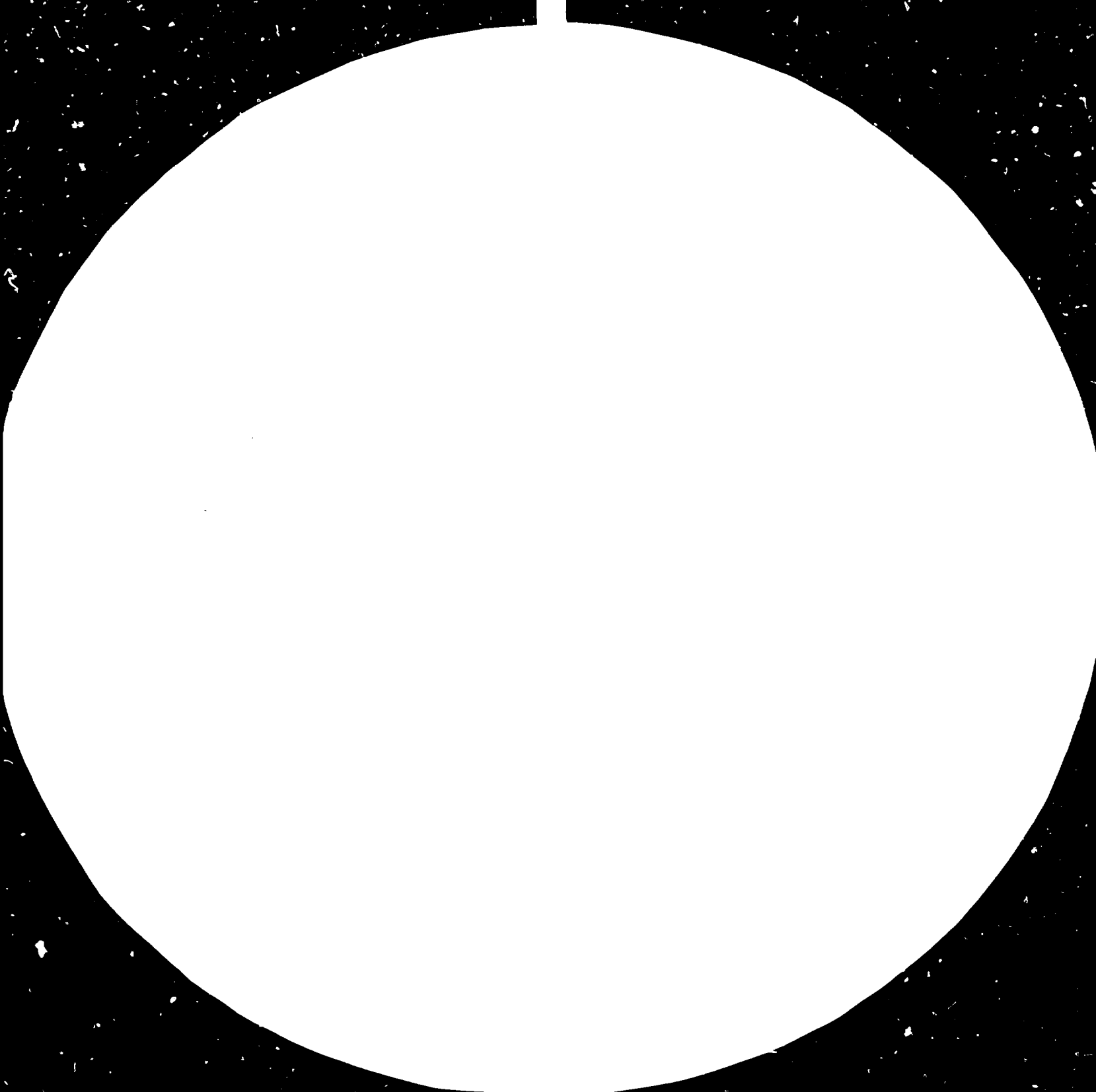
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TRENDS AND ISSUES IN CONTRACTUAL ARRANGEMENTS  
IN THE FOOD-PROCESSING INDUSTRY \*

Information paper

prepared by

Jerzy Cieslik  
UNIDO Consultant

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## INTRODUCTION

1. In the food manufacturing industry in developing countries the involvement of local enterprises in various forms of international co-operation was marginal with the exception of export-processing enclaves. This was mainly due to the limited scale of operation, simplicity of technology used and lack of experience of the local partner. In recent years, however, enterprise level co-operation has expanded mostly as a result of the rapid increase of production and sales of branded food products in developing countries. Consequently, an increasing number of food-processing companies from developing countries are entering into contractual arrangements of different types with foreign partners.

2. The First Consultation on the Food-Processing Industry, held at The Hague, Netherlands, in November 1981, recommended that "UNIDO prepares a checklist of specific elements suggested for inclusion in agreements, permitting efficient co-operation between the parties based on mutual benefit and including training as an important element".<sup>1/</sup>

3. As a first step towards complying with the recommendation of the Consultation, the UNIDO secretariat has undertaken an empirical study of existing contracts in order to assess the practice of developing countries entering into contractual arrangements with foreign counterparts in the food-processing sector. This empirical survey should provide a framework for the identification of:

- The principal characteristics of contractual arrangements used in the food-processing sector;
- The functions, structure and common elements of the most common types of arrangements;
- Critical issues as to the needs of the local partner in developing countries entering into such arrangements.

4. In order to collect background information for this study the UNIDO secretariat requested government institutions from developing countries

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<sup>1/</sup> Report of the First Consultation on the Food-Processing Industry, The Hague, Netherlands, 9-13 November 1981. UNIDO, ID/278, page 6, para. 2.

participating in the Technological Information Exchange System (TIES)<sup>2/</sup> to share their experience on contractual arrangements used in the food-processing sector with special emphasis on vegetable oils and fats, dairy, fruit processing, meat, and sugar industries.<sup>3/</sup> This study is based on the following data:

- Basic information (including type of contract, industry branch, duration, origin of the foreign partner, mode and level of payment) on 198 contracts from Andean Pact countries, Argentina, Brazil, India, Malaysia, Nigeria and South Korea. This information has been used primarily for identifying general trends and principal characteristics of contractual arrangements in the food-processing sector;
- Copies of 16 contracts and combined contracts. The access to the copies of contracts enabled more detailed analysis of their structure, functions, common elements as well as identification of the critical aspects of contractual arrangements used in the food-processing industry.

5. Among 198 contracts included in the sample, the dairy industry accounted for 22 per cent of the total, vegetable oils and fats industry for 15 per cent, fruit processing industry for 10 per cent, meat industry for 10 per cent and sugar industry for 7 per cent. The relatively high share of ISIC group 3121 "Manufacture of food products not elsewhere classified" (16 per cent) can be explained by the fact that this group comprises of various branded products (infant foods, coffee and tea processing, spices) manufactured traditionally with the use of foreign technology and involving direct equity participation.

6. Among foreign partners entering into contractual arrangements in the food-processing sector, firms from the United States of America and Japan played a dominant role followed by those from other developed market economy countries including Great Britain, Netherlands and Switzerland.<sup>4/</sup>

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<sup>2/</sup> Government institutions responsible for evaluation and registration of technology transfer agreements often called technology transfer registries.

<sup>3/</sup> The analysis has been limited to ISIC category 311-312 "Food manufacturing".

<sup>4/</sup> In a number of cases both partners originated from developing countries.

7. The findings and conclusions contained in the present document should facilitate the elaboration of an extensive and detailed checklist of specific elements to be included in contractual arrangements. The paper also aims at exemplifying the legal implications of international co-operation with a view to draw attention of policy makers and industry to critical aspects of contractual arrangements in the food-processing sector.

#### I. PRINCIPAL CHARACTERISTICS OF CONTRACTUAL ARRANGEMENTS USED IN THE FOOD-PROCESSING SECTOR

##### 1. Types of contractual arrangements

8. The analysis does not cover the entire spectrum of existing contractual arrangements, due to limitations of data available.<sup>5/</sup> Those included in the survey refer essentially to the following categories of contracts commonly used in the food-processing industry:

(a) Technical assistance and licensing agreements: This was found the most common contract type.<sup>6/</sup> Under such an arrangement the granting of know-how and/or trademark (patent licences were less common) is often supplemented by the provisions for rendering various services necessary for the effective assimilation of the acquired technology. Typical "supporting" collaboration arrangements are production supervision, administrative supervision, training, and management of construction set-up.

(b) Technical service agreements including management contracts: Those are agreements governing provision of various services without transmission of property rights such as consulting, engineering, marketing, management

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<sup>5/</sup> Several important categories of contracts such as turn-key deliveries, contracts for the supply of machinery and equipment, buy-back arrangements, etc. have not been included in the analysis as they were not subject of approval by technology transfer registries. Consequently, the information on such arrangements was not available.

<sup>6/</sup> More than half the agreements in the sample belonged to this category.



services, etc.<sup>7/</sup> Within this group the management contract clearly emerges as a distinct category due to the long-term, day-to-day relationship between partners.

(c) Pure licensing agreements: The pure licensing agreements (in most cases trademark licences) containing provisions relating exclusively to the transmission of industrial property rights between licensor and licensee.<sup>8/</sup> Trademark licences are usually granted for branded products such as infant foods, speciality food items, processed tea, coffee, etc.

(d) Joint venture agreements: A clear distinction has to be made between joint venture agreements and the situation where the equity capital is being shared between local and foreign partners without a formal agreement.<sup>9/</sup> Although joint equity participation was found in approximately 20 per cent of all contracts, in a limited number of cases the rights and duties of partners had been defined in the joint venture agreement.

9. The empirical analysis revealed also that combinations of contracts are quite common in the food-processing sector. In many cases more than one contract concluded with the same foreign partner is linked with a given investment project. In addition the contractual arrangements are often combined with equity control (with or without formal agreement) of the local enterprise by the foreign partner. Consequences of such combinations are discussed in detail in Chapter II.

## 2. Contract duration

10 The survey revealed a clear trend as to the duration of contracts: approximately 60 per cent of all contracts have been signed and approved by

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<sup>7/</sup> Approximately 10-15 per cent of all contracts surveyed belong to this group.

<sup>8/</sup> Pure licensing agreements account for less than 10 per cent of the total samples.

<sup>9/</sup> An additional, distinct category is the "contractual joint venture" which relates to the situation when pooling of resources takes place without equity sharing

the registries for a period of 5 years. Shorter duration was found in agreements covering engineering and consultancy services. On the other hand there were very few contracts exceeding a period of 10 years. The tendency to limit the contract duration to a maximum of 5 years appears to be the result of government intervention in the process of technology transfer with a view to avoiding excessive payments beyond the period required for the effective assimilation of technology. In the case of justified need for longer duration, a contract extension is usually considered upon evaluation of the results achieved during the initial period.

3. Royalties and payments

11. With respect to the mode of payment applied in the contractual arrangements in the food-processing sector, it has to be recalled that the majority of contracts surveyed are of a technical service and licence type where royalty is the usual form of payment. It was found that in 43 per cent of the contracts only royalties were stipulated, whereas in 21 per cent of the contracts the foreign partner has been remunerated in the form of fees (lump sum, initial fee, fee payed in installments, etc.). The contracts where royalties were combined with a fee-type payment accounted for only 5 per cent of the total. For the remaining 31 per cent either no payment was stipulated or reliable information was not available.

12. Among contracts where the payment of royalties was involved the breakdown by the royalty rate was the following:

Royalty rate (%)	Per cent of the sample
less than 1%	7.5
1-2.9%	46.2
3-4.9%	23.8
5-6.9%	17.5
7-9.9%	2.5
10% or more	2.5
	<hr/>
	Total 100.0

13. In the majority of contracts the royalties were charged at a level between 1.5 and 3 per cent. As a rule, the fixed royalties were applied notwithstanding the level of sales or production volume. Except for a few cases, the value of net sales served as a basis for calculating the amount of payment due to the foreign partner.

4. Partners involved

14. Information obtained from selected developing countries indicate that transnational corporations dominate as partners in the contractual arrangements in the food-processing industry, especially in the large projects involving substantial amount of capital, mass-scale technology, marketing and managerial experience. The equity control which was found in the 20 per cent of contracts was most typical in the case of such projects.<sup>10/</sup> On the other hand state-owned as well as small- and medium-sized enterprises were less visible as partners on both sides (i.e. from developed and developing countries).

II. THE STRUCTURE, FUNCTIONS AND COMMON ELEMENTS  
OF CONTRACTUAL ARRANGEMENTS

1. Introductory remarks

15. In this Chapter the contents of contractual arrangements are analysed in general terms in order to identify major sections, sequence of contractual provisions, etc. This should provide a framework for defining the structure, functions, common elements and modalities of agreements most often used in the food-processing industry. The contracts surveyed are considered the appropriate legal tools for expanding manufacturing of processed food products in developing countries. Such an approach has essential methodological implications: First, in the case where two or more contracts are associated with a given project, they were evaluated jointly despite the fact that each contract represented formally a separate legal entity. Secondly, from the

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<sup>10/</sup> The more detailed information obtained from Brazil indicated that among the 20 largest contracts in the food industry concluded during 1965-1980, 11 agreements were signed between parent (usually TNC) and majority-owned subsidiaries and an additional 4 agreements between parent and minority-owned partners.

point of view of project implementation, agreements signed between parent and subsidiary companies usually have different functions than similar arrangements concluded between unrelated partners. Consequently, the question of equity control of the recipient enterprise by the foreign company providing technology and/or services has been taken into account as an essential factor in the analysis.

2. Technical assistance and licensing agreements

16. The composite agreement of this type is most often used as a legal tool for granting property rights, transfer of know-how and the rendering of technical services between unrelated partners. In general, agreements within this group are found to be well structured and there was substantial degree of conformity as to the incidence and sequence of major sections and sub-sections. The common groups of provisions are the following:

- recitals;
- definitions;
- object and scope of the contract;
- obligations and scope of services provided by the supplier;
- remuneration of the supplier;
- duration, extension and termination of the agreement;
- quality control;
- guarantees;
- arbitration;
- governing law.

17. As to modalities and specific elements, the incidence of two separate but interlinked agreements (technical assistance and licence) should be mentioned first. Such cases may create problems for government agencies approving the agreements as the existing linkages might be easily overlooked. Secondly, such arrangements are often combined with minority equity participation. Thirdly, substantial differences are found as to the level of detail in defining the obligations and scope of services to be provided by the licensor. Finally, in some cases, the incidence of restrictive provisions such as a non-competition clause, ban on exports, etc. have been observed.

3. Pure licensing agreements

18. Pure licensing agreements are usually concluded between parent and majority-owned subsidiaries. Under such circumstances it is evident that the

major function of these agreements is to protect the position of the foreign partner (usually TNC) on the domestic market, and to strengthen their bargaining power vis-à-vis local partners.

19. A substantial degree of standardization is found with respect to the structure and contents of pure licensing agreements: The major common provisions included:

- recitals;
- right to use trademark;
- adherence to quality standards;
- inspection rights;
- payment conditions;
- duration, extension and termination of the agreement;
- restrictive clauses (no use of similar trademarks, no sales of competitive products, restrictions on exports, cancellation of the use of trademark after termination of the agreement);
- arbitration;
- governing law.

20. In general, a one-sided formulation of these agreements has been noted. This is reflected in the inclusion of numerous provisions protecting the interest of the licensor and a lack of provisions specifying the scope and type of services to be provided by the foreign partner in order to launch the manufacturing of the licensed product.

#### 4. Technical service agreements

21. The technical service agreements surveyed were quite diversified which is the result of their linkage with different types of investment projects and stages of implementation. Consequently a broad variety of services is covered by such agreements, and it was therefore difficult to identify common elements.

22. There seems to be a lack of standard formats as the majority of technical service agreements appears to be inadequately formulated. The contracts were badly structured, important provisions missing and the sequence of clauses often haphazard. Standard formats in the form of checklists could be of assistance to enterprises from developing countries entering into technical service agreements with foreign partners.

5. Management contracts

23. The majority of management contracts in the sample surveyed were signed by different local companies with the same supplier of managerial services: Those contracts are well elaborated and almost identical. The major sections and sub-sections include:

- Scope of services to be provided by the supplier (operational activities to be managed, job descriptions, training, reporting to Board of Directors, direction and control of personnel);
- Reimbursable expenses and management fee (information to the recipient, reimbursement of expenses, salaries to management personnel, management fee, delay of payments);
- General obligations of the recipient (designation of the official, day-to-day liaison between Board of Directors and the Chairman, obligations to hire personnel, limitations in the suppliers' responsibilities and recipient coverage against various damages, immigration and working permits, recruiting and repatriation costs, accommodation of the management staff, transportation, education);
- Disputes and arbitration (settlement of disputes);
- Duration and termination of the contract (validity and prolongation of the contract, termination, force majeure);
- General conditions (notes, reports and memoranda available to the recipient, application of the local laws, disposition under the contract, subcontracting of work, the parties' addresses of notice and notification, changes and modification of the contract);
- Appendices (job descriptions of the general manager, factory manager, sales and marketing manager and chief engineer).

24. The example of identical or almost identical contracts concluded by an established foreign supplier of managerial services with several partners in developing countries calls attention to the more general problem of uneven negotiating strength. In the process of negotiations, partners from developing countries are usually meeting with well experienced foreign firms. It is usual that at the beginning the foreign partner provides a ready-made draft of the contract. Under such circumstances it is difficult for the local partner to formulate different provisions in the final version of the contract, to take into account his own intents.

25. A more detailed analysis of the contract provisions indicate that this can result in an unequal formulation of the rights and duties of both partners.

26. Management contracts concluded between parent and subsidiary companies<sup>11/</sup> have to be seen in a different perspective. Typically they are limited in scope and contain only major provisions: The major function of such contracts is to strengthen the position of the foreign firm vis-à-vis the local partner beyond the relationship resulting from equity sharing.

6. Joint ventures

27. Although there is no typical joint venture<sup>12/</sup>, the agreements surveyed have several common characteristics. The common feature is the incidence of a main agreement between partners forming the joint venture ("incorporators agreement") further supplemented by contracts between the newly established company and the foreign partner.

28. The common elements of the main agreement are the following:

- preamble;
- formation of the company;
- transfer and issue of shares;
- Board of Directors;
- reference to "associated" agreements;
- arbitration;
- governing law.

29. The detailed aspects of the operations of the joint venture company are governed by the "associated" contracts explicitly referred to in the main agreement. Those are technical service, licensing, management, consultancy and distributorship agreements. This would suggest that in the process of negotiating joint venture agreements, more attention should definitely be given to the proper formulation of the "associated" contracts. Obviously, with the existence of "associated" contracts the real influence of the foreign partner on day-to-day operations of the joint venture company goes beyond the formal position reflected by his equity share.

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<sup>11/</sup> One agreement belonging to this category has been identified in the sample.

<sup>12/</sup> "Manual on the Establishment of Industrial Joint-Venture Agreements in Developing Countries", UNIDO, ID/68, UN, New York, 1971, p.1.

30. The incidence of a hybrid "Memorandum of Joint Venture Agreement" in the sample draws attention to the necessity of contractual arrangements governing the pre-incorporation period. In the above-mentioned agreement, partners indicated their interest in forming a joint venture company. However, due to uncertainty as to the product acceptance on the local market and the approval by the government, the parties decided to start project implementation under the technical assistance programme. The agreement contained alternative provisions for capitalization of expenditures for technical services rendered by the foreign partner as pre-incorporation expenses, or payment for the services in case the idea of joint venture did not materialize.

7. Concluding remarks

31. From the survey of empirical data conducted in Chapters I and II, a clear picture emerges as to the incidence, principal characteristics, functions, common elements and modalities of contractual arrangements used in the food-processing sector in developing countries. The analysis reveals that in the major types of arrangements the common elements and standard provisions are easily identified. On the other hand, no specific elements typical for a given branch or the food-processing industry can be identified. Similarly, there seem to be no major differences between food-processing and other sectors of manufacturing industry as to the types and formats of contractual arrangements.

32. The analysis conducted so far helps to define major problems associated with the use of various types of contractual arrangements in the food-processing sector.

III. CRITICAL ISSUES IN THE CONTRACTUAL ARRANGEMENTS  
IN THE FOOD-PROCESSING SECTOR

1. Introductory remarks

33. It is widely accepted that international co-operation constitutes an essential factor for enhancing the integrated development of the



food-processing industry in developing countries.<sup>13/</sup> The scope, forms and conditions of such co-operation are governed predominantly by the contractual arrangements concluded at the enterprise level. Consequently, the type of contracts used and the formulation of specific provisions play a substantial role in achieving the objectives of such integrated development.

34. In the present Chapter the contents of the selected provisions are analysed to find out to what extent agreements concluded at the enterprise level provide an appropriate framework for overcoming bottlenecks in the further development of the food-processing industry in developing countries. For the purpose of the study the following problems have been identified:

- irregularity and low quality of raw material supply;
- acute shortage of qualified personnel;
- lack of technological capabilities with special emphasis on quality control and R + D facilities;
- lack of marketing experience and of organized distribution system (home and export markets).

2. Provisions for the improved supply of raw materials

35. International co-operation could contribute to overcome major bottlenecks as to supplying in as much as the services offered by the foreign partners could cover the organization of an effective supply system, quality testing, technical advice extended to farmers, growers, etc. Indeed, food-processing companies in the developed countries have accumulated substantial experience in that field over a long period of time.

36. Unfortunately, in most cases no provisions to this effect are contained in the contracts used in the food-processing sector. This problem was mentioned vaguely only in a few cases, but the services provided by the foreign partner were related to selection of suppliers, testing quality, etc. of the imported components.

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<sup>13/</sup> Report of the First Consultation on the Food-Processing Industry, op.cit., page 7, para. 4

37. The above situation might be partly explained by the lack of experience of the local partners from the developing countries, who tend to concentrate their attention on proper formulation of clauses directly related to plant operations. Consequently, the experience of the foreign partners in the organization of an efficient supply system is often neglected as the local partner does not insist on negotiating relevant services.

38. An additional factor which has to be taken into consideration is the position of the foreign partner as supplier of imported inputs. It is not unusual that foreign companies offering technology and services derive a major share of their earnings from additional deliveries of raw materials, semi-products, components, etc., especially where quality standards cannot be met by the local suppliers. In the latter case it is obvious that foreign partners are not motivated to extend their services to improve backward linkages of the local food-processing industry.

### 3. Training of local personnel

39. In view of the acute shortage of qualified personnel, industrial training (including on-the-job training) conducted within the framework of international co-operation at the enterprise level should be given highest priority. The analysis of contractual provisions in the food-processing industry indicates that the overall situation in that field varies widely. Four patterns of defining training obligations of the foreign partner could be distinguished as follows:

- (a) The question of training not mentioned in the contract at all or formulated in very general terms. This was found in the pure licensing agreements and also in a number of technical service contracts.
- (b) The provisions with respect to training are listed among other services to be provided by the foreign partner. This appears usual for the majority of management and technical service agreements. The scope and conditions for providing training services is often left to further agreement between partners.
- (c) The scope, timing, conditions, and type of training is well defined in the contract. Typically a distinction is made between training conducted in the home country and abroad. In the latter case a separate category, i.e. "training in the R + D centre of the foreign partner" was identified. Although it appears to be unusual, the advantage of such training arrangements has to be emphasized as it gives the local partner direct access to the newest research and modern laboratory facilities.

- (d) In addition to (c), performance requirements with regard to training services are spelled out: For example, the clause from a technical service and licensing agreement linked with a joint venture:

"FOREIGN PARTNER shall train the personnel of the LOCAL PARTNER so that any and all technical knowledge, skill and ability needed to operate and maintain the plant and manufacture the products may be completely transmitted to the LOCAL PARTNER by the end of the fifth year from the start of commercial production."

Similar provisions exist in well drafted management agreements but there the main emphasis is laid on the managerial capabilities to be acquired by the local personnel. For example:

"For this purpose (training) the FOREIGN personnel whilst in the service shall have NATIONALS as understudies. It shall be a duty of the foreign personnel to train national understudies with the objective that such understudies will be professionally equipped and qualified to assume the executive position upon expiry of the services of the FOREIGN personnel."

40. The analysis of the contents of contractual arrangements used in the food-processing sector indicates that although the question of training is generally covered, the interest of the local partner are not always adequately protected. Regardless of the bargaining strength of both parties and the willingness of the foreign partner to provide such services, this may also be the result of unawareness of the local partner of the possibility that the provisions related to training could be formulated in a more detailed pragmatic way. Therefore, information on positive experience in that field could be of assistance to the less experienced firms from developing countries.

#### 4. Quality control

41. With exception of modern plants operated by transnational corporations, quality control in the food-processing industry in developing countries is generally inefficiently managed due to lack of satisfactory control procedures, testing equipment, etc. However, experience has shown that by introducing even minor improvements, quality of the products could be upgraded and food losses reduced. In addition, the establishment of quality testing facilities has to be seen as a first step towards launching "real" R + D activities.

42. Enterprises from developing countries could certainly benefit from their foreign partners in improving quality control procedures. It is worth

emphasizing, especially in the case of branded food products, that the maintenance of high quality standards by the recipient company is also in the best interest of the foreign partner.

43. With respect to contractual provisions relating to quality control, there are two general approaches, a restrictive and a positive approach:

Examples of restrictive formulations are found in agreements involving trademark licences. Such contracts impose strict obligations upon the licensee, e.g.:

"The LICENSEE undertakes to use the said trademarks in strict accordance with the said processes and conforming to the standards of quality from time to time prescribed, laid down, given, supplied or approved in writing by or on behalf of the LICENSOR."

These requirements are further strengthened by the right of the foreign partner to inspect the premises of the licensee, e.g.:

"The LICENSEE shall permit LICENSOR or its authorized representative at all reasonable times to enter the premises of the LICENSEE for the purpose of satisfying itself that the goods of the LICENSEE upon or in relation to which the said trademarks are to be used fulfil the requirements specified hereof".

44. The positive approach, on the other hand, is reflected in the contractual provisions defining practical measures and scope of assistance of the foreign partner leading to the implementation of efficient quality control procedures in the recipient's plant. In management contracts the supervision of quality control is sometimes explicitly listed among services to be provided by the foreign partner. In some cases the obligation to provide necessary information is stipulated in the agreement, e.g.:

"Such co-operation shall include full and complete information concerning the standards of quality of products and the control thereof, as quality tests, methods and laboratory processes."

45. The provisions covering more extensive involvement of the foreign partner in the implementation of efficient quality control procedures are sometimes found in licensing and technical assistance agreements. For example:

"FOREIGN PARTNER shall furnish the LOCAL PARTNER with such information, suggestion or recommendation as may be useful to enhance the efficiency of the plant and quality of products. FOREIGN PARTNER shall despatch its qualified personnel to the LOCAL PARTNER, at any time the LOCAL PARTNER requests, to advise and assist in the improvement of the quality control of the products. The number of such personnel and any other terms and conditions of despatch shall be decided by mutual consultation between the parties hereto."

46. This analysis seems to indicate that contractual provisions do not usually provide adequate framework for improving quality control procedures in the food-processing sector in developing countries.

5. R + D assistance

47. In the transfer of food-processing technology from developed to developing countries there is often a need to adapt products and processes to the local conditions. As only a limited number of food-processing companies in the developing countries are engaged in any kind of R + D activities, the assistance provided by foreign partners within the framework of international co-operation constitutes a valuable contribution.

48. Relevant provisions were found only in a few contracts mostly belonging to the technical assistance and licensing category. The contract provisions on the subject ranged from listing R + D assistance among other services, to detailed separate sections devoted entirely to this issue. For example:

"In addition to the services defined earlier FOREIGN PARTNER shall ensure to the benefit of LOCAL PARTNER special works in the field of research and development relative to the technical adaptation of the products and processes to the specific characteristics in African countries, such as tropical climate, special packaging suitable for local conditions and transportation, special local requirements for taste, flavour etc. FOREIGN PARTNER shall furnish the LOCAL PARTNER all data resulting from these works and help LOCAL PARTNER to implement such results in its plant."

49. However, all contracts covering R + D assistance contained provisions for additional payments; the rates applied are usually higher than those for other services rendered by the foreign partner.

6. Organization of marketing and distribution systems

50. The launching of new processed food products in a developing country usually requires modern marketing and distribution techniques. The lack of experience in that field constitutes in many cases a considerable bottleneck negatively affecting the results of a given investment project.

51. It was found that marketing and distribution were extensively covered in joint venture agreements, whereas in other contracts these issues were almost totally neglected. In joint ventures, the relevant questions, rights and duties of partners are usually defined in the "associated" agreements<sup>14/</sup> explicitly mentioned in the main agreement. Alternatively the previously mentioned "Memorandum on Joint Venture Agreement" stipulated an extensive technical assistance programme for the local partner, including:

- Transfer of practical knowledge of specific expertise of the FOREIGN PARTNER in marketing and distribution by training of not less than 3 employees through a training period of 6 months abroad;
- Training abroad of 3 sales supervisors;
- Training in the recipient country, by foreign qualified personnel, of a managerial level employee who will assume permanently the marketing and distribution responsibilities after the training programme;
- Designing by foreign personnel within the period of 6 months an initial operating system for the marketing and distribution, consisting of:
  - (i) An analysis of current organization of marketing and distribution in terms of structure, operating system and human and material resources;
  - (ii) A definition of marketing and distribution structure, operating systems and human and material resources necessary.

52. From the above considerations it appears that in the case of products where the success of the entire project depends to a substantial degree on the organization of an efficient marketing and distribution system, joint ventures seem to be the most suitable form of entering into international co-operation by food-processing companies from developing countries.

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<sup>14/</sup> They were called "Marketing Agreement" and "Distributorship Agreement". Unfortunately the copies of "associated" agreements were not available for more detailed analysis.

53. The marketing programme of the local partner might also be affected by the non-competition provisions found in many technical assistance and licensing agreements. For example:

"LICENSEE agrees to refrain from selling products in the Territory under its own or another's brand name that may be regarded as competitive with the Products. The determination by LICENSOR that any product is competitive with the Products shall be conclusive, and any and temporary permission to manufacture, assemble or sell competitive products shall not be constructed as a waiver by LICENSOR of its prerogative to enforce compliance at any time with the provisions of this section."

54. The non-competition clauses may, however, negatively affect local manufacturers who offer a broad variety of processed foods on the local market and when the licensing production generates only a small fraction of the total sales.

#### 7. Export rights

55. The expansion of exports of processed food products substituting and/or supplementing traditional agricultural exports is one of an important objective of integrated development. The formulation of the contractual provisions relating to exports is affected by the following factors:

- The expansion of exports of processed foods by the local partner is generally not in the interest of the foreign supplier of technology and services. This applies especially to the branded food products marketed under well-established trademarks. As a result, foreign partners usually insist on the inclusion of provisions restricting exports in the licensing agreements;
- At the present stage of development of the food-processing industry, firms in developing countries are predominantly oriented towards satisfying local needs and do not usually consider exports as a feasible alternative;
- Of recent, several developing countries introduced various policy measures in order to stimulate manufactured exports. Within this framework, technology transfer registries are carefully screening the agreements with a view to exclude excessive export restrictions.

56. The influence of these factors is reflected in the contracts surveyed. In principle, the contractual provisions relating to exports are of a restrictive character. However, the way such restrictions are formulated differs substantially among contracts. A distinction can be made as follows:

- (a) The issue of potential exports is not mentioned in the contract; indirectly this possibility is excluded. This is found mostly in licensing agreements where the licence is granted only for the territory of the recipient country.
- (b) Exports are not excluded, but in each case prior written approval of the foreign partner is required. This appears to be the usual way of defining export rights of the foreign partner. There are, however, examples of government intervention. In a technical assistance and licensing agreement concluded the respective provision reads as follows, for example:

"During the continuance of this Agreement the LICENSEE will not export or sell for export outside the Territory any goods under the said trademarks except through LICENSOR or with the prior written approval of the LICENSOR."

After expiration of the initial agreement the company submitted an application for renewal. The contract renewal has been approved conditionally and among other changes technology transfer registry requested reformulation of the export clause in the following way:

"LICENSEE may export products manufactured under this Agreement and offered for sale undermarks other than the TRADEMARK to the LICENSOR or any other parties. LICENSEE may also export products manufactured under this Agreement and offered for sale under the TRADEMARK to the LICENSOR or to other parties but such exports shall be mutually agreed upon and approved by the LICENSOR in writing."

- (c) The unconditioned export rights are explicitly granted to the local firm. For example:

"LICENSOR hereby grants to the COMPANY:

- exclusive rights to sell the trademarked products in the home country;
- the right to export the trademarked products to any other country in the world."

57. In practice, the elimination of restrictive contractual provisions related to exports is very difficult to achieve. However, some positive results might be achieved through a gradual approach. Such an approach might be, for example, to obtain during an initial period the granting of export rights to neighbouring countries.

#### CONCLUDING REMARKS

58. This empirical survey does not by itself allow the drawing of general conclusions as guidelines for contractual arrangements in the food-processing sector. It provides, however, ample confirmation of the fact that whilst this sector uses the same standard types and formats of contracts as do other



sectors of manufacturing industry, it is for the sector-specific issues and problems that the less experienced partner in developing countries need further guidance. In the food-processing industry, checklists, guidelines and model forms of clauses should essentially focus on those areas when co-operation can be improved for mutual benefit of both partners. Such areas could include: Assistance to local suppliers of raw materials to improve integration of production, maintenance and repair, training of qualified personnel, quality control and issues relating to trademarks and exports. These and other issues require further careful examination. In order to elaborate such tools, the experience of enterprises in developed and developing countries, licensors and licensees, recipients and purveyors of know-how has to be adequately examined by the UNIDO Secretariat.

