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UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION
Vienna International Centre, P.O. Box 300, 1400 Vienna, Austria
Tel: (+43-1) 26026-0 · www.unido.org · unido@unido.org

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NOTE ON A SUGGESTION CONCERNING GOVERNMENT GUARANTEES IN INDUSTRIAL CO-OPERATION CONTRACTS*

by

P. Khan**

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** Institut de relations internationales, Centre de recherche sur le droit des marchés et des investissements internationaux, Université de Dijon.

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1. This note attempts to consider the ever more clearly expressed demand of the developing countries[1] for the implementation in kind of the production contracts which they are brought to conclude either directly or, more often, through one of their own enterprises. To achieve this, the developing countries are asking for a performance guarantee from the Government of the country of origin of the multinational concerns which are their chief partners. The purpose of this note is to try to determine whether such a guarantee is possible and along what lines it could produce the maximum effect in the present economic situation. The guarantee suggested would be the introduction of a bilateral nature provided by the Governments of the respective countries of origin of the seller and the buyer, or, to use a term that better expresses the changes taking place in international contracts, of the supplier of capital goods, the industrial complex and/or technology, and the purchaser of those goods and services.[2]

2. If the implications of the above-mentioned demand are to be full grasped, it must beclearly understood that development blueprints usually accepted in developing countries under the influence of prevailing dogmas very often involve the purchase abroad of big industrial complexes or in any case of large units on the "turn-key" system. This means that, in a given country and a given industrial sector, only a few enterprises, or even only

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1/ c.f. the report submitted by Algeria to the Conference of Sovereigns and Heads of State of the Member countries of OPEC, Algiers, March 1975, p.211, annex VI, on legal relations between Third World enterprises and enterprises in developed countries.

2/ Under the direction of Judet-Kahn, Kiss and Touscot, Transfert de Technologie et Developpement (Development and the transfer of technology), Librairies Techniques, Paris 1977.

one, will be in operation. Moreover, when one of these enterprises is working badly this does harm - not merely the direct harm suffered by the buyer, but considerable indirect harm to the Government of the buyer's country, and that is a very serious affair, since it compromises the said Government's development policy. This situation is peculiar to developing countries, because in an industrialized country the failure of one enterprise is offset by the activity of another. This phenomenon, which lies at the root of the matter, becomes more widespread when production technology and management technology are inadequate - a characteristic feature of under-development - and leads, in the first place, to the conclusion of ill-judged contracts and then, in every case, to difficulties in controlling implementation and often, regardless of the seller's behaviour and intentions, to unfavourable reception of the contract in the buyer's country.

3. The original situation has, however, become more complicated. At first, international trade relations were regulated by a contract - the sales contract - which is based upon the opposing interests of the parties concerned, upon a single individual relation in which each party pursues his own advantage: it amounts to an exchange of goods for a price, and all difficulties with regard to the drawing up and execution of the contract can be solved by financial compensation.[1/] In this contract new production processes hinging on technological changes relate to equipment not easily assimilable to goods of an earlier type.[2/] The final product, like the means used to achieve it, is often extremely complex and the sales contract has been succeeded by such contracts as the "turn-key" contract, the "monitoring" ("product-available") contract, the preliminary studies contract ("d'ingéniérie") and the consortium contract, in which the original opposition of interests is corrected by the need for co-operation between the parties, since the contract cannot be carried out unless both parties collaborate and each fulfils his obligations in kind. Moreover, obligations

1/ Ph. Kahn, La vente commerciale internationale (International commercial sales), Sirey, Paris, 1961.

2/ L'accord industriel international (International industrial contracts), Librairies Techniques, Paris 1975; Le contrat économique international (International business contracts), Colloque Louvain 197 , Pédone, Paris 1976.

with regard to information, assistance or training are often reciprocal, and reciprocity is strengthened by the fact that the performance of services extends over a lengthy period, and the technical complexity of the operations is augmented by uncertainty regarding the viability and the development of the contract itself.

4. Notwithstanding the changing nature of contract formulae, however, the main elements of the legal technique applied to them continue to exist, although these are not fully grasped by the politicians who demand a guarantee and by the technicians not expert in legal matters who conclude contracts. Consequently, numerous misunderstandings arise with regard to the interpretation of contracts and about who is to blame for failure to fulfil commitments - that is to say, misunderstandings about the guarantee.

5. Thus, at least as regards rights under the continental system, obligations arising from a contract - a sales contract, for instance - may be classified into three sections: obligations to provide services ("means"), obligations regarding the achievement of results, and guarantee obligations.[1/]

6. In obligations to provide services, the debtor (the seller) simply undertakes to make every effort to fulfil his promises. If the contract is not implemented, the creditor (buyer) must prove that the seller has made a mistake in performance. In obligations regarding the achievement of results, the seller undertakes to deliver the promised result but is not released from this commitment unless he can prove that failure to carry out the contract is due to <u>force majeure</u> or to circumstances beyond his control. Lastly, in guarantee obligations, the seller undertakes to provide the promised goods or services without being able to free himself from the commitment even in a case of <u>force majeure</u>. Thus, contrary to general belief, what differentiates a "turn-key" contract from a "monitoring" ("product-available") contract is not that in the former the seller assumes

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1/ For a clear and up-to-date statement on contract law, see Farjat, <u>Droit privé de l'Economie</u>; 2. Théorie des obligations, collection Thémis, Presses universitaires de France, Paris 1975.

obligations to provide services and in the latter undertakes obligations regarding the achievement of results. Indeed, in either sale he can assume obligations to provide services and/or obligations regarding the achievement of results.* A perusal of the contract and a study of the escape clauses that the seller may invoke alone can enable obligations that have been assumed to be defined. Differentiation rests on the number and scope of the obligations accepted not only by the seller but also by the buyer, because if the majority of them are borne by the seller, the contract cannot be carried out properly without the participation of both partners.

7. The above classification, however, is difficult to apply in complex industrial co-operation contracts, because these contracts are made up of a bundle of obligations, sometimes to provide services, sometimes with regard to the achievement of results, which taken together nevertheless form a whole that is difficult to define, all the more so because the obligations of seller and buyer are intertwined and the fulfilment of some of them often depends upon the fulfilment of the others.

8. One other thing must be made clear: in the drawing up of contracts guarantee clauses couched in terms similar to the following are very often encountered:

ARTICLE 21 GUARANTEES

21.1. Technical guarantees

21.1.1. The CONSORTIUM guarantees:

- that the technical processes and the projects of the UNITS which are the subject of the present Contract have been worked out on the basis of the modern techniques known at the time when the contract enters into force;
- that the equipment to be supplied will conform to the TECHNICAL SPECIFICATIONS annexed to the present Contract;
- the good quality of the materials used in the construction of the equipment;
- high standards of workmanship in the mechanical and assembly operations,

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*Translators note: The language of the original text is not clear.

on the following conditions:

21.1.2. The GUARANTEE PERIOD shall be, for each SECTION, 12 months from the date of the record of the PROVISIONAL TAKE-OVER, but not longer than 26 months from the date of the f.o.b. deliveries in the event that the PROVISIONAL TAKE-OVER is delayed for reasons not the fault of the CONSORTIUM.

During this period the CONSORTIUM undertakes to make good at its own expense any defects that can be laid to its charge and that result from non-observance of the provisions of item 21.1.1. Defective parts shall be repaired or replaced at the choice of the CONSORTIUM.

For parts replaced or repaired the CONSORTIUM guarantee shall be valid for a period of 12 months from the date of replacement or repair.

The validity of this guarantee shall expire 6 months at latest after the end of the guarantee of the SECTION concerned.

The supplying of the parts mentioned above in this Article shall take place in accordance with all the other provisions of the present Contract applicable to original parts.

If any part requiring to be replaced is included in the consignment of spare parts provided for in this Contract, the GOVERNMENT shall place it at the disposal of the CONSORTIUM, which shall use it and replace it as soon as possible in order to complete the said consignment of spare parts.

21.1.3. At the end of the GUARANTEE PERIOD provided for under 21.1.2., final take-over shall be deemed to have taken place.

21.2. Operational guarantees

21.2.1. The CONSORTIUM shall guarantee the satisfactory operation of the various SECTIONS of the PLANT, namely, that each SECTION, in normal conditions of working and maintenance, shall be capable of achieving the production goals set forth in Annex 3.

21.2.2. The operational guarantees shall be understood to become valid for each SECTION at the time when the record mentioned in Article 20 is drawn up.

Contrary to the implication that a literal reading of these clauses might appear to convey, the intention here is not to reinforce the commitments entered into by the seller, but rather to limit his responsibility. As a matter of fact, although in effect the subject itself of the contract fairly

widely defines the seller's obligations, the specification clause makes this clearer, and the guarantee clause puts into concrete form the ways in which the seller is actually to fulfil his commitments. As a rule, even though the relevant text would lead to a lengthy period of responsibility (to the termination of the contract), the clause restricts this to a period of several months to a year, in the most favourable circumstances. Similarly, whereas the general criteria of contractual responsibility would entail the granting of compensation for loss actually suffered and for earnings unrealized, most guarantee clauses go no further than a mere replacement of unsatisfactory parts and machines. A fortiori, compensation for indirect damage - so important for the economy of a developing country - is excluded. In fact, the seller guarantees nothing himself; he merely fulfils his obligations, which he tries to reduce.

9. Thus, when considering a performance guarantee, it is well to determine the exact nature of such a guarantee and never to forget that an outside guarantee to the seller (or the buyer) never goes beyond the precise commitment of the seller (or buyer). It is therefore necessary to go back to the definition set forth in the contract of the obligations of each, taking into consideration the clauses that, in various ways, reduce the responsibility of the partners, either as regards the scope of their responsibility or as regards the kind and amount of compensation.

10. With these provisos, the performance guarantees, in the legal sense, that the seller can give the buyer are varied.

11. The first guarantee directly concerns the implementation in kind of the contract, namely, all the rights the seller gives the buyer to supervise the execution of the contract and, if necessary, to take steps to correct it. The main point involved is the buyer's right to visit the seller's installations in order to supervise the manufacturing process, the right to criticize and make changes, the right to refuse to admit certain technical assistants to the assembly workshop, etc. This is a very frequent practice in the case of loans made by the World Bank. Apart

from the book-keeping records it has sent to it, the Bank often has officials on the spot to examine the progress of preliminary studies and work, and to make any comments that might seem useful. Indeed, it may well be that supervising the execution of the contract is the best guarantee of all, and this has become general practice with regard to loans made by international financial institutions.

12. The other guarantees provided at present are those given by the seller (or buyer) to ensure that the financial consequences of failing to implement the contract shall be adequately borne by the debtor and not by the creditor. These must be real securities (mortgages, pledged chattels, warrants) but above all personal surety in the form of bank guarantees. Finally, the system is supported by insurance covering the various risks entailed in the execution of the contract. This system, which is quite effective, partly or wholly protects the debtor from insolvency, but it deals only with the financial consequences of failure to fulfil the contract, to the extent that such failure is the fault of the debtor in question. It lies within the framework of opposing individual relations rather than in that of the new philosophy of industrial co-operation.

13. Turning now to the role of Governments, it may be noted that Governments of a liberal outlook, who maintain that there should be no interference in the conclusion and execution of contracts, nevertheless follow a policy of participation. As a matter of fact, in order to encourage exports of goods and capital, many Governments have initiated insurance schemes covering risks likely to arise in economic dealings with foreign countries: exchange risks, political risks, including nationalization, and even commercial risks (insurance of prospecting activities); similarly, export financing systems supported by the Government operate in all industrialized countries. This leads, directly or indirectly, to a certain amount of government control with regard to contracts and to familiarity with contracts on the part of government officials who have a say in them, or who follow the conclusion and execution of contracts and the settlement of disputes. It is important to note this, since it proves that Governments with a free economy have some direct experience of industrial contracts.

14. Moreover, and this brings us to the suggestions which follow, there are special cases where Governments guarantee the satisfactory implementation of private contracts. In the case of a loan granted by the World Bank to a commercial, industrial or agricultural enterprise, the Member State (or its Central Bank) must fully guarantee repayment of principal, and the payment of interest and other charges in respect of the loan (IBRD Articles of Agreement article III, section 4 (1)). Thus, among many other instances, the loan made to the Ogooué mining company for a project relating to the working of manganese mines was guaranteed jointly by France, Gabon, and the Congo, and the loan to Camel was guaranteed by Algeria. We are dealing here with a current practice in respect of international loans, including loans granted by international financial bodies other than the International Bank, as well as loans issued on the Euro bond market. But the practice goes much further: the protocol signed by France on 14 March 1978 with the Organization of Arab States respecting an armaments industry provides that France shall guarantee the conformity of the military equipment ordered by the OAI from French manufacturers. The protocol constitutes a framework agreement establishing the ways in which the French manufacturers can take any steps that may be necessary with the Arab countries concerned.

15. A study of international industrial co-operation reveals some extension of this method whereby intergovernmental agreements form the framework for private contracts.

16. Most intergovernmental contracts for industrial and technical co-operation envisage several forms of co-operation: co-operation at the stage of preliminary studies and during the period of execution of the contract, for the purpose of equipping new economic units or modernizing existing units; co-operation in joint activities at the production stage; co-operation by exchange of patents, processes, and documentation, etc. Frequently, an organization based on equal representation is set up, with a committee or commission having general powers, assisted by sectoral commissions whose function is to ensure that co-operation remains close and effective. In particular, the committee or commission plays an interesting role by acting as a conciliatory body in the implementation of contracts

between private and/or public enterprises in the two countries concerned. Indeed, the preferred legal instrument of co-operation is the international commercial contract in the various forms it may assume when it brings reciprocal advantages to the parties concerned and makes it possible to achieve the aims of industrial co-operation specified by the contracts (joint ventures, turn-key contracts, licensing contracts, technical assistance contracts, etc.).

17. Curiously enough, however, this set-up, which has become traditional, has undergone a change in recent years that may be of great significance for the future, namely, the appearance of the inter-enterprise co-operation agreement. There are now in evidence, under various names (protocols, framework agreements, etc.), contracts concluded between the economic entities which play a part in the relations between the two countries, and these are true industrial co-operation contracts between enterprises. The reason for this development is probably to be found in the difficulty of giving practical effect to genuine co-operation over a long-term period, and in complex technological circumstances, merely by contracts concluded one at a time. Whilst subscribing to the idea of prolonged operational co-operation, the economic entities are probably not yet ready for the institutional type of collaboration arrangements. Moreover, the requirements of forecasting, medium- and long-term planning and readjustment are not properly met by turn-key contracts concluded one at a time, and still less by licensing contracts, although these requirements could have been met by the association arrangement, if it had been accepted. In other words, a legal form of co-operation had to be found which was less restrictive than the institutional form (company) and more stable than the operational form (turn-key). The solution that has emerged in practice, in the absence of any precise text, has been the introduction of framework co-operation agreements.

18. These framework agreements, which are applicable for a fairly long period, define the area and conditions of collaboration between economic entities in the two countries, this being of necessity co-ordinated with the intergovernmental agreement. The agreements are concluded at the highest

enterprise level. Specific sectors of co-operation are decided on and arrangements are made for sectoral commissions which, meeting alternately in each of the signatory countries, will be responsible for implementing the policy of co-operation that should lead to the conclusion of operational contracts. Depending on the agreements, there may be only one (general) commission and no sectoral commissions, or there may be both. Another duty of these commissions is to try to settle problems arising from the interpretation and execution of specific contracts. The arbitration procedure provided for in the contracts comes into effect if this conciliation effort does not succeed.

19. The legal status of these framework agreements (protocols, co-operation agreements, etc.) is difficult to determine, since they are more declarations of intent then firm commitments, more management procedures than sources of law. They are very similar to the agreements concluded by the Governments of the signatories and they constitute a stage in the implementation of the intergovernmental agreement.

20. The integrated pragmatism (integrated "up-stream" in the intergovernmental agreement and "down-stream" in specific contracts) of these agreements, transposed into relations between developed and developing countries, might make it possible to estimate the industrial needs of the developing countries more accurately and to work out a more concerted, more prolonged and consequently more coherent policy that would include both Governments and enterprises in the task of deciding on a programme, the stages of its development and the means of achieving it, since relations between Governments on the one hand and firms on the other would be built up with the partners in very close contact with each other. And it is on the basis of such concerted action that the Government of the supplier of capital goods, industrial complexes and technology might be induced to provide a performance guarantee, and the Government of the recipient might also be induced to guarantee certain commitments entered into by the recipient which are essential to the successful execution of the project.

The performance guarantee by Governments

21. In the co-operation agreement as it is now drafted, the proposals made by the industrial State are based primarily on the capacities and needs of its enterprises, adjusted in the light of certain considerations of general

policy. The Government enters into no direct commitment with regard to the execution of specific contracts, at least as a rule. In the name of the enterprises' freedom of action, it does not feel it has the right to do so, and since it has no say in the selection of partners, it does not assume the right.

The dual procedure described above should make the problem easier to solve, it being understood that co-operation implies duration.

Thus, at the stage where the bilateral agreement between Governments was being negotiated, each Government would have to be very careful to define clearly the area and extent of the co-operation planned. Then, once the broad outlines of relations between the Governments had been settled by them, those responsible for carrying out projects could improve them by working out their own framework agreements.

At a later stage the Governments would be able, by setting up joint committees and sectoral commissions, to examine together the projects of their economic entities, and those which were accepted would receive encouragement in line with the policies of each Government and/or as provided for in the intergovernmental agreement. The latter might include a guarantee by each Government that its enterprises would discharge their obligations, or certain of them. This guarantee would include steps to ensure implementation in kind - which alone would lead to the development of their relations along the right lines. Failing ability to achieve implementation in kind, however, the Government would bear the financial cost of contractual responsibility.

The system proposed is similar to a surety system.

22. The State does not guarantee its national against a risk; it guarantees to the other State which is party to the co-operation treaty and to the national of that State that a contract concluded on the basis of intergovernmental and inter-enterprise co-operation agreements will, after examination, be duly implemented by its national. It must therefore either exclude dubious enterprises from co-operation arrangements or bear the consequences. We are not therefore dealing with an insurance system of the type mentioned above (para. 13). Indeed, under an insurance system, even

if the Government pays part of the cost, the enterprise insured pays a premium calculated on the conception of the risk run by the insurer; there is subrogation of the Government in the rights of the insured; countries are selected on the basis of good and bad risks; sometimes insurance depends on the existence of an agreement guaranteeing certain conditions of investment within the territory of the receiving country and free access to the insurance system by the economic entity, provided it fulfils the conditions laid down by the insurer (regulations and policies).

23. The main problems that arise are of three kinds: the cost to each Government of a guarantee of this kind; the terms in which the guarantee is to be defined and, lastly, on the political level, determination of the link between co-operation and dependence.

The financial cost to each Government

24. It is to be feared that if enterprises know that they are supported by the power of the State they may be negligent in the discharge of their obligations. That is a risk that can never, of course, be fully removed. But taking into account the preliminary studies, the seriousness of the projects and the quality of the enterprises concerned, most projects are likely to work out normally, and the financial cost should not be heavy. In any case, the guarantee is not given once and for all. It is granted to each contract individually. Indeed, the real problem is its scope.

Scope of the guarantee

25. Deciding the scope of a government guarantee may be done from two angles: that of the obligations to be guaranteed, and that of the conditions on which the guarantee is granted.

Obligations guaranteed

26. A government guarantee must clearly be linked to a definition of the contractual obligations of the national concerned. In order to determine the guarantor's commitment, it must be known precisely to what the seller

(or buyer) is committed. The margin of appraisement is considerable, because, depending on the system chosen, a government guarantee may be more extensive or less extensive than the contractor's commitment. Production contracts are complicated and include a sheaf of commitments bearing on obligations with regard to equipment (the delivery of capital goods) and on intellectual contributions (supplying of know-how, technical assistance, training of staff, etc.). It is conceivable that the Government will guarantee only some of these obligations. On the other hand, the Government, especially of an industrialized country, may agree to accept responsibility for the indirect damage caused by the seller's failure to execute the contract - damage which is more a public than a private matter. A definite position must therefore be taken on obligations whose fulfilment is guaranteed and on the amount (scope) of the guarantee. Similarly, a definite line must be taken with regard to knowing whether the guarantee that is granted is a guarantee for implementation in kind or for implementation by a monetary substitute. There is no simple answer. The demand of the developing countries is for implementation in kind. In sectors where there are public enterprises carrying on the same activity as that of the enterprise which has concluded the contract, it is conceivable that, in case of failure to execute the contract, the Government would have the unfulfilled obligations of its enterprise carried out, with the difficulties (in respect of access to know-how, later time-limits) which that would entail. It must also be remembered that the enterprises in question are chosen by means of a procedure in which the two Governments concerned take part on a permanent basis, and this leads to uninterrupted control over the implementation of the contract. Now, the Government has effective means of pressure at its disposal, if it cares to make use of them, in order to compel the seller (or buyer) to carry out the contract properly. The main obstacle to implementation is then the difficulties of a technical kind, where compulsion is useless and replacement of those responsible is unlikely. In that case the single remedy that remains is financial compensation; this only partly meets the case, but it is the one solution left.

27. Once the scope of the Government's guarantee has been determined, the problem arises of establishing a procedure for settling disputes, whether it is a question of taking urgent measures, ascertaining failures of execution, and establishing who is to blame for these, or suggesting appropriate compensation. Most big production contracts include an arbitration clause, and a tendency can be seen in recent practice to increase the powers of arbitrators and the number of their mandates (arbitration injunctions, arbitration in technical matters, etc.).[1/] According to the particular case, the arbitration award may or may not be subject to objection on the part of the subcontractors and the guarantors of each party to the contract. Here, as on every occasion when a Government is implicated, the situation is more delicate. Since public money is involved, the Government must have an opportunity to intervene directly without thereby impairing the contract or abolishing the responsibility of the parties concerned. Since arbitration depends very much on the confidence the parties feel in the arbitrators themselves, the arbitration clause in the contract must contain an exact definition of the duties to be entrusted to them, and this arbitration clause should be specially accepted by the Governments when the contract is being agreed. There should also be a special agreement on the methods of appointing arbitators. Except for urgent measures it should be possible to effect settlement in a friendly way within the intergovernmental commission, since the experience gained in co-operation contracts at present in force shows the value of such a procedure.

28. Each of the Governments concerned should no doubt be left to give its own guarantee on certain conditions presented either to the foreign partner (economic entity or Government), in which case the conditions would be suspensive, or to the Government's national, in which case the conditions would not normally be subject to objection on the part of the foreign partner and would operate only in respect of the national's relations with his own Government.

1/ Oppetit, L'arbitrage et les contrats commerciaux à long terme (Arbitration and long-term commercial contracts), in the Rev. de. l'arbitrage (Arbitration Review), 1976, p. 91; International conferences on arbitration, Moscow 1972, Rev. de l'arbitrage 1972, p. 163, New Delhi, 1975. Rev. de l'arbitrage 1975, p. 3 Reunion intermediaire de Vienne 1976 (Interim meeting in Vienna) 1976. Rev. de l'arbitrage, 1977, p. 3.

Co-operation and dependence

29. The system outlined above would give a certain permanence and scope to economic relations between the two States and their respective enterprises. A developing country may fear that, by having special contacts with a single representative in a given sector, it is putting itself in a position of economic and technological dependence. The risk certainly exists, but a choice has to be made between several objectives which do not fully coincide, because it is difficult to ensure at one and the same time a consistent pattern of industrialization, the transfer of technology, and total independence. That is the essential problem of under-development

30. This suggestion for a system whereby Governments would guarantee contracts entered into by their nationals within the framework of co-operation agreements, is purposely modest. It is perhaps not applicable to all international economic relations, since it depends on some amount of confidence between Governments themselves and between the enterprises that are to give practical effect to the policy of co-operation established by the Governments. Its success depends as much on the procedures for selecting the enterprises and discouraging them from improper behaviour as on a general, unilateral and vague guarantee, such as the industrialized countries are sometimes asked to give. But limited objectives, the frequent contacts that Governments and economic entities must keep up with one another, and the reciprocal character of obligations may finally produce excellent results along the lines in which this Conference is interested.

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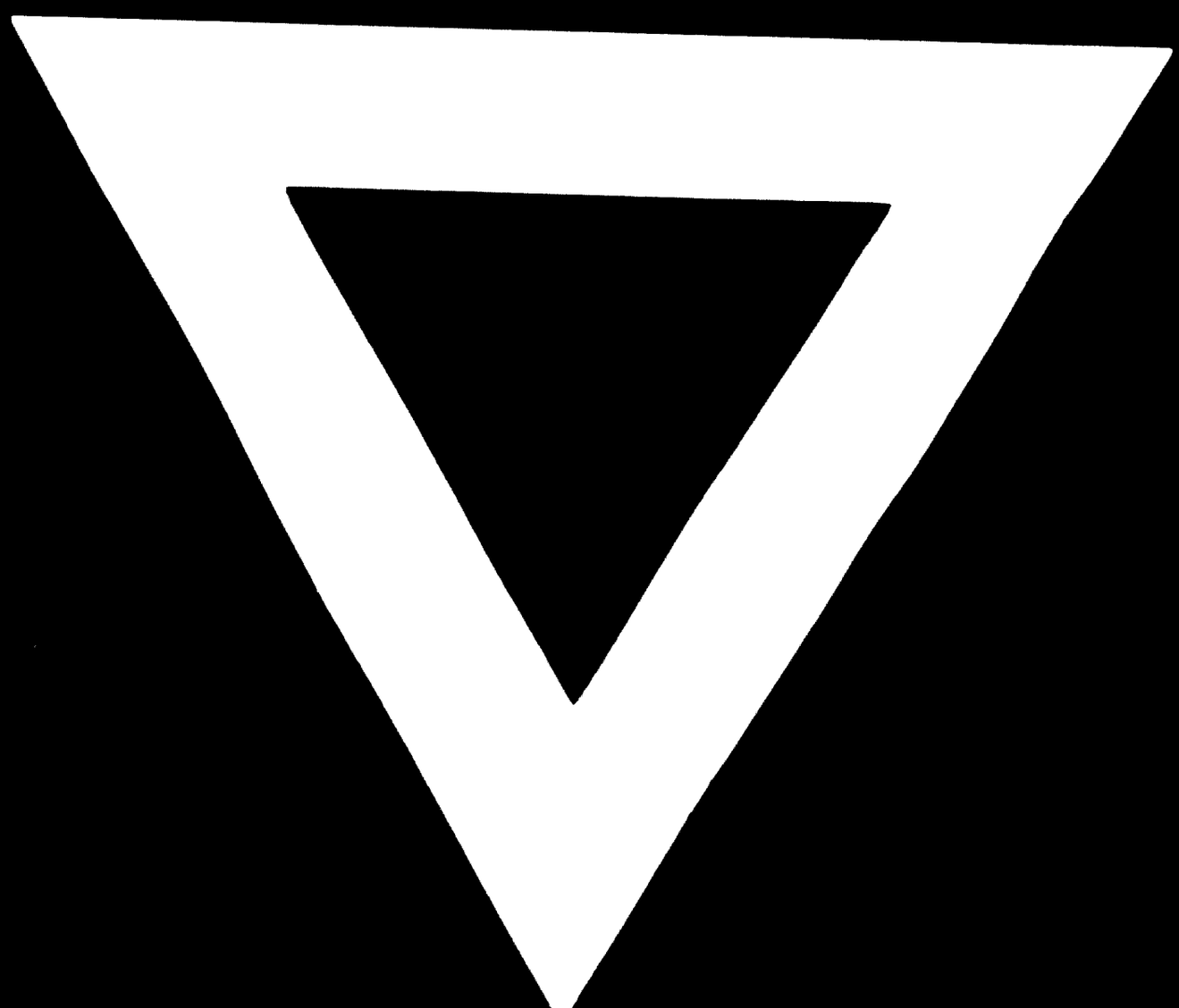

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