SEPARATE OPINION OF PRESIDENT IWASAWA

Article 31, paragraph 3 (c)*, Vienna Convention — Meaning of "applicable in the relations between the parties" — For a rule in an external treaty to be taken into account, all parties to the treaty under interpretation need not be bound by the external treaty — Rule of international law may be applicable in the relations between the parties if it reflects the "common understanding" of the parties to the treaty — Threshold lower under Article 31, paragraph 3* (c)*, than under paragraph 3* (b)*.*

Subsequent practice of the parties not establishing their agreement, pronouncements of ILO supervisory bodies, and regional instruments and jurisprudence may be taken into account in the interpretation of Convention No. 87 as supplementary means of interpretation under Article 32.

Scope of right to strike — Court does not express a view on question whether or to what extent Convention No. 87 requires that right to strike be guaranteed for public officials.

1. I agree for the most part with the conclusion and reasoning of the Court. The purpose of this opinion is to offer my views on certain aspects of the Advisory Opinion.

I. RELEVANT RULES OF INTERNATIONAL LAW APPLICABLE IN THE RELATIONS BETWEEN THE PARTIES

2. Pursuant to the customary rule reflected in Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties, in the interpretation of a treaty, "[t]here shall be taken into account . . . [a]ny relevant rules of international law applicable in the relations between the parties". Article 31, paragraph 3 *(c)*, lays down a primary, not supplementary, means of interpretation, which may provide valuable guidance for the interpretation. The term "shall" indicates that it is mandatory to take such rules into account in the interpretation of a treaty.

3. One important question that arises in this context is the meaning of the requirement that the rule be "applicable in the relations between the parties" to the treaty. Since rules of general customary international law bind all States, they are certainly "applicable in the relations between the parties". This logic also applies when a rule contained in a treaty reflects customary international law. Similarly, general principles of law are undoubtedly rules "applicable in the relations between the parties". Accordingly, it is appropriate that international courts and tribunals have taken customary international law[1] and general principles of law[2] into account when interpreting treaties. The more controversial issue is which treaty rules should be considered "applicable in the relations between the parties" within the meaning of Article 31, paragraph 3 *(c)*.

4. Judicial decisions and scholarly writings reveal different approaches to this question. Some take the view that the phrase "the parties" means "all parties" to a treaty, while others consider that the phrase refers to "the parties to a dispute". A WTO panel adopted the former view in 2006, stating that Article 31, paragraph 3 *(c)*, requires consideration of those rules of international law "which are

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[1] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 182-183, paras. 41-42 (the prohibition of the use of force).

[2] ECtHR, *Golder* v. *United Kingdom*, Plenary, judgment of 21 February 1975, No. 4451/70, para. 35 (the principle whereby a civil claim must be capable of being submitted to a judge and the principle which forbids the denial of justice). *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, adopted 6 November 1998, p. 61-62, para. 158, fn. 157 (the principle of good faith).

applicable between all parties to the treaty"[3]. The requirement that the external rules are "applicable" in the relations between the parties may suggest that the parties are bound by those rules. However, interpreting the phrase "the parties" to mean "all parties" would significantly reduce the role of external treaties under Article 31, paragraph 3 *(c)*. It would be ironic if the more parties a multilateral treaty had, and hence the broader its scope of application, the less likely it would be that other treaties could be taken into account in its interpretation.

5. In analysing this question, the Study Group of the International Law Commission (ILC) on Fragmentation of International Law distinguished between reciprocal or synallagmatic treaties, on the one hand, and integral or interdependent treaties, on the other. With respect to the former category, the Study Group suggested that reference to an external treaty would be permissible provided that the "parties in dispute" were also parties to that other treaty[4]. This understanding may be acceptable in adversarial settings where, in interpreting obligations under a synallagmatic treaty, a party seeks to rely upon obligations contained in an external treaty which also applies bilaterally to the parties in dispute[5]. However, that is not the situation in the present case.

6. The Study Group further suggested that notions in an external treaty may be taken into account if they have been so widely adopted that they could be considered to have been implicitly accepted, or at least tolerated, by all parties, and thus express their common understanding[6]. The WTO Appellate Body apparently adopted this approach in 2011, when it suggested that where a rule establishes the common intention of the parties to the treaty, the rule is a relevant rule applicable between the parties[7]. The Appellate Body thus effectively reversed the position taken by the WTO panel in 2006. In the present Advisory Opinion, the Court takes a similar view, stating that

> "Article 31, paragraph 3 *(c)*, does not necessarily require all parties to the treaty under interpretation to be bound by the 'relevant rules of international law' in order for those rules to be taken into account. A rule may be 'applicable in the relations between the parties' if it expresses their common understanding regarding certain provisions of the treaty under interpretation." (Advisory Opinion, para. 90.)

I agree with this approach. For a rule in an external treaty to be taken into account, Article 31, paragraph 3 *(c)*, does not necessarily require all parties to the treaty under interpretation to be bound by the external treaty, in the sense that they are also parties to the external treaty. The concept of a "common understanding" of the parties serves as an essential medium in this regard.

7. In 2024, one of the parties to the United Nations Convention on the Law of the Sea (UNCLOS) was not a party to the Paris Agreement. Still, the International Tribunal of the Law of the Sea (ITLOS) included the Paris Agreement among the treaties to be taken into account in the interpretation of UNCLOS, along with the treaties to which all parties to UNCLOS had expressed consent to be bound (the United Nations Framework Convention on Climate Change and the Kyoto

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[3] *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Report of the Panel, adopted 21 November 2006, p. 334, para. 7.70.

[4] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Mr Martti Koskenniemi, 13 April 2006, UN doc. A/CN.4/L.682 and Add.1, p. 96, para. 472.

[5] See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 219, paras. 113-114.

[6] Report of the Study Group, *supra*, fn. 4, p. 96, para. 472.

[7] *EC and Certain Member States — Large Civil Aircraft*, WT/DS316/AB/R, Report of the Appellate Body, adopted 1 June 2011, p. 362, paras. 844-845.

Protocol)[8]. ITLOS did not explain why the rules in the Paris Agreement constituted relevant rules within the meaning of Article 31, paragraph 3 *(c)*. In my view, it was because those rules could reasonably be considered to express the common understanding of all parties to UNCLOS.

8. In the present Advisory Opinion, the Court also used the term "common understanding" to describe the "agreement of the parties" under Article 31, paragraph 3 *(b)*, of the Vienna Convention (Advisory Opinion, para. 77). However, the "common understanding" of the parties envisaged under Article 31, paragraph 3 *(c)*, should be clearly distinguished from the "agreement" of the parties required under Article 31, paragraph 3 *(b)*.

9. It is undisputed that, under Article 31, paragraph 3 *(b)*, subsequent practice must establish the "agreement" of *all* parties in order for it to be taken into account in the interpretation of the treaty. The threshold is high. The ILC Draft conclusions on subsequent agreements and subsequent practice explain that "[s]ilence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction" (Conclusion 10, para. 2). However, the commentary cautions that "acceptance of a practice by one or more parties by way of silence or inaction is not easily established"[9]. The ILC Draft conclusions also provide:

> "A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3 . . . *Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3* (b)" (Conclusion 13, para. 3; emphasis added).

The commentary stresses the difficulty of establishing the *agreement* of *all* parties through silence, stating that "[i]t will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty"[10].

10. On the other hand, Article 31, paragraph 3 *(c)*, does not require *all* parties to the treaty under interpretation to *be bound* by the relevant rule of international law. A rule may be applicable in the relations between the parties if it reflects their "common understanding", namely if it has been so widely adopted that it could be considered to have been implicitly accepted, or at least tolerated, by all parties[11]. Since what is required is a "common understanding", not an "agreement", the silence of a party carries more weight under Article 31, paragraph 3 *(c)*, than under paragraph 3 *(b)*. The threshold is lower under Article 31, paragraph 3 *(c)*, than under paragraph 3 *(b)*.

11. Article 8 of the ICESCR explicitly guarantees the right to strike. While Article 22 of the ICCPR provides for the right to freedom of association, that right has been interpreted as encompassing the right to strike. I agree with the Court that Article 8 of the ICESCR and Article 22 of the ICCPR may be considered to express a common understanding of the parties to Convention No. 87 regarding the right to strike and as such can be regarded as relevant rules of international law to be taken into account in the interpretation of Convention No. 87. I subscribe to the reasons given

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[8] ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024*, para. 137.

[9] ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 66, para. 18.

[10] *Ibid.*, p. 84, para. 12.

[11] *Supra,* fn. 6.

by the Court in support of this conclusion, including the weight attached to the silence of States (Advisory Opinion, paras. 91-98).

12. It is useful to discuss the concept of "authentic interpretation" in this connection. The concept of authentic interpretation was introduced into international law by Lord Phillimore as early as 1855[12]. In 1923, the Permanent Court of International Justice adopted the concept, citing the legal maxim *ejus est interpretare legem cujus condere*. It declared that "it is an established principle that the right of giving an [authentic] interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it"[13]. This concept of "authentic interpretation" has been embraced not only by authors but also by international courts and tribunals[14]. In the context of international law, authentic interpretation means the interpretation agreed upon by all parties to a treaty. Sir Humphrey Waldock, the Special Rapporteur of the ILC on the law of treaties, used the term in this sense[15]. Authentic interpretation is often understood to possess the same force as the rule being interpreted, to be legally binding and to take precedence over other interpretations.

13. Parties may agree on the interpretation of a treaty in two ways: either explicitly, or informally through practice[16]. Oppenheim considered only the former to be authentic[17]. In a similar vein, some commentators have referred to the latter as "quasi-authentic", suggesting that it is not truly authentic[18]. In my view, if an interpretation is agreed upon by all parties to a treaty, even if that agreement is ascertained from practice, it should still be considered authentic. Whereas subsequent agreements under Article 31, paragraph 3 *(a)*, constitute explicit authentic interpretation, subsequent practice under Article 31, paragraph 3 *(b)*, may be characterized as authentic interpretation through practice. Adopting Waldock's view, the ILC likewise considered that "subsequent practice . . . should be included in paragraph 3 [of Article 31] as an authentic means of interpretation alongside interpretative agreements"[19]. In 2018, the ILC reaffirmed that "[s]ubsequent agreements and subsequent practice under article 31, paragraph 3 *(a)* and *(b)* . . . are authentic means of interpretation"[20]. In this Opinion, the Court confirms that "subsequent practice within the meaning

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[12] Robert Phillimore, *Commentaries upon International Law*, Vol. II, 1855, p. 72.

[13] *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*, p. 37. The term "authoritative" used in the English text was replaced by this author with "authentic", since the term "authentiquement" was used in the authoritative French text — appropriately. In my view, "authentic" interpretation must be sharply distinguished from "authoritative" interpretation. However, unfortunately, these two concepts are sometimes used interchangeably in the literature in English. The confusion may be attributed to the use of "authoritative" interpretation in the English text of the PCIJ's opinion.

[14] See e.g. Charles De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, 1963, pp. 20-21; Ioan Voïcu, *De l'interprétation authentique des traités internationaux*, 1968; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1075, para. 49; *Methanex Corporation* v. *United States of America*, Final Award on Jurisdiction and Merits of 3 August 2005, Part II, Chapter H, para. 23.

[15] Third Report on the Law of Treaties, by Sir Humphrey Waldock, *Yearbook of the International Law Commission*, 1964, Vol. II, pp. 59-60 (citing De Visscher, *supra* fn. 14). Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 98-99.

[16] See e.g. L. Oppenheim, *International Law*, 2d ed. 1912, pp. 583-584; De Visscher, *supra* fn. 14, p. 20; Voïcu, *supra* fn. 14, pp. 2-4, 87, 195-210.

[17] Oppenheim, *supra* fn. 16, p. 584.

[18] See e.g. Ludwik Ehrlich, "L'interprétation des traités", *Recueil des cours de l'Académie de droit international*, Vol. 24, 1928, p. 48; Serge Sur, *L'interprétation en droit international public*, 1974, pp. 387-388; Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht*, 1983, p. 40.

[19] ILC, Commentary on Article 27 [current 31] of the Draft articles on the law of treaties, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 222, para. 15. See also *Tax Regime Governing Pensions Paid to Retired UNESCO Officials Residing in France (France* v. *UNESCO)*, Award of 14 January 2003, United Nations, *RIAA*, Vol. XXV, p. 258 (quoting the ILC commentary).

[20] ILC, Conclusion 3, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 24.

of Article 31, paragraph 3 *(b)*, constitutes an authentic means of interpretation" (Advisory Opinion, para. 77).

14. Article 31, paragraph 3 *(c)*, constitutes a primary means of interpretation along with Article 31, paragraph 3 *(a)* and *(b)*. However, the function of paragraph 3 *(c)* is not the same as that of *(a)* and *(b)*. Subsequent agreements under paragraph 3 *(a)* and subsequent practice under paragraph 3 *(b)* reflect the *agreement* of *all* parties. On the other hand, under paragraph 3 *(c)*, rules in an external treaty may constitute relevant rules of international law, even where some of the parties to the treaty under interpretation are not parties to the external treaty and thus *not bound* by the external treaty. Under the circumstances, it is questionable whether an interpretation arrived at under Article 31, paragraph 3 *(c)*, has the same legal force as "authentic" interpretation as one reached under *(a)* and *(b)*.

II. SUPPLEMENTARY MEANS OF INTERPRETATION

15. In this Opinion, the Court examines the *travaux préparatoires* of Convention No. 87, the subsequent practice of the parties, the pronouncements of ILO supervisory bodies, and regional instruments and jurisprudence as relevant supplementary means of interpretation of Convention No. 87 (Advisory Opinion, para. 103).

16. With respect to the subsequent practice of the parties, I share the view that even where it does not establish the agreement of the parties regarding the interpretation of the treaty under Article 31, paragraph 3 *(b)*, of the Vienna Convention, the Court may still take such practice into consideration as a supplementary means of interpretation under Article 32 (Advisory Opinion, para. 113). The overwhelming majority of the parties to Convention No. 87 have either supported the interpretation that the right to strike is protected under the Convention or have not objected to that interpretation. This subsequent practice confirms the interpretation that the right to strike is protected under Convention No. 87.

17. The pronouncements of ILO supervisory bodies may be relevant to the interpretation of Convention No. 87 in two ways. First, they may give rise to subsequent practice by the parties, which may in turn inform the interpretation of the Convention under either Article 31, paragraph 3 *(b)*, (Advisory Opinion, para. 83) or Article 32 of the Vienna Convention (*ibid.*, paras. 114-115). Second, the pronouncements of ILO supervisory bodies may in themselves constitute supplementary means of interpretation under Article 32. Thus, I agree that the Court may have recourse to the pronouncements of ILO supervisory bodies in this Advisory Opinion as a supplementary means of interpretation under Article 32 (*ibid*., paras. 117-119).

18. Regional human rights instruments in Africa, Arab States, Europe, and the Americas are by definition geographically limited. Asia as a whole has no regional instrument on human rights. To consider the above-mentioned regional instruments as relevant rules of international law in the interpretation of Convention No. 87 under Article 31, paragraph 3 *(c)*, of the Vienna Convention, with effects for all 158 parties to Convention No. 87, would virtually do away with the requirement that such a rule be "applicable in the relations between the parties" and would risk undermining the principle of State consent. Those regional instruments should therefore not be perceived as relevant rules of international law under Article 31, paragraph 3 *(c)*. This, however, does not mean that the Court is precluded from referring to these regional instruments in the interpretation of Convention No. 87. The Court can have recourse to regional instruments as well as regional jurisprudence as a supplementary means of interpretation under Article 32 of the Vienna Convention. In the present case, regional instruments and jurisprudence are highly relevant to the question before the Court. The

Court is fully entitled to have recourse to such material under Article 32 to confirm its interpretation under Article 31 that the right to strike is protected under Convention No. 87. For these reasons, I agree with the approach adopted by the Court (Advisory Opinion, paras. 120-137). While the Court in the present Advisory Opinion has recourse to regional instruments as a supplementary means of interpretation under Article 32 of the Vienna Convention, it is to be noted that external rules can also be referred to with a view to clarifying the "ordinary meaning" of treaty terms under Article 31, paragraph 1[21].

III. RIGHT TO STRIKE UNDER CONVENTION NO. 87

19. Having analysed the *travaux préparatoires* of Convention No. 87, the Court points out that although the right to strike in general was briefly mentioned at the very beginning of the preparatory work, the discussions during the preparation of Convention No. 87 negotiations appear to have focused on the right to strike of public officials, and concludes that the analysis of the *travaux préparatoires* leads to an inconclusive result (Advisory Opinion, para. 111). While sharing this conclusion, I add the following to the explanation given by the Court.

20. The International Labour Office circulated a questionnaire in 1947, question 3, paragraph *(c)*, of which asked: "Do you consider that it would be desirable to provide that the recognition of the right of association *of public officials* by international regulation should in no way prejudge the question of the right *of such officials* to strike?" (Emphasis added.)

21. An earlier background report prepared by the International Labour Office sheds light on the formulation of this question. In the report, the Office provided an analysis of the status of the freedom of association at the time. The Office considered that "the guarantee of the right of association should apply to all employers and workers, public or private, and, therefore, to public servants and officials", but that "the recognition of the right of association *of public servants* in no way prejudges the question of the right *of such officials* to strike"[22].

22. At the time, several States had already prohibited or restricted the right of public officials to strike, owing to widely shared concerns about strikes in the public sector. Sixteen States replied in the affirmative to question 3, paragraph *(c)*, suggesting that the right to strike *of public officials* should not be regulated under the Convention[23]. One State (the Kingdom of the Netherlands) also replied in the affirmative but stated more generally that "a provision concerning the right to strike should . . . not be included [in the Convention]"[24]. The Kingdom of the Netherlands, however, clarified in the present proceedings that "[this] response was provided in connection with a question on the recognition of the right of association *of public officials* and that it does not preclude the position . . . that the right to strike is included in the freedom of association and is protected by ILO Convention No. 87"[25]. After summarizing these replies, the Office observed that "[m]ost

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[21] See e.g. *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Report of the Panel, adopted 21 November 2006, p. 341, para. 7.92; *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, adopted 6 November 1998, pp. 48-49, para. 130.

[22] International Labour Conference, 30th Session, 1947, Report VII, Freedom of Association and Protection of the Right to Organise, pp. 46, 108-109 (emphasis added).

[23] International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise, pp. 16-24 (Australia, Austria, Belgium, Bulgaria, Canada, Denmark, Ecuador, Finland, France, Hungary, India, Sweden, Switzerland, South Africa, United Kingdom, and United States).

[24] *Ibid*., pp. 19-20. One State (Mexico) replied simply "No". *Ibid*., p. 19.

[25] Written Comment of the Kingdom of the Netherlands, para. 2.2 (emphasis added).

countries, therefore, implicitly recognise the right of association *of public officials* without prejudice to the question of the right to strike, which latter question, many countries point out, is not relevant to the present proposed Convention"[26]. This observation by the Office was focused on the rights of public officials. It appears that the "latter question" referred to by the Office was the question of the right to strike *of public officials*.

23. The replies of States to question 3, paragraph *(c)*, suggest that ILO Member States wished to avoid producing a treaty text which might imply that public officials enjoyed a right to strike. One way to achieve this result would have been to include an explicit caveat to that effect in the treaty text. The International Labour Office, however, decided against such an approach, choosing instead not to refer to the right to strike in the draft text at all. Nonetheless, one may infer from the background to the formulation of question 3, paragraph *(c)*, and the replies given by States to the question, that it was decided not to provide for the right to strike *of public officials* in Convention No. 87.

24. The International Labour Office, however, addressed the issue again in Chapter III of the same report, entitled "Conclusions", where it summarized the results of the questionnaire as follows:

> "[T]he Governments were . . . consulted on the question whether it would be desirable to provide in the international regulations that the recognition of the right of association of public officials should in no way prejudge the question of the right of such officials to strike. Several Governments, while giving their approval to the formula, have nevertheless emphasized, justifiably it would appear, that *the proposed Convention relates only to the freedom of association and not to the right to strike* . . . In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association."[27]

This summary of the Office suggests that it was decided not to include in Convention No. 87 a provision on the right to strike *in general*.

25. After the International Labour Office compiled this report, a further thirteen replies were received from other States. The content of these replies was similar to that of replies received within the prescribed time-limit[28].

26. Thus, the *travaux préparatoires* do not provide clear evidence as to whether it was decided not to provide for the right to strike *of public officials* or the right to strike *in general* in Convention No. 87.

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[26] International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise, p. 67 (emphasis added).

[27] *Ibid*. p. 87 (emphasis added).

[28] International Labour Conference, 31st Session, 1948, Report VII (Supplement), Freedom of Association and Protection of the Right to Organise, pp. 8-12 (Bolivia, Chile, Cuba, Egypt, Greece, Iceland, Italy, Luxembourg, New Zealand, Norway, Pakistan, Poland, Uruguay: Uruguay did not reply to question 3, paragraph *(c)*).

27. In this Advisory Opinion, the Court's task is limited to determining whether the right to strike is protected under Convention No. 87. By concluding that the right to strike is protected under the Convention, the Court is not suggesting that the right is absolute. The Court underlines this point by affirming that "[its] conclusion that the right to strike is protected by Convention No. 87 does not entail any determination on the precise content, scope or conditions for the exercise of that right" (Advisory Opinion, para. 140). In this Opinion, the Court does not express a view on the scope of the right, in particular on the question whether or to what extent Convention No. 87 requires that the right to strike be guaranteed for public officials.

(Signed) IWASAWA Yuji.

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