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Areas of Dispute in Mexican-American Relations

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AREAS OF DISPUTE IN MEXICAN-AMERICAN RELATIONS

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I. The Question of Chamizal

BEFORE proceeding into an analysis of the Chamizal dispute as it now exists, it is interesting to observe the deep faith which the Mexican nation has placed in the process of arbitration throughout the one hundred and twenty-five years of her independent life and the firm devotion with which she has invoked this juridical method of resolving controversies with other nations. During the last century and in the first third of the present century—the period coinciding with the development and decline of the arbitration institution—Mexico invoked the use of arbitration on several occasions. She has held fast to her conviction that differences between the members of the international community should be handled through pacific, preferably legal, procedures.

In spite of Mexico's love of international justice, it is discouraging to note the little fortune and lack of success that Mexico has had in all instances. From the first arbitrations, that nation has been subjected to discriminative treatment, imposition, and abuse. Often she has been victim of the lack of preparation on the part of her arbitrating proxies. Take, for example, a few relevant cases. The 1868 Commission awarded millions of dollars to Weil and La Abra, after rejecting the clearest evidence of fraud, and it took thirty-two long years of laborious negotiations to retrieve that which had been robbed from Mexico.[1] Both at this Commission and the 1923-1934 Claims Commissions, the demands filed against Mexico were grossly exaggerated, while at others, *e.g.*, the 1839 Commission, nonexistent or groundless cases were included.[2] Finally, in the *Clipperton* (Isla de la Pasion) case, it may well be concluded that Mexico was unjustly deprived of her territorial rights in 1931 through an unconvincing resolution, one that would never satisfy an unbiased jurist.[3]

[1] 2 Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party § 1083, at 63-68 (1906); Sepulveda, *Dos Reclamaciones Internacionales Fraudulentas contra México: Los Casos de Weil y de la Abra,* Archivo Histórico Diplomático Mexicano (in press at this writing).

[2] Sepulveda, *Sobre Reclamaciones de Norteamericanos a México,* 42 Historia Mexicana 190-91 (1961). The legal adjudications reached an average of 2.6362% of the claimed amounts. See generally Feller, The Mexican Claims Commissions, 1923-1934. The Commissioner of Claims reached only an average of .4%. See generally Sepulveda, *op. cit. supra* note 1, at 68.

[3] The judgment is contained in 26 Am. J. Int'l L. 390 (1932). For a commentary see Dickinson, 27 Am. J. Int'l L. 130-37 (1938). Ralston, The Law and Procedure of International Tribunals 155-56 (Supp.), openly criticizes the decision.

What is surprising is that in spite of so much misfortune, Mexico has been true to her dedication to international justice. Most worthy of admiration is the fact that at no time have obligations deriving from decisions adverse to that country remained unfulfilled.

Because of this background of cooperation in arbitrations, when on June 15, 1911, a court of arbitration resolved that according to the most generally accepted rules of international law, Mexico should be awarded the Chamizal tract,[4] it was thought that law could prevail over the most powerful nations. However, legal subterfuges and the White House's dislike of the Mexican revolutionary governments stood in the way, and the small tract of land was not returned to its owner. The Mexican people made the subject a point of honor and surrounded it with political sensitivity and with some degree of exaggeration.

The existence of such conditions makes any measure of understanding difficult. The United States should not be accused of being entirely reluctant to find a way to settle the problem. During the years 1912 and 1913 rather weak proposals were submitted to the Mexican government to exchange Chamizal for Barra del Horcon and a certain sum of money. The Mexican administration under Madero also proposed some methods of solution,[5] but conditions then existing were not altogether favorable for negotiations. Yet, it cannot be said that Mexico has displayed a great measure of activity towards securing compliance with the arbitral award.

Two arguments were expounded by the United States for its refusal to comply with the Chamizal arbitral decision. The first, of a practical nature, was that the award had not specified the sites along which the boundary line should pass. This premise, however, lacked validity inasmuch as it was not the task of arbitration courts, but of technical commissions, to determine a boundary line. Probably, a little good will would have been sufficient to settle the matter.

The other argument was of a juridical character and more specious than effective. It consisted of presenting the very subtle objection that the arbitral compromise agreement had established that the court was to decide on the *whole* of the Chamizal land; whereas, the court had *divided* the tract in the award. Accordingly, the argument ran, it was impossible to comply with the decision.

If both the agreement and the award are carefully analyzed, the value of such an argument disappears. It was in fact resolved at the

[4] The settlement of the arbitration appears in 5 Am. J. Int'l L. 117 (Supp. 1911), the award in 5 Am. J. Int'l L. 785 (1911).

[5] See [1912] Foreign Rel. U.S. 506-07, 964-65 (1919); [1913] Foreign Rel. U.S. 965, 969-71 (1920).

1910 Convention by article III that "the Commission shall decide solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America or Mexico."[6] However, a correct interpretation will establish that the clause was included to set the jurisdictional limits of the court so that matters other than the territorial question of dominion over the Chamizal would not be considered. In other words, those who drafted the agreement intended that the arbitrators should be prevented from considering such questions as territorial waters and the like. The agreement in no way precluded the possibility of settling the matter by application of the provisions of law most reasonable and proper to the case.

On the other hand, even if it were accepted that the court did not adhere to the agreement, such a circumstance would not give rise to the exception of the abuse of right. That objection is reserved for serious cases of procedural violation or deviations of power, not for matters in which existing provisions are correctly applied and as such offer a reasonable solution.[7]

The Chamizal question is, in any event, a matter of no easy settlement. Otherwise, it would have been resolved long ago like other important adjustments which have been made with relative ease in the Mexican-American border on both sides of the Rio Grande—adjustments which involved the transfer of tracts of land much larger than the one under discussion. Thus, for example, by the Convention of March 20, 1905, fifty-eight "bancos" (banks of land left by receding waters) were mutually exchanged between the two nations,[8] and in 1933, after rectifying, by virtue of a treaty, the bed of the Rio Grande in the Juarez-El Paso area, a canal was built that separated lands formerly possessed by each of the countries. The award given in the case of the "bancos" was consummated[9] without further complication.

All of this is history. We shall now see what possibilities of settlement exist for the Chamizal. The fullest and most satisfactory solution would be strict compliance with the 1911 arbitral award; that is, the river line as it was in 1864 before the great flood should be

[6] Convention With Mexico for the Arbitration of the Chamizal Case, June 24, 1910, art. III, 36 Stat. 2481, T.S. No. 555; 5 Am. J. Int'l L. 117, 120 (Supp. 1911).

[7] Kiss, L'Abuse de Droit en Droit International, *passim* (1925); 1 Oppenheim, International Law 345-47 (8th ed. Lauterpacht 1955).

[8] Convention With Mexico for the Elimination of Bancos in the Rio Grande From the Effects of Article II of the Treaty of Nov. 12, 1884, March 20, 1905, 35 Stat. 1863, T.S. No. 461.

[9] Convention With Mexico for the Rectification of the Rio Grande, Feb. 1, 1933, 48 Stat. 1621, T.S. No. 864.

localized as closely as possible and the applicable portion surrendered to Mexico. This would put an end to old reproaches, enmities would disappear, and the matter would reflect itself most favorably on diplomatic relations between the two nations. This solution would also provide the basis for subsequent settlements in connection with other matters. If it remains unresolved, the point will necessarily become more complicated.

Intelligent negotiations and good faith may in the end lead to realizing some sort of mediative plan similar to that suggested by Mr. Mann, the present United States Ambassador to Mexico. That plan calls for the creation in the Zone of a new, more practical, and less sinuous bed for the Rio Grande so that a part of Chamizal—that which, after the change in the river bed, would be connected with the adjacent Corte de Cordova—would then remain to the south of the river. Also, Mexico would receive an American territorial tract of the size equal to a total of 160 hectares (about 395 acres). Thus, the tract of land coming to Mexico would be approximately the same in size as that awarded by the 1911 arbitral commission.

To create a favorable atmosphere, Mexican public opinion should first be carefully cultivated, for it abounds in well-justified suspicion. The Mexican people need to be convinced of the advantages of removing this cause of conflict and divergence. It may be difficult, but it can be done.

I sincerely believe that if we succeeded in disposing of this unpleasant legacy, there would be a more favorable atmosphere in which to conduct negotiations concerning other pressing questions. Hence, an effort to terminate this disagreement is thoroughly warranted.

II. The Problem of the Colorado River Saline Waters

The Treaty for the Distribution of the Waters from the Rio Grande, Colorado, and Tijuana Rivers, of February 3, 1944,[10] represents, so it seems, a reasonable agreement between Mexico and the United States. The Republic of Mexico by means of this international instrument would obtain a certain volume of water which it previously had not received. The Treaty recognizes the traditional principle that a river touching two or more countries is an international river, that one state owes to the other state a certain obligation in respect to the waters from those international currents, and that these obligations should be defined to prevent uncertainty and ill usage by one state to the detriment of the other state.

[10] 59 Stat. 1219, T.S. No. 994.

It must be said that the United States Government had to overcome strong opposition from the western states of that Union to secure ratification of the Treaty. Representatives of these states clung to the one-sided, ultra-nationalistic view that the country upstream has all of the rights, even to the point of abuse, to employ freely those waters.[11]

However, the Mexican jurists of the time failed to see, or for some reason overlooked, two important things. First, according to well-established provisions of the law of nations, Mexico was unquestionably entitled to a considerable part of the waters from the Colorado River. Second, the 1944 Treaty actually froze at a very low level, irretrievably perhaps, Mexican rights in these waters by not providing for the growth of communities that later might need the water downstream in Lower California or in Sonora.

Be that as it may, the Waters Treaty of 1944 proved to be a good instrument, indeed an operative and reasonable one, until certain interests in the state of Arizona initiated a process whereby the water became polluted. Large tracts of land in that state were "washed" by flooding them with river water. The water was then returned to the Colorado River with the resulting waste. The salt content in the water, which had already increased as a consequence of drought and evaporation, reached such a level that the water became unfit for any use. Since the pollution was not known in due time, it caused numerous Mexican cotton lands to become impaired, perhaps permanently. Losses in the region have been considerable and have seriously affected the Mexican economy. There is little doubt that the "washing" program in Arizona has caused the uncertainty as to the effectiveness of the Treaty and, in the eyes of many, has converted it into an instrument of wavering validity.

It is discouraging to observe that in spite of the unquestionable progress of international law and the great number of treaties for the pacific settlement of controversies to which both Mexico and the United States are parties, it has not been possible so far to find a solution with respect to the saline waters. Of course, any settlement should not only be with a view to the future, but also it should reflect efforts to make up for the past damages.

This question, like all matters related to boundaries, has a highly emotional content that could adversely degenerate and eventually threaten all methods designed for the peaceful settling of controversies. It is also a matter that weighs heavily on all Mexican-

[11] *Hearings Before the Senate Committee on Foreign Relations*, 79th Cong., 1st Sess., pts. 1-4 (1945).

American relations, inasmuch as the Treaty is a very important part of the present system of mutual understanding.

Ever since the time of Washington's three rules, the principle has been incorporated in public international law that one state cannot use its territory to cause damage, negligently or intentionally, to the rights of another country. Noble rules, like the one mentioned, found their way into the practice of nations and gave birth to institutions such as the limitation of a nation's sovereignty in territorial matters, the international community of interests, and, as a consequence, the institution of the abuse of rights. Both international courts and the Supreme Court of the United States have on numerous occasions paid homage to these precepts,[12] the reason being that they are not only true rules of natural law but also rules that evince a practice that is generally accepted as law. Nevertheless, even at the current high point in the institutional progress of the law of nations and the international community, there remain men who try to find a reason to justify an action of this sort, which, originating in their own territory, turns to the detriment of another state.

In the present case there exist a number of clearly defined obligations of a contractual nature. Like all international agreements, the Waters Treaty is ruled by that same good faith which governs the exercise of any rights derived from a treaty itself. We, the Mexican jurists, understand that when a treaty is signed between nations and contractual obligations are assumed, any practices or individual rights conflicting with such obligations are to be restricted, if not altogether eliminated. Also, it is inherent in the doctrine of good faith that any rights deriving from a treaty should be exercised reasonably and in a manner that is proper and necessary for accomplishing the specified purpose. Treaties, then, must be equitable for both parties; one should not strive to secure advantage beyond that measure.

Any departure from the equilibrium between the respective interests and rights is a deviation from the original purpose of the treaty, an abuse of rights, and a violation of duty. A structure of rights and duties in which fair play and good will are not observed is logically and practically useless. The interpretation of this treaty, in the light of the customary rules of hermeneutics and the principles of good

[12] See, *e.g.*, The Trail Smelter Case, 3 U.N. Rep. Int'l Arb. Awards 1905 (1941); Nebraska v. Wyoming, 325 U.S. 589 (1945); New Jersey v. New York, 283 U.S. 336 (1931); Missouri v. Illinois, 200 U.S. 496 (1906); Kansas v. Colorado, 185 U.S. 125 (1902), 206 U.S. 46 (1906); Societé Energie Electrique v. Compagnia Impreses Elettriche Liguri (Corte di Cassazione di Italia 1939), in Annual Digest of Public International Law Cases 120 (1938-1940). Concerning the doctrine of abuse of rights, see Cheng, General Principles of Law 121 (1953).

neighborhood, equity, community of interests, and good faith, precludes any preferential privilege in favor of one party and, most certainly, all abuses.

It is, therefore, with alarm that we realize that a degree of intransigency exists and that no effort to control such actions has been made. Our apprehension is heightened when we consider that the Treaty affords a regime that is adequate to take corrective measures grounded on good neighborhood.[13] We are nonetheless confident that since there is involved a mere exegesis calling for the good disposition of the United States Government and the setting aside of certain political interests, the principle of loyalty to treaties will prevail in the end. When such good faith does exist, a great step will be taken towards eliminating another most unpleasant chapter in the history of the relations between the two countries.

III. Fishing on the Gulf

There was in 1935 and 1936 an unpleasant, violent clash between the two nations—this time on the Pacific—in connection with the fish that were being used as a bait for tuna. However, it was possible to mend things more or less satisfactorily.[14] Now the same question has arisen in connection with the shrimp shoals that are migrating in the Gulf of Mexico toward the Mexican coasts of Sonda de Campeche and thereby depleting the shores of Florida, Louisiana, and Texas of an abundant supply. The problem may spread because of the shortage of other sea products or because of the concurrence of third powers now coveting the fishing resources in the Gulf. The controversy has moved within the confines of the old debate about the three-mile territorial waters rule and has become aggravated as a consequence of the failure to seek a decent solution to this latter type of problem.

Today, after considering the codification work done by the International Law Commission on sea resources and by the two Geneva

[13] Article 24 of the Treaty, *op. cit. supra* note 10, establishes that the International Boundary and Water Commission shall have the power and duty:

> (d) To settle all differences that may arise between the two Governments with respect to the interpretation or application of this Treaty, subject to the approval of the two Governments. In any case in which the Commissioners do not reach an agreement, they shall so inform their respective governments reporting their respective opinions and the grounds therefor and the points upon which they differ, for discussion and adjustment of the difference through diplomatic channels and for application where proper of the general or special agreements which the two governments have concluded for the settlement of controversies.

[14] See an account of the controversy in 1 Hackworth, Digest of International Law 639-42 (1940).

conferences on sea questions, no international jurist will doubt that the so-called three-mile rule is an ancient relic and that rules having a greater general assent are at present necessary for the modern international community.[15] It now appears that the three-mile argument is a political expedient rather than a legal provision.

Moreover, Mexican jurists maintain that as far as the United States is concerned the correct off-shore distance should be at least a nine nautical mile width. This principle has been included in international instruments executed between the two nations and, therefore, has been part of our laws for decades.[16] If we are to talk of an international custom, we have here all of the elements needed to construct a clear definite rule of behavior. From this perspective the matter does not call for discussion: the territorial sovereignty of the Mexican State reaches into the sea as far as three nautical leagues.

These statements have been made briefly in connection with the extension of territorial waters. However, it should be observed that two notions calling for separate treatment have traditionally been intermingled. In fact, the notion of the width of the marginal sea corresponds to an idea of safety and territorial supremacy; whereas, fishing is related to the preservation and utilization of renewable natural resources. To put it differently, for the sake of technical purity and at this stage in the development of international law, questions of territorial policy should not be mixed with those of natural resources, especially at this time when a fatal Malthusianism is observed. It is high time to treat the matters separately, for the fishing question is and must be of itself an independent problem.

The Truman Proclamation in 1945 must be viewed as an expression of progress in the matter of fishing rights and also as an acknowledgement of the general principle that a state which has a coastline as its border maintains priority over the fishing resources that originate within its territorial seas. Furthermore, the doctrine recognizes that this priority spreads toward the adjacent regions or the open sea and over the species living in that zone as well. The Truman Proclamation was, beyond doubt, both a warning about and a

[15] See Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 Am. J. Int'l Law 607, 614-15 (1958). The United States presented its standard three-mile limit proposal to the conference but the necessary two-thirds support was lacking. As a compromise a six-mile limit was then proposed with the right of the coastal state to regulate fishing for another six miles subject to certain historical fishing rights. Although this proposal did not receive the two-thirds vote required for adoption, it received more votes than any other proposal.

[16] See, *e.g.*, the following Mexican statutes: The Law of Federal Property 1902, amended, 1935; The Law of Natural Property art. 176 (1944); see also Sepulveda, Curso de Derecho Internacional Público 139-42 (1960).

starting point towards the modern thesis of the community of interests in oceanic fisheries.

Much talk is heard about the contingent international right of fishing on the open sea, and too much emphasis has been laid upon the fact that such a right has become a consuetudinary rule which takes precedence over the right to control fisheries in the off-shore waters. It is possible that this practice, sporadically adhered to by a limited number of powers, will be appealed to as a general rule of the law of nations. However, it should not in reason be accepted as such for it lacks the requirements exacted under modern international law for a custom to become a legal provision. Its character as a rule accepted by general assent is quite dubious.

In contrast with such an unwarranted claim, the more generally accepted right of maintaining and preserving fishing resources and protecting them against abuse is evidently more just. These fishing areas are in fact not the wealth of only one nation that has available means for their development but the common property of mankind; no one is entitled to appropriate them to himself alone. However, as long as the other nations do not approach the country whose boundaries border the coastline, the latter country holds a right of preference in such resources and may exclude other states.

These ideas have seemingly been endorsed by most nations and were the inspiring principle of the Convention on Fishing and Conservation of the Living Resources of the High Seas[17] subscribed to at Geneva in 1958 by more than thirty nations. Under such conditions, therefore, I cannot see at present how the Mexican claim to reserve fishing within the adjacent zones and even on certain areas of the open sea is open to objection. Such a practice is in agreement with the most widely accepted rules of international law.

As far as the United States is concerned, no obstacle precludes settlement of this question on the basis of conventions which would affirm the rights of Mexico and allow, at the same time, a reasonable fishing development in the disputed zones. There are a number of antecedents that permit us to conclude that an understanding in this respect can and will be feasibly reached. Thus, for example, Mexico concluded in 1949, at the petition of the United States, the Treaty for establishing an International Commission for the Scientific Investigation of the Tuna[18] that served later as a basis for the agreement between Costa Rica and the United States (the Inter-American Tropical Tuna Commission) in 1951.

[17] U.N. Doc. No. A/Conf.B/L.54 (1958).
[18] 99 U.N.T.S. No. 1367, at 3.

The State Department itself has suggested this approach on several occasions,[19] and such a step would be in accord with the common desire to avoid extinction of sea species and to find sufficient food for the peoples of the world. It is, moreover, in keeping with the modern theses of the community of interests and the maximum resource development.

It is evident that an excellent opportunity is being overlooked to settle permanently this dispute over the Mexican rights in fishing, while the intrusion of third nations, and even of other continents—which fact will lead to serious problems—is being tolerated. It is discouraging to observe how energies are being dissipated and how manifest is our absence of foresight.

IV. Foreign Oil-Prospecting in Territorial Waters and Along the Mexican Continental Shelf

The area of foreign oil-explorations has left a bitter taste in Mexican mouths. With reluctance, yet facing the inevitable, Mexico had to nationalize the petroleum industry, thereby opening a new era in the law of nations.[20] Notwithstanding the fact that compensations were quite onerous and did not seem to be warranted, the Republic of Mexico, to the serious detriment of the national economy, punctually paid a total of 175 million dollars indemnity.[21] American companies received 45 million dollars from 1943 to 1949, British companies, 130 million dollars from 1946. The last installment was paid August 31, 1962.[22]

Mexico rapidly became a victim to the unfair attitude assumed in the face of her well-meant effort to pay such a tremendous indemnity. As a result, Mexico had to undergo long years of boycott, discrimination, suspicion, and indifference. The nationalizaton was viewed by the powers as a menacing gesture of an unruly socialism and as a threat to the security of the system of private property. However, if we look unbiasedly into the matter, little choice was left to the Mexican State. Her prestige and her sovereign integrity were at stake: both were threatened by intransigent, monopolistic corporations.

Although such attitudes have been overcome, and they were never

[19] Harrington, *U.S. Policy on Fisheries and Territorial Waters*, 26 Dep't State Bull. 1021, 1022 (1952).

[20] See White, Nationalization of Foreign Property (1961). The problems of expropriation of foreign property, although they have presented themselves on occasions, have had neither the uniformity nor the systematization achieved by the Mexican oil expropriations.

[21] The figures can be found in Cline, The United States and Mexico 247-51 (1953).

[22] Excelsior, Sept. 1, 1962.

in harmony with an integrated international community, traces of the unfair treatment remain. The effects can be detected by subtracting from the country's development program, needed sums of money which went to pay the pressing indemnities. In addition there is a deeply embedded psychological attitude. The Mexican people still believe that they had to pay for something that belonged to the nation in the first place, *viz.*, their own petroleum, since all of the property of these nationalized corporations came from the exploitation of Mexican natural resources.

All of these antecedents as well as reasonable planning for the utilization of non-renewable resources have led to Mexican legislative provisions that place solely in the hands of the Republic the prospecting, exploitation, refining, and distribution of hydrocarbons.[23]

The question of continental shelves has worried internationalists for the last few decades. Although not without some dissension, it can now be reasonably maintained that a country bordering on a seashore has the jurisdiction and control of the natural resources located in the continental shelf, including, of course, the important resource of hydrocarbons. Here too, the Truman Proclamation resulted in a series of theories and rules that in the end became a general principle at the Geneva Convention on the Continental Shelf in 1958. Just like so many other nations, Mexico has made laws reserving these resources for the nation.[24]

With all the antecedents mentioned above, there does not seem to be any possibility of ever granting to foreigners the right to exploit the resources in the off-shore zone. Mexico has shown itself to be jealous and nationalistic with some reason, and the present trend is towards government intervention in all oil utilization programs. Prospecting by foreign companies could place in foreign hands a monopoly of knowledge about the existence and location of these hydrocarbons.

It is, however, curious to observe that the very man who, according to well informed sources, originated President Truman's statement, Mr. Pauley, the famous petroleum industrialist, is at present the only one who retains a number of grants for prospecting along the continental shelf and the tidelands. This paradox is well worth the

[23] Amendments to the Federal Constitution of Mexico, Jan. 20, 1960; Sepulveda, A Statement of the Laws of Mexico 145-47 (1961); Amendment to Article 27 of the Federal Constitution of Mexico, Nov. 29, 1958; Sepulveda, *Commentary on the Amendments to Articles 27, 47, and 48 of the Constitution, Scope and Extent,* 30-31 El Foro (July-Dec. 1960).

[24] See Sepulveda, *Commentary, supra* note 23.

mention. It seems, however, that the undertaking has not been successful and that no further grants will be given in the future.

As a final note, it is in this field that the United Nations' technical assistance programs could be of benefit in permitting a reasonable exploitation of the mineral resources in the depths off the coasts of Mexico, with Mexican-owned elements.

V. Final Comments

Relations between Mexico and the United States are friendly at present, and there has been understanding in numerous aspects. Some adjustments, however, still remain to be effected in order to eliminate certain unpleasant situations or to carry those relations to an optimum. An effort is required to terminate such pending questions as Chamizal, fishing, and the saline waters. This effort is demanded by good sense and the harmony that should exist between mutually respecting neighbors. It is up to us, the jurists of one and the other country, to advance the best suited methods to terminate these differences that cast a shadow over good relations and remain as barriers to agreements in other areas of dispute.

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