

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MERCURIA ENERGY GROUP LIMITED,

Simou Menardou 8
Ria Court 8, Office 302
6515 Larnaca, Cyprus

Petitioner,

v.

THE REPUBLIC OF POLAND,

J. Ch. Szucha 23
00-580 Warsaw, Poland
NIP 5262131556
Regon 000177916

Respondent.

Civil Action No.

PETITION TO CONFIRM FOREIGN ARBITRAL AWARD

Petitioner Mercuria Energy Group Limited (“**Mercuria**”), by and through its undersigned counsel, hereby petitions this Court for an order pursuant to 9 U.S.C. § 207 (i) confirming and recognizing the final arbitral award (the “**Award**”) rendered on December 29, 2022 in an arbitration between Mercuria, on one hand, and the Republic of Poland (“**Poland**”), on the other, pursuant to the Energy Charter Treaty and the 2017 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “**SCC Rules**”), in SCC Case No. V 2019/126; (ii) entering judgment in Mercuria’s favor and against Poland in the amount of the Award with pre- and post-award interest and costs as provided therein and as authorized by law, plus the costs of this proceeding; and (iii) awarding Mercuria such other and further relief as this Court deems just and proper. A true and correct copy of the Award is attached as **Exhibit A** to the Declaration of Erin Collins, dated November 29, 2023 (the “**Collins Decl.**”).

Parties, Jurisdiction and Venue

1. Mercuria brings this summary proceeding under the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958), 21 U.S.T. 2517, 330 U.N.T.S. 38 (the “**New York Convention**”) and Chapter 2 of the Federal Arbitration Act (“**FAA**”), 9 U.S.C. §§ 201 *et seq.*, to confirm the Award.

2. Mercuria is a limited liability company organized and existing under the laws of the Republic of Cyprus under registration number HE 145530, with its registered office at Simou Menardou 8, Ria Court 8, Office 302, 6515 Larnaca, Cyprus. Collins Decl., Ex. A ¶¶ 3-4.

3. Respondent Poland is a foreign state within the meaning of the Foreign Sovereign Immunities Act (“**FSIA**”), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-611.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1330(a) as this case falls under the exception to immunity set forth in 28 U.S.C. § 1605(a)(6) for cases brought against a foreign state to confirm arbitration awards that “[are] or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards[.]” 28 U.S.C. § 1605(a)(6)(B).

5. Personal jurisdiction over Poland is expressly conferred by 28 U.S.C. § 1330(b), which provides that this Court may exercise personal jurisdiction over a foreign state in any action with respect to which the foreign state is not entitled to sovereign immunity under 28 U.S.C. §§ 1605-1607, and service has been made pursuant to 28 U.S.C. § 1608.

6. Venue is proper in this district pursuant to 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(4).

Summary of the Dispute

7. The parties’ dispute arises from a financial penalty imposed on Mercuria’s subsidiary, J&S Energy S.A. (“**JSE**”) by the Minister of Energy and the President of the Polish

Material Reserves Agency in 2008. Collins Decl., Ex. A, ¶ 163. The financial penalty was ultimately overturned by the Polish administrative courts in 2009, but was never reimbursed in full by the government to Mercuria. Mercuria brought an arbitration against Poland to recover the outstanding part of the penalty with statutory interest accrued thereon (the “**Arbitration**”).

8. On December 29, 2022, the Tribunal issued the Award and unanimously found that Poland breached its obligations of fair and equitable treatment as conferred by Article 10(1) of the Energy Charter Treaty (the “**ECT**” or the “**Treaty**”) and that Poland had failed to ensure that its domestic law provided an effective means for Mercuria to assert its claims and enforce its rights, as required by Article 10(12) of the ECT. *Id.* ¶ 930(II). As a result, the Tribunal awarded Mercuria PLN 145,094,420.20 in losses, plus simple interest accrued on the amount of PLN 64,636,447.36 at the rate applied to tax arrears in accordance with the Polish Tax Ordinance announced by the Polish Minister of Finances from May 16, 2020 until the day of full and final payment. *Id.* ¶ 930 (III-IV). The Tribunal further awarded Mercuria its legal expenses and other costs in the amount of EUR 212,328.14 with simple interest set at 5% until the date of payment. *Id.* ¶¶ 930 (VIII-IX).

9. The facts underlying Mercuria’s investment in Poland, and the parties’ dispute, are briefly summarized as follows:

10. On April 3, 2008, the President of the Material Reserves Agency imposed a financial penalty on JSE in the amount of PLN 461,695,807.26. *Id.* ¶ 178. The Minister of Energy later reduced the penalty to PLN 452,045,537.36 on June 5, 2008. *Id.* ¶ 179. Finally, on June 23, 2008, the Material Reserves Agency issued a notice to JSE demanding payment of the penalty with interest calculated from June 20, 2008, at the rate applicable to tax arrears under the Polish Tax Ordinance in place at the time. *Id.* ¶ 180.

11. On June 23, 2008, in order to pay these dues, Mercuria and JSE entered into a loan agreement for USD 212,900,000 (the “**Loan Agreement**”) so that JSE would have sufficient funds to pay the penalty. *Id.* ¶ 182. On June 30, 2008, Mercuria and JSE also entered into a revaluation agreement which calculated the capital sum of the loan agreement at PLN 450,049,310.

12. On June 30, 2008, JSE paid the Material Reserves Agency a total amount of PLN 454,053,525.36, which covered both the penalty and statutory interest. JSE made an additional payment of PLN 1,796,510.70 the following day to cover the remaining interest. *Id.* ¶ 184.

13. Following these payments, on July 8, 2008, the Material Reserves Agency informed JSE of a change in the interest rate for the late payment of tax arrears as of June 26, 2008, applying a higher rate of 15% per annum to the JSE penalty, and causing JSE to make an additional interest payment of PLN 211,477.30 on July 11, 2008. *Id.* ¶¶ 185-86.

14. On December 23, 2008, the Provincial Administrative Court in Warsaw repealed the penalties imposed on Mercuria by the President of Material Reserves Agency’s April 3, 2008 decision and the Ministry of Economy’s June 5, 2008 decision. *Id.* ¶ 188. This decision was appealed, and on October 20, 2009, the Supreme Administrative Court of Poland upheld the Provincial Administrative Court’s judgment. The cases were returned to the Material Reserves Agency for reconsideration, and on February 26, 2010, the President of the Material Reserves Agency discontinued the administrative proceedings against JSE and no penalty was ever reinstated. *Id.* ¶ 189.

15. On October 22, 2009, after the Supreme Administrative Court upheld the Provincial Administrative Court’s judgment, JSE requested that the Material Reserves Agency repay PLN 454,053,525.36 with interest based on Articles 2.2., 78.1 and 78.3.1 of the Polish Tax Ordinance.

Id. ¶ 190. On November 9, 2009, the Material Reserves Agency returned the exact amount JSE had paid in connection with the penalty but refused to provide JSE with any of the additional interest paid by JSE. *Id.* ¶ 192. As JSE explained, the returned amounts should have been allocated pro rata for the principal amount of the unduly paid penalty (an overpayment) and the statutory interest. As a result, when the Polish authorities only returned what JSE had paid directly, they only returned part of the principal amount and part of the interest, and left JSE uncompensated for the interest it should have been incurring but for the over payment for the last 15 years. *See id.* ¶¶ 873-75.

16. Throughout 2010, JSE wrote to the Ministry of Energy and the President of the Material Reserves Agency to be reimbursed for the outstanding part of the penalty and the statutory interest it was entitled. None of these efforts was successful. *Id.* ¶¶ 196-97.

17. As a result, JSE sought recourse from various Polish courts and administrative agencies. From 2009 through 2022, JSE commenced three different civil judicial proceedings and six different administrative proceedings aimed at resolving the parties' dispute. *Id.* ¶ 211. JSE was unable to obtain meaningful relief as a result of these proceedings. While JSE was awarded six final and non-appealable judgments of the Polish Administrative Courts directing the President of the Material Reserves Agency to examine and resolve JSE's complaint, none of those judgments resulted in settlement with the Material Reserves Agency. Rather, beginning in June 2022, the President of the Material Reserves Agency opted to indefinitely delay giving attention to JSE's complaint, issuing three different non-appealable notices continuously setting "new deadlines" to settle JSE's case. *Id.* ¶¶ 240-42.

18. The Tribunal concluded, based on JSE's unsuccessful efforts to seek relief from the Polish administrative courts and authorities for 13 years, that while "the Polish judiciary provided

effective means for the assertion of JSE and [Mercuria]’s claims,” there was a “failure of the administrative authorities to comply in a timely fashion – if at all – with the decisions rendered by the Polish administrative courts.” *Id.* ¶ 776. Specifically, the Tribunal found that, over more than a decade, Poland’s administrative authorities “lacked transparency and respect for procedural propriety” and, notwithstanding multiple administrative court rulings in JSE’s favor, the Polish authorities refused to enforce JSE’s and Mercuria’s rights in a way that was “non-transparent, inconsistent, and arbitrary” and in violation of Poland’s fair and equitable treatment obligations. *Id.* ¶ 839. Consequently, the Tribunal found that the Polish system had resulted in “an endless loop of proceedings for JSE and Mercuria between the various Polish courts and the administrative authorities.” *Id.* ¶ 777. Upon finding that the local enforcement remedies provided by Poland were ineffective, the Tribunal concluded that Poland breached the requirements of Articles 10(1) and 10(12) of the ECT. *Id.*

19. Following the arbitration, on June 29, 2023, the President of the Material Reserves Agency issued another decision denying JSE’s claim in glaring contradiction with the aforementioned judgments. This time the President of the Material Reserves Agency acknowledged that JSE once had a claim, but determined that due the claim was now expired under the statute of limitations. JSE submitted an appeal to the Minister of Climate and Environment on July 17, 2023. Those proceedings remain ongoing. *Id.*

The Energy Charter Treaty

20. Both the relationship and dispute at issue between Mercuria and Poland are governed by the ECT, which Poland signed on December 17, 1994 and ratified on November 24, 2000,¹ and which Cyprus signed on December 17, 1994 and ratified on January 2, 1998.²

21. Article 1(7) of the ECT provides that the term “investor” means “a company or other organization organized in accordance with the law applicable in that Contracting Party.” Collins Decl., Ex. B, Art. 1(7). The domestic laws of each Contracting State determine nationality. *Id.* Poland acknowledged that it is a Contracting Party to the ECT, and over Poland’s objections, the Tribunal concluded that Mercuria was considered an investor “of another Contracting Party,” notwithstanding the fact that Poland and Cyprus are both EU member states. Collins Decl., Ex. A, ¶ 374.

22. Article 26 of the ECT provides that “[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former . . . shall, if possible, be settled amicably” and “[i]f such disputes cannot be settled according to paragraph (1) . . . the Investor party to the dispute may choose to submit it for resolution” in “an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.” Collins Decl., Ex. B, Art. 26.

¹ See Int’l Energy Charter, Contracting Parties and Signatories, Poland, <https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/poland/> (last visited Nov. 2, 2023). On December 28, 2022, Poland submitted its notification of withdrawal from the ECT. Poland’s withdrawal has not yet taken effect, and even once it does, all investments existing at the time of its renunciation of the ECT remain protected, and investors in Poland will be permitted to use the Dispute Settlement Provisions of the ECT for an additional 20 years. Article 47(3) of the ECT provides for a “sunset period” of 20 years during which the ECT continues to apply to pre-existing qualifying investments after a signatory state’s withdrawal from the treaty.

² Int’l Energy Charter, Contracting Parties and Signatories, Cyprus, <https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/cyprus/> (last visited Nov. 2, 2023).

23. The Tribunal found that all of the States involved in the dispute (*i.e.*, Poland as the respondent state and Cyprus as the state of nationality of the claimant) had ratified the ECT and are therefore “Contracting Parties.” Collins Decl., Ex. A, ¶¶ 373-74. While Poland challenged the Tribunal’s jurisdiction, alleging an unwritten intra-EU exception to ECT Article 26 that ostensibly precluded the use of international arbitration to resolve disputes between EU investors and EU member states, the Tribunal found that the text of the ECT did not contain any provision imposing this restriction and that Article 26 of the ECT “operates as an unconditional offer by the Contracting Parties to the ECT, including the EU and its Member States ... to submit to international arbitration, should an investor from another Contracting Party chose to accept it.” *Id.* ¶ 394. The Tribunal therefore dismissed this jurisdictional objection.

24. The ECT also sets forth the substantive obligations of each Party to protect the investors of the other Party, as well as their investments. Specifically, Article 10(1) provides:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions of Investors of other Contracting Parties to make Investments in its Area. **Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.** Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

Collins Decl., Ex. B, Art. 10(1) (emphasis supplied).

25. Likewise, Article 10(12) provides:

Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of

rights with respect to Investments, investment agreements, and investment authorisations.

Id., Art. 10(12).

The Parties Agreement to Arbitrate

26. Poland, by signing and ratifying the ECT, made a binding offer to arbitrate disputes covered by the ECT. Mercuria accepted that offer by serving its notice of arbitration.

27. In a treaty arbitration, an agreement to arbitrate exists where the State has signed and ratified a treaty containing an arbitration provision and the investor submits a notice of arbitration invoking that provision. *See Stati v. Republic of Kazakhstan* 199 F. Supp. 3d 179, 188 (D.D.C. 2016) (finding that proffer of treaty containing arbitration provision, coupled with notice of arbitration, establishes prima facie evidence of arbitration agreement) (citing *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205 (D.C. Cir. 2015), *aff'd*, No. 18-7047 (D.C. Cir. 2019) (unpublished)); *see also 9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-CV-01871 (TSC), 2023 WL 2016933, at *6 (D.D.C. Feb. 15, 2023) (recalling that a plaintiff has satisfied its “jurisdictional burden” by producing copies of the underlying treaty, notice of arbitration, and the tribunal’s decision (citing *LLC SPS Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021)); *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, No. 20-CV-1708-EGS-MAU, 2023 WL 2914472, at *9 (D.D.C. Mar. 31, 2023) (recalling that a plaintiff has made a *prima facie* showing of an arbitration agreement when it produces the award, the treaty and the notice of arbitration); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir. 2011) (“[a]ll that is necessary to form an agreement to arbitrate is for one party to be a . . . signatory and the other to consent to arbitration of an investment dispute in accordance with the Treaty’s terms.”).

28. Article 26(4) of the ECT memorializes Poland’s and Cyprus’ consent to arbitration of claims by an investor of a Party against the other Party and provides that:

In the event that an Investor chooses to submit the dispute for resolution [in international arbitration], the Investor shall further provide its consent in writing for the dispute to be submitted to:

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

Collins Decl., Ex. B, Art. 26(4).

29. Poland thus gave its consent to the submission of this dispute to SCC arbitration when it ratified the ECT. Collins Decl., Ex. A, ¶ 394. This consent was “unconditional” under Article 26(3)(a) of the ECT, which provides that “subject **only** to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.” Collins Decl, Ex. B, Art. 26 (emphasis supplied). While Poland is one of the Contracting Parties which made a reservation pursuant to Article 26(3)(b) of the ECT, that reservation merely precludes an investor from arbitrating a dispute that “has already been submitted to a competent court or administrative tribunal in Poland or to a previously agreed arbitration procedure for settlement of the dispute.” Collins Decl., Ex. A ¶ 582 (quoting the Statement sent by the Polish Embassy in Brussels on March 6, 2001). As explained below, the Tribunal rejected Poland’s argument that this reservation was applicable in this case. *See infra* ¶ 39 Poland has never alleged that the exception to consent set forth under Article 26(3)(c) applies. Collins Decl, ¶ 7.

30. Mercuria affirmed in writing its consent to arbitrate pursuant to Article 26 of the ECT in its Notice of Arbitration. Collins Decl, Ex. D, Notice of Arbitration.

31. Accordingly, under Article 26 of the ECT, Mercuria’s submission to arbitration, coupled with Poland’s consent set forth in Article 26(3)(a), constituted an enforceable agreement to arbitrate.

The Arbitration

32. Mercuria commenced the Arbitration by submitting its Notice of Arbitration, which was registered with the SCC on September 12, 2019. Collins Decl., Ex. A, ¶ 14; *see also* Collins Decl, Ex. D, Notice of Arbitration.

33. The Arbitration was seated in Stockholm, Sweden, and proceeded in accordance with the SCC Rules. Selection of the Tribunal was completed on January 9, 2020, and the Tribunal was composed of Dr. Klaus Sachs (Chairperson, appointed by the parties), Ms. Juliet Blanch (appointed by Mercuria), and Dr. Laurence Boisson de Chazournes (appointed by Poland). Collins Decl., Ex. A, ¶¶ 12, 15, 29-31.

34. Poland was represented in the Arbitration by attorneys from the General Counsel to the Republic of Poland. *Id.* ¶ 10. Poland participated in the Arbitration, including by submitting an Answer to the Request for Arbitration, a Statement of Defense, expert reports, witness statements, and multiple post-hearing submissions regarding various issues. *Id.* § B.

35. The European Commission requested the opportunity to participate as a non-disputing party to the ECT. *Id.* ¶ 68. This request was granted, and the Tribunal permitted the European Commission to file a written submission on the interpretation of Article 26 of the ECT as a non-disputing party, pursuant to Article 4, Annex III of the SCC Rules. *Id.* ¶ 70.

36. After the parties' written submissions, the tribunal held a hearing virtually, with the agreement of both parties (*id.* ¶ 82), which took place from June 27-July 1, 2021. *Id.* ¶ 92.

37. After the hearing, the Tribunal accepted requests by the parties to hear further briefing on the effect, if any, on the Tribunal's jurisdiction by new decisions issued by the Court of Justice of the European Union (the "CJEU"), the Svea Court of Appeal, and other ECT tribunals. *Id.* ¶¶ 99, 115, 124, 135-36, 159. The Tribunal also received further briefing on the status JSE's pending administrative proceedings. *Id.* ¶ 124-27, 135-36.

38. As a result, the Tribunal did not declare the arbitration proceedings closed until December 23, 2022. *Id.* ¶ 162.

The Award

39. The Tribunal issued its unanimous Award on December 29, 2022.

40. With respect to jurisdiction, the Tribunal dismissed Poland’s objection that the Tribunal did not have jurisdiction to adjudicate this dispute under the ECT because Poland did not agree to arbitrate disputes with investors from EU member states – disputes frequently referred to as “intra-EU disputes” – under Article 26 of the ECT. Collins Decl., Ex. A, ¶ 257. The Tribunal also rejected Poland’s fork-in-the road objection. It found that, even though Poland had made a reservation to Article 26(3)(a) – insofar as it did not provide standing consent to arbitrate cases which an investor had submitted to local courts, because Mercuria’s claims in the Arbitration arose principally based on the absence of domestic remedies in Poland, the ECT’s fork-in-the-road provision was not triggered, and neither was Poland’s reservation. *Id.* ¶¶ 610-11. Poland also asserted various other jurisdictional objections which were likewise dismissed. *Id.* ¶¶ 296-97, 373-82, 484, 547 575-78, 627-28, 641-43, 662-65.

41. On the merits, the Tribunal found that Poland failed to provide Mercuria with an effective means to assert its claims. The Tribunal found that “JSE and [Mercuria] did everything that could be reasonably expected of them in order to have the administrative authorities resolve JSE’s Application in an effective manner and within reasonable time,” and as a result, Mercuria “was not afforded effective local remedies to enforce its rights in the case at hand.” *Id.* ¶¶ 811, 816. As a result, Poland breached its obligations under Article 10(12) of the ECT.

42. The Tribunal also found that “[t]he conduct of Respondent that led this Tribunal to establish the violation of the effective means standard of Article 10(12) of the ECT gives this

Tribunal grounds to establish the violation of the FET standard of Article 10(1) of the ECT.” *Id.* ¶ 838.

43. To compensate Mercuria for Poland’s breach, the Tribunal unanimously awarded Mercuria PLN 145,094,420.20, plus simple interest accrued on the amount of PLN 64,636,447.36 at the rate applied to tax arrears in accordance with the Polish Tax Ordinance, as announced by the Polish Minister of Finances, from May 16, 2020 until the day of full and final payment. *Id.* ¶ 930 (III-IV). The Tribunal also awarded Mercuria its share of the costs of the Arbitration amounting to EUR 289,650.39, and the legal expenses and Mercuria’s other costs incurred in the Arbitration amounting to EUR 212,328.14. *Id.* ¶ 930 (VII-VIII).

Poland’s Challenge to the Award in Sweden

44. On February 28, 2023, Poland filed an application to set aside the Award before the Svea Court of Appeal. Collins Decl. ¶ 8. The Swedish set aside proceedings remain pending. *Id.*

* * *

45. The Award remains unpaid. Collins Decl. ¶ 9. By this action, Mercuria seeks recognition and enforcement of the Award by this Court.

Cause of Action

46. Mercuria repeats and realleges the allegations in paragraphs 1 through 45 as if set forth fully herein.

47. The arbitration agreement set forth herein at paragraphs 26 through 31 constitutes “an agreement in writing” within the meaning of Article II(2) of the New York Convention.

48. The Award arose out of a legal relationship that is commercial within the meaning of 9 U.S.C. § 202.

49. The Award was made in Sweden, a nation that is a signatory to the New York Convention, and which is a State other than the State where recognition and enforcement is sought hereby.

50. Cyprus and Poland are also both signatories to the New York Convention.

51. The Award is final and binding within the meaning of the New York Convention and Chapter 2 of the FAA.

52. None of the grounds for refusal or deferral of the Award set forth in the New York Convention apply.

53. The Award is required to be recognized, and judgment entered thereon, pursuant to the New York Convention and 9 U.S.C. § 207.

WHEREFORE, Mercuria prays:

- (a) That the Court enter a judgment pursuant to 9 U.S.C. § 207 recognizing the Award against Poland;
- (b) That, on the basis of the Award, the Court enter a judgment that Poland is liable to Mercuria in the amount of
 - (i) **PLN 145,094,420.20** plus simple interest accrued on the amount of PLN 64,636,447.36 at the rate applied to tax arrears in accordance with the Polish Tax Ordinance, as announced by the Polish Minister of Finances, from 16 May 2020 until the day of full and final payment to Mercuria of this amount and the principal amounts;
 - (ii) EUR 289,650.39 plus simple interest at the rate of 5% per annum, covering Mercuria's share of the costs of the Arbitration;
 - (iii) EUR 212,328.14 plus simple interest at the rate of 5% per annum, covering Mercuria's legal expenses and other costs incurred in the Arbitration by Mercuria;
- (c) That Mercuria be awarded such other and further relief as may be proper.

Dated: New York, New York
November 30, 2023

Respectfully submitted,

/s/ James E. Berger

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