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Appendices

Agreement on Technical Barriers to Trade (TBT), WTO.

Agreement on Textiles and Clothing, WTO.

Banana Case. (WT/DS 16–27-105–152–158–165-237)

Beef Harmony Case. (WT/DS26 and WT/DS48).

Chile Taxes on Alcoholic Beverages. (WT/DS110, WT/DS109 and WT/DS87).

Japan Taxes on Alcoholic Beverages. (WT/DS8, WT/DS10 and WT/DS11)

Shrimps Case. (WT/DS 61-5B and WT/DS58).

Standards for Reformulated and Conventional Gasoline case. (DS2).

Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

United States – imposition of countervailing duties on certain hot rolled lead and bismuth carbon steel products originating in the United Kingdom. (WT/DS138)

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The second issue to be addressed is that of the participation in the dispute settlement process of non-members such as NGOs, companies or individuals. The parties permitted to initiate a dispute under the DSU are government members of the WTO, States, and customs unions such as the European Community (Schoenbaum, 1998:653). As a consequence, the way in which a private party can gain access to the WTO dispute settlement procedure to represent his case is through any WTO member who may be willing to advocate the private party's case (Schoenbaum, 1999:654). In the case between the Kodak and Fuji companies (Dunoff , 1998:446) concerning the opening of Japans' market to Kodak goods, both companies participated indirectly in the dispute settlement process through their governments by providing them with all relevant documents in support of their positions against each other.

The third issue is the overlapping of international laws with international trade dispute settlement rulings. In the *beef hormones* case, the problem of scientific conflict made it harder for the panel, the Appellate Body and the arbitration mechanism to take a clear, prompt and correct decision because of the conflict between scientific sources from each party in the case (Boyle,1999: 52-53).

Conclusion

This paper has sought to show that the multilateral trading system was designed from the beginning to support the idea of international dispute settlement body. Moreover, generally speaking, since most WTO Members have been part of one or more disputes, the WTO dispute settlement body has widespread effects, both positive and negative. Nonetheless, the legal and political connection between the Members, although unclear, remains a key to its achieving success. There are fears about three main issues: i) third-party participation, ii) equal access to the dispute settlement mechanism and NGO involvement, and iii) retaliation outcomes.

It is remarkable that the DSB has a clear and positive process of resolving disputes between member states. The WTO, as mentioned above, distinguishes between developed countries and developing countries in the adjudication procedure.

Furthermore, the difference in efficiency between the old and new systems is clear (GATT 1947 v. WTO), as illustrated by three well-known cases, the banana case[44], the shrimp-turtle case[45] and the beef hormones case[46], where the old system would allow the process to go on without any clear limit of time or certainty of outcome in "the matter of enforceability", while such cases are solved in a well-organised way under the new dispute settlement mechanism.

The concluding test of the WTO's success is not the amount of trade covered or the extent to which trade barriers have been lowered, but whether and to what extent there can be seen to be fairness of application and participation of all Members equally, particularly the developing countries, which make up eighty percent of the membership. Although the DSU is considered one of the most successful international dispute settlement mechanisms, providing a strong multilateral dispute settlement mechanism and reducing unilateral action by states, it still has some areas which need to be addressed.

[44] Banana case (WTO/DS 16–27-105–152–158–165-237) WTO documents.
[45] Shrimp case, WT/DS5, WTO documents.
[46] Beef Hormones Case, WT/DS26 and WT/DS48, WTO documents.

In the case of *Standards for Reformulated and Conventional Gasoline*[35] in 1995 both Venezuela and Brazil alleged that the US breached the GATT articles I and III and article 2 of the Agreement on Technical Barriers to Trade (TBT)[36]. The findings of the panel and the Appellate Body were that the US, by imposing its gasoline regulations, violated the covered agreement in some parts. According to the ruling and recommendation of the DSB, the US implemented the requirement within the reasonable time of 15 months. This case demonstrates that developed and developing countries are in the same position, without any discrimination under the DSU; as a consequence, the implementation of the ruling and recommendation adopted by the DSB provides concrete evidence of the justifiability of the DSU. Further, it is a significant victory for the Dispute Settlement Mechanism, building confidence in the mechanism for both developed and developing countries and making them more likely to bring their disputes to it (Ebina *et al.*,1999: 7-8).

It is worth emphasising that stability and consistency in decisions taken about cases under the DSU, where there are similarities in the facts, will signify the increased credibility of the dispute settlement system (Ebina *et al.*, 1999:8). There are two cases, *Japan Taxes on Alcoholic Beverages*[37] and *Chile Taxes on Alcoholic Beverages*,[38] where the complaining parties in the second case relied on the first case as similar in fact. In the first case, there were complaints by the US and EU against Japan stating that the Japanese had discriminated against their exports of alcohol under the Japanese liquor tax system. After the case had passed through the dispute settlement process the Appellate Body upheld the complaints. Subsequently, the EU alleged that Chile had imposed a higher tax on certain kinds of alcoholic drink; after unsuccessful consultation, the EU requested the establishment of a panel with the US and other countries involved as third parties, in the process advancing the previous case as a similar fact. Both the panel and the Appellate Body based their examination of the case on the earlier one, and ultimately the EU again won the case.

Although many cases have passed through the DSB, two in particular have challenged the dispute settlement process itself: the *banana*[39] case and the *beef hormones*[40] case, which are both considered important cases, being the only two cases where the violation has not been rectified, even after the imposition of sanctions.

It is vital the *banana* case[41] to be considered. In April 1996, after an unsuccessful stage of consultation between the US and the EU, the US requested that a panel be established. The allegation was that the EU regime was contrary to GATT articles I, II, III, X, XI and XIII and provisions of the import licensing agreement[42]. At the second meeting the DSB established a panel, which found that the banana regime was indeed inconsistent with the GATT[43]. In 1997 the EU stated its intention to appeal the panel report; the Appellate Body then upheld the panel report. The DSB requested the EU, in the given reasonable time, to bring its banana policy into conformity; otherwise the US, once the given time had terminated, would apply sanctions. The EU policy was not so modified and sanctions were imposed by the US, which placed 100% import duties on EU countries. Finally, in 2001, the parties agreed to settle the dispute by means acceptable to them, regardless of the WTO regulations.

Criticisms of the Dispute Settlement Understanding

The first issue to be discussed is that the composition of the panel can cause a delay in hearing a case in due time. In principle, examining a case is restricted to a period of time which both the panellists and the parties should respect. Nevertheless, in practice the appointment of panel members from different countries, regardless of the time constraints on the parties, can reflect ineffective communication between them (Chang, 2003:220). For instance, in the case of the appointment of a member from the US and another from Saudi Arabia, it will be hard for them to communicate directly by telephone, because they are in different time zones. Furthermore, the imposition of time limits on the production of the final report of the panel and even on the process at the panel stage is seen as an impractical way to resolve conflicts between parties. Quite simply, the panellists being under time pressure may cause avoidable error (Chang, 2003:220). Accordingly, some panel findings are being reversed or modified at the Appellate Body stage, and this may be attributed to time restrictions on the panel process which may reflect on the outcome of the report (Wasescha, 2003:219). For this reason, most panellists do not believe that such time limits allow them to produce equitable reports (Chang , 2003:219).

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[35] Standards for Reformulated and Conventional Gasoline. (DS2).WTO Document.
[36] The Agreement on Technical Barriers to Trade (TBT), WTO Document. DISPUTE DS2.
[37] Japan Taxes on Alcoholic Beverages WT/DS8, WT/DS10 and WT/DS11. WTO Document.
[38] Chile Taxes on Alcoholic Beverages, WTO/DS110, WT/DS109 and WT/DS87. WTO Document.
[39] Banana case, WT/DS16, WT/DS27, WT/DS105, WT/DS158. WTO Document.
[40] Beef hormones case, WT/DS26- WT/DS48. WTO Document.
[41] Banana case, WT/DS16, WT/DS27, WT/DS105 and WT/DS158, WTO Document.
[42] Ibid.
[43] Ibid.

Hong Kong, China, Mexico and Nigeria had shown a potential interest in the case, which justified their intervention as third parties under article 10.

The panel had to examine the documents submitted by both parties to determine whether the prohibition of importation could be justified under article XI of GATT 1994 or would fall under article XX (B) and (G) of GATT 1994, which prohibits the quantitative restriction of imports. During the consideration there was a further written submission by a non-governmental organization (NGO) which the panel at this stage did not accept, regarding it as inconsistent with article 13 of the DSU. At this point it is relevant to raise the criticism by the Trade Stakeholder model of the fact that permissible intervention does not cover non-governmental or international organizations, for instance those concerned with environmental or health issues, even through written submission (Trebilcock *et al.* , 2002:66). In May 1998, the panel report upheld the complaining argument. The US appealed under article 16 against the panel report.

The findings of the Appellate Body were in favour of the complaining parties[30]. However, it is noteworthy that the appellate body reversed the process which the panel had used in its investigation. The main reversal was that written submission by an NGO was not contrary to article 13 of the DSU and was accepted by the Appellate Body, since it found that article 13 of the DSU allowed the panel "the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not". Qureshi observes that acceptance of the NGO's submission means that firstly, NGOs are not restricted or time-limited in the design or submission of relevant work; secondly, the burden of proof of the veracity of their statement falls to the parties in the case, which may influence the case findings (Qureshi *et al.*, 1999:205).

The second case is *United States – imposition of countervailing duties on certain hot rolled lead and bismuth carbon steel products originating in the United Kingdom*[31]. The background of the case is about the US imposed countervailing duties on the import of certain steel products originating in Britain, and the panel found that the US violated article 10 of the Subsidies Agreement[32]. The US appealed the panel decision. During the Appellate Body stage two documents were advanced as amicus curiae briefs. The European Communities (Complainant) argued that article 17,4 of the DSU and Rules 21,22 and 28,1 of the Working Procedures limit the participation of third parties. In addition, the European Community stated that in the *shrimp* case the grounds for permitting the amicus curiae briefs were under article 13 of the DSU, which does not apply to the appeal process; furthermore, this article is confined to the provision of technical information, not legal argument or interpretation[33]. This argument was maintained by the third parties to the case, who stressed that the Appellate Body does not have the authority to accept amicus curiae briefs. However, the Appellate Body concluded that neither the DSU nor the Working Procedures state specifically that information may not be derived from any source other than the participants or third parties. Hence, it held that it can adopt any rules and procedures that do not contradict those of the DSU or WTO. Consequently, the Appellate Body may accept any relevant information from which it can benefit.

From the two cases mentioned above it can be deduced firstly that the interpretation by the Appellate Body of article 13 seeking information has opened the door for unsolicited submissions to be provided by NGOs or other sources which are not members of the WTO. A consequence of the effect on the final decisions of the Appellate Body and panel of allowing such submissions is that the trustworthiness and credibility of the dispute settlement process will be enhanced. Secondly, there is a possibility of modification in the way documents are examined which may result in different findings, since the approach which a panel has used may be changed by the Appellate Body to re-examine evidence. This may be seen as a significant point. On one hand, the Appellate Body can correct any mistake made at the previous stage; on the other hand, both parties are able to ensure that the examination of their evidence has been conducted thoroughly. Thirdly, the interpretation may weaken the argument that the WTO dispute settlement process is an isolated mechanism which will not produce an equitable decision; thus, the benefits of NGO intervention will influence decision-making and trade policy[34].

Moreover, the terms 'confidence' and 'justifiability' are reflections of each other. The assessment of justifiability arises at the first stage of the DSU process, while subsequently, at the end of the case, the parties will express their confidence by either bringing a new case to the DSU or by executing promptly the ruling and recommendations of the panel or Appellate Body. The equitability among the parties can be seen from the point of view of the parties by analysis of the case by an expert, depending on the merits of the case.

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[30] Shrimp case, WT/DS 61-58, WTO Document.
[31] United States – imposition of countervailing duties on certain hot rolled lead and bismuth carbon steel products originating in the United Kingdom case, WT/DS138, WTO Document.
[32] *Ibid.*
[33] Shrimp case, WT/DS 61-85. WTO Document.
[34] Note shrimp case p 4.

generally be issued after a period of deliberation of between sixty days and ninety days[19]. The adoption of the final conclusion of the Appellate Body by the DSB may be accepted unconditionally by the parties, or the DSB can reject the conclusion by consensus within thirty days[20].

If the case has been decided, the defeated party must execute the recommendations or the ruling of the DSB in order to retain the effectiveness of the outcome[21]. It is essential, to ensure the practical settlement of disputes within the WTO, that the implementation of the DSB's findings should be complied with by all parties within a fixed period of time. The members concerned, in order to fulfil the binding decision of the report of the Appellate Body or the panel, must notify the DSB of their intention to implement the recommendations and rulings, because the practical application of the DSU procedures requires a time limit for conformity in good faith[22].

Moreover, if the losing member has not carried out the requirement upon him within the given time, the next step which can be taken is that both parties enter into negotiations in order to agree on mutually acceptable compensation[23]. If, within no more than twenty days from the expiry date of the time given, no agreement has been reached, the invoking parties to the dispute settlement procedure have the right to demand endorsement from the DSB to impose sanctions or obligations upon the inconsistent party; however, such a request may be rejected by consensus of the DSB[24].

Nevertheless, it must be emphasised that negotiation between WTO members to comply with the findings of a panel or the Appellate Body is optional, as the losing member has three choices (Jiaxiang, 2016:3):

I. the party accused of the breach immediately stops the conduct in question;
II. the party accused of the breach provides voluntary compensation; or
III. the complaining party unilaterally suspends the application of concessions or other obligations under the covered agreement with respect to the other member.

Moreover, it is worth pointing out that developing countries have different procedures applied to them as parties to disputes. At the consultation stage, they are ensured special attention to their particular problems and interests[25]. It is to insure these counties are involved into a multilateral trading system and increase their participation in international trade (Otor, 2015: 10). Sandhu discussed the involvement of developing counties into the DSS. It has shown that the developing counties have nominal participation in the DSS (Sandhu, 2016:7). the less participation can be attributed to the cost associated with the adjudication[26], and the system provides for neither mandatory compensation nor consistent punishment (Jiaxiang, 2016:4-15).

Reflections on the Dispute Settlement Understanding process

This topic examines a number of cases showing the practical exercise of the DSB process outlined above, in order to endeavour to assess the justiciability of international trade disputes and the suitability of the procedures of the DSB.

In this regard, two cases will be considered initially: *Prohibition of certain shrimp and shrimp products (*Shrimp case, WT/DS 61-58, WTO Document)[27] and *United States – imposition of countervailing duties on certain hot rolled lead and bismuth carbon steel products originating in the United Kingdom*[28].

In the case of *prohibition of certain shrimp and shrimp products* dated October 1996[29], the parties were India, Malaysia, Pakistan and Thailand ('complaining parties' hereafter) against the United States. The case background is about the United States had prohibited the importing of certain shrimp products from the complaining parties because of their use of unacceptable instruments contrary to section 609 of the US Public Law 101-102. The complaining parties asked to join a consultation with US under article 4 of the DSU in order to reach a compromise. However, the parties were unable to agree on a solution, so the complaining parties requested the establishment of a panel according to article 4 of the DSU. Meanwhile, Australia, Colombia, the European Community, Ecuador, the Philippines, Singapore,

[19] Article 17 (5) DSU, WTO documents.
[20] Article 17 (14) DSU, WTO documents.
[21] Article 21 (1) DSU, WTO documents.
[22] Article 21 (3) DSU, WTO documents.
[23] Article 21 (2) DSU, WTO documents.
[24] Article 22 (2-6) DSU, WTO documents.
[25] Article 4 (10), DSU, WTO documents.
[26] despite the dispute settlement is free of charge in WTO but still member need to hire specialized lawyers.
[27] Shrimp case, WT/DS 61-58, WTO Document.
[28] United States – imposition of countervailing duties on certain hot rolled lead and bismuth carbon steel products originating in the United Kingdom case, WT/DS 138, WTO Document.
[29] Shrimp case, WT/DS 61-58. WTO Document.

Consultations
- Informal confidential discussions between parties, who may request a panel if no mutually acceptable solution is found within 60 days. - Good offices, conciliation or mediation (possible means to settle the dispute).
↓
Panel
- Request for the establishment of a panel. - Panel Establishment. - Arguments. - Panel Decision.
↓
Appeals – 90 or 120 days
- Arguments before the Appellate Body (AB). - Appellate Body Decision.
↓
Adoption and Implementation
- Adoption of report(s) by DSB. - Intention to implement decision. - Surveillance of implementation. - (Suspension of concessions if not implemented).

Any WTO member who have a "well-established substantial" interest in the case can intervene as a third party after notifying the DSB and then have the right to attend the panel hearings and provide a relevant written submission to the panel, which may affect the panel report; meanwhile, at the first meeting the panel can receive the submissions of the parties in any related matter[9]. An interesting example is that of the *shrimp* case[10], where a number of countries requested joint compliance against the United States as a third party.

The period for the panel to produce the final report to the parties is not to exceed six months; an exception for urgent cases may be no longer than three months[11].

The panel's proceedings are criticised for not being published, which has led to criticism of a lack of transparency (Qureshi,1999 :303). Therefore, it is suggested that the panel's findings have to be clearly based on the agreements cited[12], such as in the *Argentina Textiles* Case[13] (Argentina - certain measures affecting imports of footwear, textiles, apparel and other (89) items, complaint by the United States), which concerned the imposition of specific duties on footwear, textiles, apparel and other products in excess of the bound rates and other measures taken by Argentina, where the panel based its ruling on the Agreement on Textiles and Clothing.[14]

After the issuing of the final report of the panel, both parties have the chance to appeal to the Appellate Body in regard to the panel ruling, in which case the DSB will not adopt the panel's report until completion of the appeal[15]. The DSB is the sole authority over the Appellate Body, which is restricted to looking at matters of law in the panel report. Only contracting parties, excluding any third party, may appeal to it[16]. After examining the panel report, the Appellate Body may uphold, modify or reverse it[17], as is in the s*hrimp* case[18]. The outcome of the appeal is a report which should

[9] Article 10 (2-3) DSU, WTO documents.

[10] Shrimp case, WT/DS 61-5B & WT/DS58, WTO documents. Briefly, the case about prohibition of certain shrimp and shrimp products dated October 199631, the parties were India, Malaysia, Pakistan and Thailand ('complaining parties' hereafter) against the United States. The case background is about the United States had prohibited the importing of certain shrimp products from the complaining parties because of their use of unacceptable instruments contrary to section 609 of the US Public Law 101-102.

[11] Article 12 (8) DSU, WTO documents.

[12] Article 11 – DSU, WTO documents.

[13] Argentina Textiles, WT/DS56, WTO documents.

[14] WTO documents: Agreement on Textiles and Clothing.

[15] Article 16 DSU, WTO documents.

[16] Article 17 (1, 4, 6) DSU, WTO documents.

[17] Article 17(13) DSU, WTO documents.

[18] Shrimp case, WT/DS 61-5B and WT/DS58, WTO documents.

Introduction

In January 1995 and as a consequence of the Uruguay Round of trade negotiations, the World Trade Organization (WTO) came to existence. The major aims of this organization are: first, to reduce tariffs and other hindrances to trade; and second, to create equality of treatment in international trade relations (Qureshi, 1999 :238). The vital achievement of the Uruguay Round was the establishment of the Dispute Settlement Body as part of the structure of the WTO, created under the new Dispute Settlement Understanding. The only provisions of the GATT 1947 (forerunner of the WTO) that had dealt with dispute settlement were found in Articles XXII and XXIII, while the Uruguay Round established practical dispute settlement procedures for the WTO under the formal title of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The purpose of the dispute settlement system in the WTO is to return any measure which is incompatible with any agreement covered by the system and ensure a solution acceptable to the parties of the dispute[1].

Before beginning the assessment of the dispute settlement process and its justifiability which is the main purpose of this paper, the dispute settlement mechanism will first be laid out to describe the process which any case will follow. This process will then be traced for some illustrative cases, facilitating the assessment of the international dispute settlement system under the WTO and reflecting the validity and credibility of this organ. Thus, the body of this paper will follow the standard device of basing the criticism of an organisation on an analytical account of the way in which its formal procedures work in practice. It will be concluded with the author's opinion of the success of the Dispute Settlement Understanding (DSU).

The mechanism of the Dispute Settlement Understanding procedures

The procedures of the dispute settlement system can be summarised in four main stages: consultations, panel, appeals, and adoption/ implementation. These procedures work in a very clear and structured way, as set out in the table and below.

Before the establishment of the panel, there is a pre-stage of consultation, which member parties to a conflict should start with. The objective of this step is to provide an early confidential solution between the conflicting WTO member states (Otor, 2015:2). At this stage the parties are bound to consult for a period of time not exceeding 60 days[2]. It is permissible for a third party to intervene at the consultation stage or to request the setting-up of a consultation, if it has a substantial and well-founded trade interest in the case[3]. Both parties should have enough understanding of the legal aspects of the case before moving to the panel stage in the event of no agreement being reached[4]. In practice, most disagreements are settled in consultation (Merrills, 2005:216); as of the end of year 2015, of the more than 500 disputes that had been referred to the WTO for settlement since 1995, over half had been so settled (Dispute settlement activity in 2015).

If consultation fails, parties may agree to use other means (good offices, conciliation, mediation or arbitration)[5]. In addition, they have the right to request the establishment a panel within time limits, which may be exempted in cases of urgency or 'perishable goods'[6].

The Dispute Settlement Body (DSB) may refuse to establish a panel on the basis of consensus[7]. However, when the panel is established the members of the panel are either from public or private sectors. They must have extensive experience in investigating WTO or GATT cases, or/and have teaching and publishing experienced in international trade law or policy. There are usually three or sometimes five members. Panellists must not serve in disputes to which their own countries are party unless the parties agree[8], to avoid prejudice and ensure equality.

During the examination of a case by the panel, the parties still have the opportunity to develop a mutually acceptable solution (Qureshi :1999,303).

[1] Article 3(7) DSU, WTO documents.
[2] Article 4 (2,3) DSU, WTO documents.
[3] Article 4 (11) DSU, WTO documents.
[4] Article 4 (5) DSU, WTO documents.
[5] Article 5 (1) DSU, WTO documents.
[6] Article 4 (7,9) DSU, WTO documents.
[7] Article 6 DSU, WTO documents.
[8] Article 8 DSU, WTO documents.

تحليل نظام تسوية المنازعات بمنظمة التجارة العالمية من خلال محورين: التقاضي في منازعات التجارة الدولية، ومدى ملاءمة الإجراءات التي تضعها اتفاقية تسوية المنازعات

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ملخص الدراسة

كان المحرك الرئيس لتأسيس منظمة التجارة العالمية (WTO) لتنظيم وتسهيل عملية التجارة بين الدول، وتسوية المنازعات التجارية التي تنشأ بين أعضاء هذه المنظمة حيث تعتبر أحد أهم مهام المنظمة. غير أن هناك جدل بشأن تمتع أعضاء المنظمة بالمساواة عند التقاضي، فالمنظمة تتكون من دول غنية وفقيرة؛ لذا عندما يكون أحد طرفي النزاع دولة فقيرة فهناك شكوك ونقد من عدم تمتعها بالمساواة عند التقاضي عندما يكون الخصم دولة غنية؛ لذا هدف هذا البحث النظر في موضوع التقاضي وآليته تحت مظلة منظمة التجارة العالمية.

الكلمات المفتاحية: منظمة التجارة العالمية، المنازعات، تسوية - الإجراءات.

Evaluation of the System of Dispute Settlement Created by the WTO Turns on Two Issues: the Justiciability of International Trade Disputes, and the Suitability of the Procedures Established by the Dispute Settlement Understanding

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Abstract

The World Trade Organization (WTO) is established to incorporate agreements to deal with the rules of trades between nations, and to settle disputes that arise out of trading. Members of the WTO ideally, should have equal rights. However since there are rich and poor countries, there is some criticism on perceived inequality when it comes to the issue of equal adjudication when issues arise between rich and poor counties. This paper aims to examine the dispute settlement system to assess this contention.

Keywords: Word Trade Orgnisation-Dispute- mechanism-settlement.

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