ALERT MEMORANDUM

End of Suspension of Title III of the Helms-Burton Act: Authorization of Claims Under U.S. Law for "Trafficking" In Certain Cuban Properties (Updated)

April 19, 2019

[*Ed. note:* This is an update of our alert memorandum dated February 25, 2019, to reflect the April 17, 2019 announcement that the suspension of extension of Title III of the Helms-Burton Act will not be continued.]

Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (known as the "Helms-Burton Act")[1] provides a cause of action under U.S. federal law pursuant to which U.S. nationals may sue any person who "traffics" in property that was expropriated from a U.S. national by the Cuban Government on or after January 1, 1959. On April 17, 2019, the administration announced that the cause of action made available under Title III, which has been suspended since 1996, will become fully effective as a basis to initiate litigation before the United States courts as from May 2, 2019.[2]

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Ari MacKinnon
+1 212 225 2243
amackinnon@cgsh.com

WASHINGTON

Paul Marquardt
+1 202 974 1648
pmarquardt@cgsh.com

PARIS

Jean-Yves Garaud
+33 1 40 74 68 76
jgaraud@cgsh.com

Guillaume de Rancourt
+33 1 40 74 69 13
gderancourt@cgsh.com

Aren Goldsmith
+33 1 40 74 68 51
agoldsmith@cgsh.com

LONDON

James Brady
+44 20 7614 2364
jbrady@cgsh.com

MOSCOW

Murat N. Akuyev
+7 495 660 8540
makuyev@cgsh.com

[1] Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021-91).
[2] U.S. Department of State, Secretary of State Michael R. Pompeo's Remarks to the Press (Apr. 17, 2019), *available at* https://www.state.gov/secretary/remarks/2019/04/291174.htm (the "April 17, 2019 Press Release").

As described more fully below, the relevant cause of action under Title III is extremely broad and ill-defined, reaching both direct and indirect economic transactions touching expropriated property interests. Title III provides for claims against "traffickers" for the full value of expropriated property, along with the possibility of treble damages and the reimbursement of legal fees, irrespective of the amount of economic benefit derived by the person transacting with the relevant Cuban property.

This memorandum provides an overview of Title III of the Helms-Burton Act and suggests steps that companies engaged in direct trade with Cuba, or that have economic relationships related to the Cuban activities of third parties, may wish to consider in view of the risk of potential claims based upon Title III. The memorandum also highlights some of the legal challenges that may be faced by claimants pursuing litigation under Title III.

Recent Developments Related to the Helms-Burton Act

Since the enactment of the Helms-Burton Act in 1996, all presidential administrations exercised the statutory authority to suspend the right to pursue the cause of action created by Title III for successive six-month intervals.[3]

Following the enactment of the Helms-Burton Act, the United States faced serious backlash from several of its major trading partners, which objected to the extraterritorial effects of the Act and the potentially severe impact on their companies. Among other responses, the European Union, Canada and Mexico adopted "blocking legislation" as a form of countermeasure against the Helms-Burton Act.[4] In general, such legislation blocks judicial recognition of judgments issued by the United States courts based upon Title III and entitles companies suffering damages as a result of Title III to assert "clawback" claims.[5] For example, a French company that is sued and found liable for "trafficking," and then suffers economic injury associated with the seizure of its assets in the United States as part of an enforcement

[3] President Clinton allowed Title III to come into force in 1996, but immediately suspended the right to sue for six months, placing "companies doing business in Cuba […] on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States" and warning that "with Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted." President William Jefferson Clinton, Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity Act (LIBERTAD) Act of 1995 (July 16, 1996). As explained below, at all times prior to January 2019, all subsequent administrations continued to maintain the suspension for the six-month intervals authorized under the Act. *See* Helms-Burton Act § 306 (providing for the power of the President to suspend Title III for up to six months "if the President determines . . . that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.").

[4] *See* Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Helms-Burton Law and Its Antidotes: A Classic Standoff?*, 7 Sw. J. L. & Trade Am. 95 (2000) (describing countermeasures adopted by Canada, Mexico, the European Union and Argentina, and noting that while the Argentine measures did not explicitly reference the Helms-Burton Act, their timing and effect suggest adoption on this basis). The countermeasures generally (1) prohibit compliance with the covered U.S. extraterritorial measures, (2) provide for non-recognition of judgments and administrative determinations based on the U.S. measures, (3) create "clawback" mechanisms providing a cause of action enabling recovery for damages suffered as a result of imposition of the U.S. measures, and (4) require reporting to relevant foreign legal authorities of actions related to the covered measures. *See id.* (describing EU Council Regulation 2271/96, Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1 (the "EU Blocking Regulation") ; Canada's Foreign Extraterritorial Measures Act, R.S.C. 1995, c F-29 (as amended); Mexico's Ley de Protección al Comercio y a la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional [LPCINECDI], Diario Oficial de la Federación [DOF], 22-10-1996; and Argentina's Law No. 24,871, Sept. 10, 1997.

[5] *Id.*

action, would be entitled under the EU Blocking Regulation to assert "clawback" claims in the French courts to recover a remedy for such injury against the Title III claimant.

In addition, the European Union initiated proceedings against the United States before the World Trade Organization ("WTO"), which were widely seen as putting pressure on the United States.[6] The United States and European Union subsequently reached a series of "understandings," under which the United States, *inter alia*, reiterated its presumption of continued suspension (through 2001) of Title III of the Helms-Burton Act and the European Union withdrew the WTO proceedings.[7]

While the current administration maintained the long-standing suspension when the matter came up for consideration in August 2018, White House National Security Advisor John Bolton stated on November 1, 2018 that the administration planned to give the suspension "very serious review." Those comments were made in the context of President Trump's repudiation of the Obama Administration's opening to Cuba. This was followed by Secretary Pompeo's announcement on January 16, 2019, in which Secretary Pompeo, when granting the more limited extension (45 days as opposed to the traditional six-month period), "encourage[d] any person doing business in Cuba to reconsider whether they are trafficking in confiscated property and abetting this dictatorship."[8]

On March 4, 2019, Secretary Pompeo announced another limited extension of the suspension of Title III, this time for a period of 30 days.[9] This extension followed unconfirmed reports in the press that the administration was considering various alternatives to full suspension, including the possibility of allowing Title III actions against companies based in Russia and China.[10] As the State Department has acknowledged, foreign trading partners of the United States, including the European Union, have voiced serious concern to the administration regarding the consequences of lifting the Title III suspension.[11] On April 3, 2019, the administration announced yet a further two-week extension, through May 1, 2019.[12] However, on April 17, 2019, the administration announced that there would be no further extensions of the suspension of Title III.[13] As a result, the Title III cause of action will be fully effective as of May 2, 2019.

The administration has faced serious pressure from trading partners, such as the European Union, since January 2019, when Secretary Pompeo first announced a shortened extension of the suspension of Title III. The Trump Administration granted a number of limited extensions while it determined its final policy position. Reportedly, diplomatic efforts to convince the United States not to allow the Title III suspension to end were intensified during the week preceding the

[6] *See* Perez-Lopez & Travieso-Diaz, *supra* note 4, at 143.; Stefaan Smis & Kim van der Borght, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 Am. J. of Int'l L. 227 (1999); Shoshana Perl, *Whither Helms-Burton? A Retrospective on the 10th Year Anniversary*, Jean Monnet/Robert Schuman Paper Series (EU Comm'n, Working Paper Vol. 6, No. 5, 2006).
[7] *See id*.
[8] Secretary's Determination of 45-Day-Suspension Under Title III of LIBERTAD Act (Jan. 16, 2019), https://www.state.gov/r/pa/prs/ps/2019/01/288482.htm.
[9] U.S. Department of State, "Secretary Enacts 30-Day Suspension of Title III (LIBERTAD Act) With an Exception" (Mar. 4, 2019), *available at* https://www.state.gov/r/pa/prs/ps/2019/03/289864.htm.
[10] Lesley Wroughton et al., *U.S. allows lawsuits against Cuban entities but shields foreign firms for now*, Reuters (Mar. 4, 2019), https://www.reuters.com/article/us-usa-cuba/us-to-allow-lawsuits-against-some-foreign-firms-doing-business-in-cuba-sources-idUSKCN1QL1KV; Josh Lederman et al., *Trump admin to let Americans sue some foreign firms doing business in Cuba* (Mar. 4, 2019), https://www.nbcnews.com/politics/national-security/trump-admin-let-americans-sue-some-foreign-firms-doing-business-n978676.
[11] Senior State Dep't Official on Title III of the LIBERTAD Act (Mar. 4, 2019), https://www.state.gov/r/pa/prs/ps/2019/03/289871.htm.
[12] U.S. Department of State, "Secretary Pompeo Extends For Two Weeks Title III Suspension with an Exception (LIBERTAD Act)" (April 3, 2019), *available at* https://www.state.gov/r/pa/prs/ps/2019/04/290882.htm.
[13] April 17, 2019 Press Release.

April 17, 2019 announcement.[14] Despite such pressure, which included threats of claims before the WTO, the administration proceeded to lift the suspension of Title III, citing Cuba's support of the Venezuelan and Nicaraguan regimes as well as its own policies in a so-called "troika of tyranny."[15]

Basic Overview of Title III of the Helms-Burton Act

Title III of the Helms-Burton Act creates a federal cause of action in the U.S. courts against any person who "traffics"[16] in Cuban "property"[17] that was "confiscated"[18] from a U.S. national.

Although the precise scope of the term "trafficking" as used in the Helms-Burton Act has yet to be tested in litigation, the definition contained within the Act is, on its face, exceedingly broad. The definition of "trafficking" reaches not only companies that directly exploit Cuban properties and businesses, such as operators of tourism properties occupying lands previously owned by U.S. nationals, but also those who "benefit" from expropriated properties or "profit" from "trafficking" by third parties. The definition of "trafficking" might therefore be understood to cover, for example, the activities of a European financial institution that lends to a European hotel group that develops expropriated properties. Likewise, U.S. affiliates of non-U.S. companies that deal in expropriated Cuban property could also be subject to Title III claims based on the theory that such entities have "profited" from the "trafficking" of their non-U.S. affiliates (for example, by receiving benefits from streams of commerce or financing derived from the trading of their non-U.S. affiliates with Cuba). It is even possible, though the statute has never been tested, that a plaintiff could allege that merely trading with a Cuban entity using expropriated property is sufficient to establish that a party "profits from trafficking…by another person." Plaintiffs' lawyers in the United States might use such allegations in an attempt to establish a basis for personal jurisdiction in the U.S. courts over non-U.S. entities that have no direct presence or activities in the U.S.

The Act authorizes claims by persons who were U.S. nationals at the time of expropriation, and by persons who were Cuban nationals at the time but later became U.S. nationals. This creates a large number of potential claimants, many of whom have never been identified or come forward to certify claims related to expropriated property.[19] The State Department has

[14] *See* Leslie Wroughton & Matt Spetalnick, *Trump lifts ban on U.S. Lawsuits against foreign firms in Cuba*, Reuters (Apr. 17, 2019), https://www.reuters.com/article/us-usa-cuba/us-is-lifting-ban-on-us-lawsuits-against-foreign-firms-in-cuba-pompeo-idUSKCN1RT1NJ.

[15] *See* Nick Wadhams & Nikos Chrysoloras, *Trump's Cuba Reversal on Seized Property Challenged by Allies*, Bloomberg News (Apr. 17, 2019), https://www.bloomberg.com/news/articles/2019-04-17/trump-reverses-cuba-policy-allows-suits-over-seized-property; *see also* April 17, 2019 Press Release.

[16] "A person 'traffics' in confiscated property if that person knowingly and intentionally—
(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property." Helms-Burton Act § 4(13). "Trafficking" does not include certain enumerated activities, such as trading or holding publicly-listed securities (unless trading with certain specially designated nationals). *Id.*

[17] "The term 'property' means any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." Helms-Burton Act § 4(12).

[18] This term refers essentially to properties expropriated by the Cuban Government on or after January 1, 1959 without settlement or adequate and effective compensation and to debts repudiated by the Cuban Government. Helms-Burton Act § 4(4).

[19] Approximately 6,000 claims have been certified by the Foreign Claims Settlement Commission ("FCSC"), an entity within the U.S. Department of Justice. Only individuals who were U.S. nationals at the time of expropriation were

cited estimates that the claims of such individuals could implicate "tens of billions" of dollars in property interests.[20]

The economic consequences of a liability finding based on "trafficking" may be significant. The Act provides for compensation based on the value of the property at issue, rather than based on damages to the claimant or based on the value derived from such property by the company engaged in "trafficking". Among the various methods authorized by Title III to value the property at issue, the Act provides for valuation based on the current market value.[21] Damages may be trebled if certain qualifying conditions are met and the successful Title III claimant may also recover attorneys' fees and court costs.[22]

Thus, even where a foreign company has had limited economic interactions with affected properties in Cuba, such companies may face liability for a multiple of the current market value of the properties that their economic transactions with Cuba implicate, as well as liability for significant legal fees and costs.[23]

When the suspension of Title III terminates on May 1, 2019, companies that are currently "trafficking" or which have "trafficked" during the last two years could face claims under the Act immediately. While Title III originally provided for a three-month "grace period" following effectiveness, President Clinton allowed Title III to become effective before suspending the Title III cause of action.[24] Thus, prospective claimants who have certified claims could file suit without delay. Claimants who are asserting expropriation claims not previously certified by U.S. authorities, such as former Cuban nationals who later became U.S. citizens, would need to provide 30 days' notice before being authorized to seek treble damages under the Act.[25]

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eligible to seek FCSC certification. Those claims have been valued at $1.9 billion before interest and approximately $8 billion with interest (calculated at a simple annual interest rate of 6% accruing from the date of expropriation). *See* Richard E. Feinberg, *Reconciling US Property Claims in Cuba: Transforming Trauma Into Property*, Brookings Inst. (2015). The largest 50 certified claims account for $1.5 billion out of the $1.9 billion in pre-interest claim value. *See id.* at 42-43. A database containing decisions rendered by the FCSC on these claims is available at https://www.justice.gov/fcsc/claims-against-cuba. Press reports cite the U.S. Department of State as having estimated the possibility of up to 200,000 additional claims by uncertified claimants. *See, e.g.*, Lesley Wroughton, et al., *U.S. considering allowing lawsuits over Cuba-confiscated properties*, Reuters (Jan. 16, 2019), https://uk.reuters.com/article/uk-usa-cuba/us-considering-allowing-lawsuits-over-cuba-confiscated-properties-idUKKCN1PA308 (citing U.S. Department of State estimate).

[20] *See* Wroughton & Spetalnick, *supra* note 14.

[21] Title III provides for a valuation based upon the amount which is the greatest of (i) the amount certified by the FCSC (plus interest) (which amount shall be presumed absent "clear and convincing" evidence showing that an amount under the alternative methods of valuation is correct), (ii) the amount determined by a court-appointed special master (plus interest), or (iii) the fair market value of the property, either at the time it was confiscated (plus interest) or its current market value. Helms-Burton Act, § 302(a)(1)-(2). Interest is to be calculated for purposes of the Title III action based upon the rate set forth in Section 1961 of Title 28 of the United States Code, which provides that "interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment" and that such interest shall compound annually. For purposes of a Title III action, interest would be calculated from the date of confiscation.

[22] Treble damages are available for claims certified by the FCSC or, with respect to non-certified claims that are eligible to be pursued (such as claims of qualifying Cuban nationals who subsequently became U.S. nationals), where the claimant delivers notice thirty days before initiating an action to the alleged "trafficker" and "trafficking" continues. Helms-Burton Act § 302(a)(3).

[23] For example, Starwood Properties secured from the FCSC a valuation of approximately $50 million (Claim CU-2-001) based on the value of the land at issue to a "willing buyer and willing seller in post-Castro Cuba" and by reference to comparative real estate values outside of Cuba, including in Puerto Rica, Costa Rica and Mexico. *See* R. Feinberg, "Reconciling U.S. Property Claims in Cuba," Brookings Institution (December 2015), p. 23.

[24] *See supra* note 3.

[25] Helms-Burton Act § 302(a)(3).

Evaluating Exposure and Assessing Options

Companies now trading or having traded with Cuba during the last two years, or that maintain or have during the last two years maintained economic relationships related to the Cuban activities of third parties, should consider evaluating their potential exposure and possible options for mitigating associated risk (to the extent such an analysis has not already been undertaken).

The terms of Title III are far-reaching and Plaintiffs' lawyers will doubtless argue that they cover activities that are remote from the Cuban economy. Moreover, because Title III has been suspended, there is no case law interpreting Title III, creating substantial uncertainty regarding where the lines will be drawn as to the scope of substantive liability under the Act.

Despite the ostensibly broad language of Title III and the uncertainty about its precise scope, there are steps that may be worth considering in order to mitigate risk. These would include, for example:

— Consolidating corporate information regarding commercial relationships that could fall within the statutory definition of "trafficking" under the Act, and classifying risk levels associated with the directness of such relationships;

— Consolidating evidence of diligence carried out in the past to ascertain whether trading partners may be involved in the "trafficking" of confiscated properties (which could be used to defend allegations of knowing and intentional "trafficking");

— Identifying any contemplated future transactions that could create exposure under Title III and ensuring that due diligence addresses this issue, including both to establish a potential defense against allegations of knowing and intentional "trafficking" and to inform assessments of potential risks associated with Title III should the transaction proceed;

— Drafting appropriate contractual clauses to require disclosures, representations and warranties related to "trafficking" within the meaning of Title III and, where appropriate, providing for indemnification and other contractual remedies (such as rescission rights) covering associated risk;

— Considering whether capital markets disclosures are appropriate in view of risks associated with recent developments and uncertainty as to whether the Title III suspension will be lifted;

— Understanding economic and commercial flows between U.S. and non-U.S. entities within a corporate group to ascertain the risk that such dynamics could support an argument that the U.S. entity has engaged in indirect "trafficking" by dint of the activities of its foreign affiliate;

— Preparing a plan of action to monitor the filing of legal actions in jurisdictions where companies may have assets in the U.S.;

— Assessing options for terminating "trafficking", and understanding possible penalties and restrictions that could impact the viability of exit options;[26]

[26] In addition to considering potential penalties under contract and tort law principles (for example, based upon breach of contract and damages that could be claimed by third parties injured by breaches in certain jurisdictions), such an analysis would need to be carried out against the backdrop of "blocking" legislation where relevant. For example, in the absence of available exceptions, Article 5 of the EU Blocking Regulation prohibits any EU person from "actively or by deliberate omission" complying with the requirements of the Helms-Burton Act, "whether directly or through a subsidiary or other intermediary person." The Act provides for a two-year limitations period, which begins to run after trafficking has ceased to occur. Helms-Burton Act § 305. In at least one reported matter, a foreign company settled claims by a certified U.S. claimant and received approval of the relevant settlement from the U.S. Department of State. *See* Perez-Lopez & Travieso-Diaz, *supra* note 4, at 140 (discussing settlement reached between ITT and the Italian telecommunications company, STET International, in which the State Department terminated without adverse action an investigation which it had commenced under Title IV of the Helms-Burton Act (which

— Beginning to assess options for asserting "clawback" claims where authorized[27] and other countermeasures that may be available, such as the assertion of claims against the United States under bilateral investment treaties or free trade agreements.[28]

Anticipating Legal Defenses to Title III Actions

Many prospective plaintiffs asserting Title III claims will face serious legal obstacles in the U.S. courts. Chief among these challenges may be the potential difficulty of establishing a valid basis for asserting personal jurisdiction over non-U.S. defendants who do not themselves do business in the United States. Recent case law of the U.S. Supreme Court has significantly narrowed the relevant bases for asserting jurisdiction over foreign companies that are not based in the United States where claims arise from conduct overseas. Despite the breadth of the substantive terms of Title III, such case law would be tested in the context of claims based upon "trafficking" where the defendants' activities take place outside of the United States.

In addition to personal jurisdiction obstacles, prospective plaintiffs that do not assert claims already certified by the Foreign Claims Settlement Commission could face challenges in establishing title to confiscated properties, meeting minimum requirements for amounts in controversy[29] and establishing appropriate valuations. Issues of intent and knowledge of "trafficking" may also arise in many cases, particularly where an alleged "trafficker" can show that it conducted due diligence as to the possible presence of "confiscated" property interests before transacting.[30]

Finally, Title III claimants with interests in jurisdictions that have adopted blocking legislation will need to give careful consideration to the potential adverse consequences they may face overseas even if they are successful in pursuing a Title III action in the United States. Many of the largest prospective claimants are large corporate groups in the United States that own assets in jurisdictions that have adopted "clawback" remedies, which could result in retaliatory litigation abroad against any U.S.-based Helms-Burton Act claimant.

Despite these significant legal obstacles, prospective plaintiffs likely will initiate litigation in the United States, given the substantial potential recoveries such litigation might permit.

Companies trading or having recently traded with Cuba, or which could be identified as maintaining or

provides, inter alia, for the exclusion of aliens who have been found to have engaged in "trafficking" from the United States), related to the use by STET International and its affiliates of ITT's confiscated property in Cuba). Based on the settlement reached in the ITT matter, foreign companies may wish to consider pursuing negotiated settlements of claims in order to avoid litigation in the U.S. courts.

[27] As noted, blocking legislations may also provide "clawback" actions enabling the defendant to a Title III action to act against the Title III claimant and seek a remedy for any damages suffered as a result of the Title III action. For example, under Article 6 of the EU Blocking Regulation, EU Persons are entitled to recover damages, including legal costs, for losses caused by "the application of the [specified laws] or actions based thereon or resulting therefrom." The damages are to be obtained "from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary."

[28] The question of whether such claims would in fact be available is beyond the scope of this memorandum. At the time the Helms-Burton Act was enacted, many commentators questioned the compatibility of Title III of the Helms-Burton Act with the obligations of the United States under international law. See, e.g., Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 Am. J. Int'l L. 419, 429-30 (1996) (describing Title III as imposing a secondary boycott).

[29] Title III claims may only be pursued where the amount in controversy exceeds $50,000 (exclusive of interest, costs, attorneys' fees and the trebling of damages). This could create an obstacle to smaller claims. It is unclear whether such an obstacle could be overcome by the initiation of class action proceedings.

[30] However, prospective claimants may seek to satisfy these requirements by notifying claims to entities allegedly involved in "trafficking." Were detailed notice provided and "trafficking" to continue, it could be more difficult to show the absence of knowledge and intent.

having recently maintained economic relationships related to the Cuba-directed activities of third parties, may be exposed to significant litigation in the United States courts based on Title III of the Helms-Burton Act. Given this significant risk, companies may wish to evaluate their potential exposure under Title III, consider steps that can be taken to mitigate that exposure, and anticipate potential legal defenses that may be available.

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