

**JUDGMENT No. 2867 OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL
LABOUR ORGANIZATION UPON A COMPLAINT FILED AGAINST THE INTERNATIONAL
FUND FOR AGRICULTURAL DEVELOPMENT
(REQUEST FOR ADVISORY OPINION)**

Complainant's Statement

I. Introduction

1. Ms. Ana Teresa Saez Garcia (the complainant) filed a complaint in the Administrative Tribunal of the International Labour Organization against the International Fund for Agricultural Development (IFAD, the Fund or the defendant) challenging the decision not to renew her contract. The decision was taken by the supervisor of her unit, the Managing Director of the Global Mechanism in the Office of the President of IFAD. She appealed against the decision to the Joint Appeals Board of IFAD, which found that the decision was taken without authority and recommended her reinstatement and the payment of lost earnings (Complainant's Document A.1). The President of IFAD rejected the recommendation of the Board, explicitly finding that the non-renewal of the contract was in accordance with IFAD's Human Resources Procedures Manual (Complainant's Document A.2). It was the President's decision that the complainant impugned before the Tribunal.

2. The defendant argued that the Tribunal did not have jurisdiction to entertain two of the complainant's pleas concerning abuse of authority by the Managing Director of the Global Mechanism. In simplest terms, it argued that the complainant was not a staff member of the Fund and that the decision she challenged was not the act of the Fund.

3. The Tribunal made two principal rulings on its jurisdiction to hear the complaint. It found that the Global Mechanism was "assimilated to the various administrative units of the Fund for all administrative purposes" so that "administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund." On this basis it rejected arguments that the Tribunal could not examine the decision-making of the Global Mechanism and that the acts of the Managing Director were not attributable to the Fund. The second ruling was that the complainant was a staff member of the Fund, so that administrative decisions affecting her "may be the subject of a complaint to this Tribunal in the same way and on the same grounds as decisions relating to other staff members."

4. Before addressing the specific questions that the defendant has put to this Court, the complainant will set out her views on the legal character of the Global Mechanism, on the role of the Managing Director of the Global Mechanism, on the complainant's status as a staff member of the Fund and on the Tribunal's jurisdiction.

The Global Mechanism

5. The Global Mechanism was established by article 21(4) of the United Nations Convention to Combat Desertification in Countries Experiencing Severe Drought and/or Desertification, Particularly in Africa (UNCCD). The Mechanism is to operate under the authority of the Conference of Parties to the Convention. For its operations, article 21 mandates that an organization be found to "house" the Mechanism. The Conference of Parties is to "make appropriate arrangements with the organization it has identified to house the Global Mechanism for the administrative operations of such Mechanism" (art. 21(6)).

6. As the Tribunal found, the Global Mechanism lacks legal personality. It is not explicitly granted any legal powers by the Convention. It is designed to be housed in an organization, which would normally have appropriate powers. Significantly, the Mechanism is placed in Part III(3) of the Convention, "Supporting Measures", and not in Part IV, "Institutions".

7. A Memorandum of Understanding "Regarding the Modalities and Administrative Operations of the Global Mechanism" was entered into by the Conference of Parties and the Fund in 1999 (IFAD's Document V(5)). The Memorandum provides, "While the Global Mechanism will have a separate identity within the Fund, it will be an organic part of the structure of the Fund directly under the President of the Fund." The Managing Director is appointed by the President of the Fund and "in discharging his or her responsibilities will report directly to the President of IFAD." All moneys of the Global Mechanism are to be received and disbursed by the Fund.

8. In 2009 the Office of Legal Affairs of the United Nations reviewed the mandate, status and legal capacity of the Global Mechanism on the request of the Joint Inspection Unit. On the basis of the Memorandum of Understanding and decisions of the Conference of Parties, the Office concluded "that the Global Mechanism has not been entrusted with the legal personality to enter into legally-binding agreements. Moreover, pursuant to the MOU, it is IFAD, as the housing institution, which has been tasked to provide services to the Global Mechanism in order to carry out its mandated activities including managing its budget, contracting on its behalf, administering its personnel, for example employment contracts etc. Accordingly, the relevant administrative and financial rules and regulations of IFAD apply to the Global Mechanism." (Complainant's Document B, p. 5.)

9. Against this background it is hardly surprising that the Tribunal concluded that the Global Mechanism lacked legal personality.

The Managing Director

10. The Managing Director of the Global Mechanism is a staff member of the Fund. At the time of the facts of this case, his predecessor, Mr. Per Ryden, was included in the list of staff for whom the Fund claimed the benefit of articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies (Complainant's Document C). Later versions of this list no doubt exist, but they have not been located.

11. The Managing Director's terms of reference are clear: "Under the direction of the President of the International Fund for Agricultural Development (IFAD) . . . the primary responsibility of the Managing Director . . . will be . . . to promote the mobilization of resources" (IFAD's Document V(9)). The specific tasks listed below this heading are typical of a staff member. They do not include hiring or firing of staff.

12. In the Administrative Tribunal the defendant argued that the Managing Director was not a staff member of the Fund (defendant's reply para. 39, IFAD's Document VII(13)). The best evidence of his status would be his contract of employment, but the defendant has not been able to produce it (see Complainant's Document D).

13. The Managing Director's relations with the Conference of Parties are conducted through the President of the Fund. He reports to the Conference of Parties on behalf of the President. The President reviews the Programme of Work and Budget before it is transmitted to the Executive Secretary of the Convention. In short, the Managing Director has no independent authority as director of the Global Mechanism.

14. The Office of Legal Affairs noted that the Managing Director possessed “certain delegated authority by the President on administrative issues.” It considered that actions taken on the strength of the delegated authority would depend on the delegation and the rules of the Fund (Complainant’s Document B, p. 5).

15. In a similar vein the Tribunal concluded that “administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund.”

The Complainant

16. The complainant was a staff member of the Fund. She accepted the offer of 1 March 2000 from the Fund, offering her “a fixed-term appointment for a period of two years with the International Fund for Agricultural Development (IFAD)” (Complainant’s Document E.1). It referred to “your entry on duty with IFAD”. It provided that during the probationary period the appointment could “be terminated by IFAD”. If the complainant wished to resign during this period, she was “required to give written notice . . . to IFAD”. The letter was signed by the Director of IFAD’s Personnel Division. The subsequent offers that the complainant accepted in 2002 and 2004 were similarly written on the letterhead of IFAD and offered her the extension of her “appointment with the International Fund for Agricultural Development” (Complainant’s Documents E.2, E.3). It would be hard for the defendant to be clearer in offering employment with the Fund.

17. The complainant was not only a staff member of the Fund, she was subject to all the Fund’s staff rules upon which she based her complaint. The letter offering her initial appointment stated, “The appointment will be made in accordance with the general provisions of the IFAD Personnel Policies Manual.” The renewal offers stated, “Your appointment will continue to be governed by the Personnel Policies Manual, together with the provisions of the Human Resources Handbook regarding the application of the Manual.” The Manual has since been replaced by the Human Resources Procedures Manual.

18. President’s Bulletin PB/04/01 (IFAD’s Document V(8)) states “As a matter of principle and where there is an absence of a specific provision to the contrary, as specified below, the Global Mechanism shall be subject to all provisions of IFAD’s Personal Policies Manual (PPM) and Human Resources Handbook (HRH), as they may be amended.” The only relevant exception “specified below” is that staff assigned to the Global Mechanism are not eligible for continuing contracts; they are limited to renewable two-year contracts.

19. The defendant has argued that the single exception to the Human Resources Procedures Manual means that the Manual is not generally applicable to the complainant. It stated in its reply in Judgment No. 2867 that “only those rules that have been declared applicable to the complainant can be considered by the Tribunal” (para. 28).

20. This argument contradicts the quoted statement of the President’s Bulletin (“all provisions”) and the terms of the complainant’s appointment. It is also not borne out by the practice of IFAD. The Presiding Officer of the Joint Appeals Board submitted the Board’s report “in line with Section 10.38 of the Human Resources Procedures Manual” (Complainant’s Document A.1). One of the Board’s findings was that “due process” was not followed in accordance with Manual sections 11.3.9-12 on job redundancy. The President did not cite the section numbers, but he was evidently referring to the same provisions in finding that due process had been followed. And he explicitly cited section 1.21 of the Manual in upholding the non-renewal of the complainant’s contract. (Complainant’s Document A.2.)

21. Among the provisions of the Manual that were not specified as exceptions in the President's Bulletin is the following for appeals to the ILO Administrative Tribunal:

10.40.1 Staff members have the right to Appeal to the ILOAT, under the procedures prescribed in its Statute and Rules, against: (a) final decisions taken by the President; and (b) after the expiration of the period prescribed in para 10.39.2 above, the failure of the President to take a final decision.

The complainant submits that if such a fundamental legal right were to be withheld from the staff assigned to the Global Mechanism, it would have to be stated explicitly.

22. In order not to burden the Court with a massive document, the complainant will limit herself to pointing out that the Manual contains 207 pages plus annexes. All of it applies to the complainant except for the following two paragraphs:

1.22 CONVERSION TO CONTINUOUS CONTRACT

1.22.1 At the end of a total of seven years of uninterrupted service, subject to availability of funds, good conduct and performance, a staff member may be considered upon the recommendation of the supervisor concerned, for a continuous appointment contract to be approved by the Assistant President and Director, FH or by the President for Special Advisors or assistant staff reporting to her/him.

1.22.2 Where there are issues of performance, then conversion to continuous contract will not be automatic and is subject to the procedures provided for in Chapter 5 on Performance Evaluation.

23. Finally, it is relevant to note that the defendant treated the complainant as a staff member throughout her employment and the process of appeal, from March 2000 until it submitted its reply to her complaint on 12 September 2008. She was included in the list of staff of IFAD for the purposes of privileges and immunities (Complainant's Document C), she was offered IFAD contracts, and she was allowed to go through the two-year internal facilitation and appeals process as a staff member.

Jurisdiction of the Tribunal

24. Under Article II (5) of its Statute, the Administrative Tribunal of the International Labour Organization "shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization" meeting certain requirements, of which the IFAD is one. The two questions proper to jurisdiction are therefore, was the complainant a staff member of IFAD? and did her complaint allege non-observance, in substance or in form, of her terms of appointment or provisions of the Staff Regulations of IFAD?

25. The discussion in paragraphs 16-23 above demonstrates beyond a shadow of a doubt that the complainant was a staff member of IFAD.

26. This Court has already had occasion in the *Unesco* advisory proceedings to examine the proper grounds of a complaint to the Tribunal. The *Unesco* opinion stated, "The Court cannot attach to this provision any purely formal meaning so as to require that the official should expressly indicate in his complaint the particular term or provision on which he intends to rely. . . . [w]hat must be alleged, according to Article II, paragraph 5, is non-observance, namely, some act or omission on the part of the Administration." (ICJ Rep. 1956, p. 77 at 88.)

27. In the present case the complainant invoked the refusal to renew her contract. This was an action taken in the first place by the Managing Director, a fellow staff member of IFAD, who could only have acted in matters of personnel upon delegation by the President of IFAD. The President of IFAD confirmed this decision in his decision of 4 April 2008, in which he found that non-renewal of the contract was in accordance with the Human Resources Procedures Manual (Complainant's Document A.2). It was the President's decision that was impugned before the Tribunal.

28. In its reply to the complaint, the defendant made an argument based on the indispensable parties rule, even going so far as to append the entire judgment of this Court in the *East Timor* case (ICJ Rep. 1995, p. 90). Since this argument applies to more than one of the questions below, it will be dealt with here.

29. In the *Unesco* opinion the Court made a clear distinction between controversies between States and those between an organization and one of its officials. "The arguments deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization." (ICJ Rep. 1956, p. 77 at 97.)

30. An international organization is required to apply many decisions of external actors, from the General Assembly, to the International Civil Service Commission to governments and donors. The Tribunal has consistently ruled that, even where an external decision may normally bind an organization, the organization has a duty to its staff members to evaluate the legality of that decision, and if it is not legal, it must not apply it. A recent ruling on this issue is Judgment No. 2420 (Complainant's Document F).

31. The reason for this line of precedent is clear: the staff member has the possibility of legal recourse only against his employing organization. He or she cannot bring a complaint against other international organizations. A corollary of the rather hermetic system of justice within each organization and within international organizations as a group is the responsibility of each organization for its staff members. This was the defendant's duty in the present case if it had any doubts about its own primary responsibility for the decision not to renew the complainant's contract. In fact there was no sign of such doubt until the defendant's response to the complaint in Judgment No. 2867.

Conclusion

32. The complainant submits that the Tribunal correctly determined that it had jurisdiction to hear the complaint in Judgment No. 2867. The complainant was a staff member of the Fund and the rules of the Fund applied to her with the exception noted above. The Managing Director of the Global Mechanism was an officer of the Fund and his actions which the complainant challenged were, in law, the actions of the defendant.

II. Questions Submitted by IFAD

33. The Fund has asked nine questions in an effort to overturn a much lesser number of rulings on jurisdiction by the Tribunal. It has appended to questions II-VIII a sort of sub-question concerning a fundamental fault in the procedure followed. The complainant will respond individually to the questions on jurisdiction, but she will limit herself to a general comment on the question of a "fundamental fault in the procedure followed".

Fundamental Fault in Procedure

34. This Court has dealt with the question of what constitutes a fundamental fault in procedure in the Advisory Opinion on the Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, ICJ Rep. 1973, p. 166. In its discussion it pointed out that the language of the UN Administrative Tribunal Statute (“fundamental error in procedure which has occasioned a failure of justice”) was adapted from the words of the ILO Administrative Tribunal Statute and carried the same meaning (id. at 208-09).

35. The court considered that a fundamental error was such as to deprive the party of the right to a fair hearing. It set out a non-exclusive list of the elements of a fair hearing: “the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case; the right to equality in the proceeding vis-à-vis the opponent; the right to a reasoned decision.” (Id. at 209.)

36. The court expanded on the last element, a reasoned decision, noting that “it is of the essence of judicial decisions that they be reasoned”. That requirement is satisfied if the decision “indicate[s] in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side.” (Id. at 210.)

37. The complainant submits that on any fair reading Judgment No. 2867 fulfills the requirements of a fair hearing. Both sides were heard on conditions of equality, the pleas of the defendant were heard and considered and the conclusions were supported by adequate reasoning. The defendant has not specified in what respects the elements of its questions could constitute fundamental faults in procedure. Until it does so, further comment is unnecessary.

Jurisdiction

38. In regard to jurisdiction, the complainant would like to recall the words of the Court in the *Unesco* opinion, where it suggested clear limits to questions on jurisdiction. First it said “A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision.” (ICJ Rep. 1956, p.77 at 98-99.) It added, “A request for an Advisory Opinion . . . cannot . . . be extended to an allegation that the Tribunal ‘went beyond the bounds of its competence in its consideration of the disputes’. Any such allegation, even if it were well-founded, could not lead to the conclusion that the Tribunal was not competent to hear the complaint.” (Id. at 100.)

39. The very large number of jurisdictional questions that the defendant has raised suggest that it is indeed going beyond the jurisdictional rulings of the Tribunal to question either the manner in which the Tribunal has exercised its jurisdiction or the breadth of its considerations in hearing the complaint.

40. The complainant will confine herself to essential comments on the questions submitted by the Fund. She submits that the foregoing should be sufficient for a determination of the propriety of the Tribunal’s finding that it had jurisdiction to hear the complaint and all pleas submitted to the Tribunal.

Question I

Was the ILOAT competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development (hereby the Fund) on 8 July 2008 by Ms A.T.S.G., an individual who was a member of the staff of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization?

41. The complainant objects to the formulation of the question in two respects. She was a member of the staff of the Fund, as demonstrated in paragraphs 16-23 above. And the statement that “the Fund acts merely as housing organization” does not reflect the responsibilities of the Fund for the administration of the Global Mechanism.

42. For the substance of the question, the complainant respectfully directs the attention of the Court to the discussion in part I above.

Question II

Given that the record shows that the parties to the dispute underlying the ILOAT’s Judgment No. 2867 were in agreement that the Fund and the Global Mechanism are separate legal entities and that the Complainant was a member of the staff of the Global Mechanism, and considering all the relevant documents, rules and principles, was the ILOAT’s statement, made in support of its decision confirming its jurisdiction, that ‘the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes’ and that the ‘effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund’ outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

43. The record shows that the complainant stated in her rejoinder, “The complainant has no reason to dispute the separateness of IFAD and the Global Mechanism.” This was a statement of fact, since the complainant argued on the basis of the Tribunal’s case law that the Fund was obligated to ascertain the legality of measures it applied to its staff even if they emanated from external entities.

44. In the remainder of her pleadings, the complainant set out at length the facts concerning the powers of the Managing Director, based upon the Memorandum of Understanding and his terms of reference. It was obvious from the pleadings that the complainant did not agree that the Global Mechanism and its Managing Director were separate from IFAD in relation to the issues of the complaint.

45. As set out above, the Global Mechanism was created by the Convention on Desertification. It was therefore a creature of UNCCD and not of IFAD. But the Global Mechanism lacked legal personality. It is for this reason that the UNCCD was obliged to use the legal powers of IFAD to operate the Mechanism.

46. Administratively the Global Mechanism had no existence, separate or otherwise. Only the Fund could recruit staff, handle funds and, indeed, be responsible to the Conference of Parties for the Global Mechanism. The Tribunal made a sound finding that the Global Mechanism was “assimilated to the various administrative units of the Fund for all administrative purposes”. If it had not been, there would have been no administration of the Global Mechanism.

47. The powers of the Managing Director were a function of the lack of legal powers of the Global Mechanism. His powers were, as the UN Office of Legal Affairs reported (Complainant's Document B, p. 5), those that had been delegated to him by the President of IFAD. They were not conferred by the Conference of Parties or the Global Mechanism itself.

48. The defendant's legal responsibility for the actions of the Managing Director rest on a second foundation as well. He was a staff member of IFAD, and he exercised the powers of an IFAD supervisor. He was indeed authorized by IFAD to do so "under the direction of the President . . . or his designate" (IFAD's Document V(9)).

49. Even if the defendant could show that another entity should have been responsible for the Managing Director, which it has not, the fact remains that the defendant placed him in the position where he appeared to bear the authority of IFAD. This alone makes the defendant responsible for the actions of the Managing Director.

Question III

Was the ILOAT's general statement, made in support of its decision confirming its jurisdiction, that 'the personnel of the Global Mechanism are staff members of the Fund' outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

50. The President's Bulletin cited above (IFAD's Document V(8)) would appear to answer this question. In any case, the complainant, by virtue of her contract, was undeniably a staff member of the Fund, as was the Managing Director. The status of other staff members is irrelevant to the decision of the Tribunal.

Question IV

Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea alleging an abuse of authority by the Global Mechanism's Managing Director outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

51. The complainant refers to Part I above. She considers that this disposes of the following question 5 as well.

Question V

Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea that the Managing Director's decision not to renew the Complainant's contract constituted an error of law outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

Question VI

Was the ILOAT's decision confirming its jurisdiction to interpret the Memorandum of Understanding between the Conference of the Parties to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa and IFAD (hereby the MoU), the Convention, and the Agreement Establishing IFAD beyond its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

52. This question appears to be an example of straying beyond the proper purpose of a question on jurisdiction. The Memorandum of Understanding is an agreement entered into by IFAD providing for its assumption of administrative responsibilities for the Global Mechanism. If the Tribunal was competent to receive the complaint of the complainant as an IFAD staff member, there does not seem to be any reason for it not to be competent to interpret the Memorandum of Understanding and the other relevant documents.

Question VII

Was the ILOAT's decision confirming its jurisdiction to determine that by discharging an intermediary and supporting role under the MoU, the President was acting on behalf of IFAD outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

53. The Tribunal did not make any explicit finding concerning its jurisdiction over the President of IFAD. It probably did not consider worthy of comment the argument that the President was not acting as the President of IFAD in matters concerning the Global Mechanism, an argument which was buried in a paragraph of the defendant's surrejoinder concerning the Managing Director (IFAD's Document VII(15) para. 11).

54. IFAD has offered no evidence that its President was acting in any capacity other than that of President in matters concerning the Global Mechanism. He signed the Memorandum of Understanding on behalf of IFAD, not of himself. The Memorandum of Understanding specifies certain functions to be carried out by the President, but it also specifies functions to be carried out by IFAD. See, for example, "The Fund and the Secretariat of the Convention will cooperate" (Part IV.B.1); "the Fund will work out with the Secretariat of the Convention appropriate arrangements for liaison and cooperation between the Secretariat and the Global Mechanism" (Part IV.B.2); "The Fund will make appropriate arrangements to obtain supporting services" (Part V).

55. Governing Council Resolution 108/XXI authorizing the President to sign the Memorandum of Understanding also requires him "to report periodically to the Executive Board on the administrative arrangements for the housing of the said Global Mechanism in IFAD and on such activities as IFAD may undertake in support of the Global Mechanism, while also keeping the Executive Board informed of the activities of the Global Mechanism." (IFAD's Documents V(6).) This appears to reflect the expectation of IFAD that its President act as President.

56. The President of IFAD was also acting as President when he (or non-Global Mechanism IFAD officials on his behalf) offered the complainant a series of appointments "with IFAD". He also acted as the President of IFAD when he made the impugned decision rejecting the recommendation of IFAD's Joint Appeals Board.

Question VIII

Was the ILOAT's decision confirming its jurisdiction to substitute the discretionary decision of the Managing Director of the Global Mechanism with its own outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

57. This does not appear to be a jurisdictional or even procedural question. The Tribunal did not substitute the decision of the Managing Director with its own. It ruled on the legality of the decision, which is what it is established to do.

Question IX

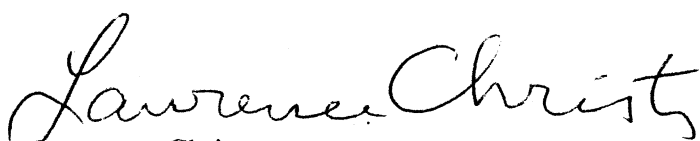
What is the validity of the decision given by the ILOAT in its Judgment No. 2867?

58. The Court is respectfully requested to confirm the validity of Judgment 2867.

III. Conclusion

59. The Court is respectfully requested to answer questions I-VII in the negative. It is requested to refuse to answer question VIII, or alternatively to answer it in the negative. It is requested to confirm the validity of Judgment 2867 in response to question IX.

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