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Sovereignty and its hold on the Antarctic Treaty System, can it be displaced?

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Abstract:

This essay looks at the issue of sovereignty with the Antarctic Treaty system. Sovereignty has continued to be an issue with states asserting their territorial sovereign rights in multiple ways. The issue of extending continental shelf has raised the issue of sovereignty to the forefront of the Antarctic treaty system. Calls for Antarctica to become based on the Common Heritage of Mankind principle have gained prominence. These calls aim to redress the issue of sovereignty but do not reflect the political reality of asking states to give up their sovereign right. Reform of the Antarctic treaty system has also been considered.

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Introduction

The Antarctic Treaty was negotiated in 1959 and was meant to have the final say on the issue of territorial sovereignty in Antarctica. However, claimant states have continued to assert their claims in other ways and territorial sovereignty remains a big issue within the ATS. It has come to fore with issues such as the continental shelf and will remain an issue in the perceivable future. Sovereignty is still present in the ATS and has the potential to destabilise the governance framework which has protected the Antarctic environment for over 50 years. Claimant states have continued to assert their sovereign rights. Therefore, reform of the ATS and resolving the issue of territorial sovereignty have been debated by academics and non-parties to the ATS. Whilst number of alternatives have been suggested the option which has gained the most attention and traction is applying the Common Heritage of Mankind principle to Antarctic. This would entail the current claimant states giving up their claims to Antarctic so that it can be managed by a more equally presentative body and the benefit of Antarctic's resources would be shared amongst all states. The proposal has been criticised for not recognising the political reality of territorial sovereignty. The ATS has also been able, so far, to manage state sovereignty and protect the fragile Antarctic environment. Reforming the current ATS and putting in place mechanism to deal with territorial sovereign claims provides a more realistic and achievable way to deal with the issue of sovereignty. This essay will examine the concept of territorial sovereignty in the ATS and how it is still present today. It will also consider the common heritage of mankind as an alternative governance framework for Antarctic and critically review its potential. Additionally, this essay will examine the calls for reform of the ATS.

Territorial Sovereignty in Antarctica

Politics in Antarctica has been dominated by the issue of territorial sovereignty held by the seven claimant states, Australia, New Zealand, United Kingdom, France, Norway, Argentina and Chile and the right to claim territory from the United States and Russia. The issue of territorial sovereignty has continued to influence policy since the Antarctic Treaty was signed in 1959 and will continue to be an issue in the perceivable future. There are seven claimant states in Antarctica: Australia, New Zealand, United Kingdom, France, Argentina and Chile. The UK, Argentina and Chile's claims overlap and are contested by all parties, the remaining claimant states recognises each other's claim, whilst the US and Russia reserve the right to claim and simultaneously do not recognise the claims of the other states (Hemmings, 2008). These claims are not recognised by the international community.

This essay defines territorial sovereignty as the 'plenary competence of a State or ... the totality of the rights and duties of a State which are recognised by international law' (Triggs 1981, 126; Hodgson-Johnston, 2015). States have been able to assert territorial sovereignty over land which is considered to be *terra nullius*, owned by no one (Triggs, 1985). If a land is considered to be *terra nullius* a state then has to prove 'effective occupation' of that territory in order to claim it (Triggs, 1985; Hodgson-Johnston, 2015). Effective occupation is considered to be the permanent settlement of an area with an established administrative structure, for example starting a postal service (Howkins, 2016). The difficult conditions in

Antarctica have prevented permanent settlement, and this has led non-claimant states to question the legitimacy of the sovereign territorial claims on Antarctica (Hodgson-Johnston, 2015). However, it has also been argued to satisfy the conditions of ‘effective occupation’ in Antarctica should be different due to the environment conditions (Howkins, 2016). Whilst it is still debated whether the claimant states satisfy the requirement for ‘effective occupation’ by academics and non-claimant states alike, the political reality is the Antarctic Treaty recognises their claims.

Territorial Sovereignty and Article IV of the Antarctic Treaty

The status of territorial sovereign claims has been enshrined in Article IV of the Antarctic Treaty. Article IV states:

“Nothing contained in the present Treaty shall be interpreted as:

(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.” (Antarctic Treaty, 1959)

Article IV has been praised by some authors as a “master class in legal drafting” and an “elegant solution” (Hemmings, 2008; Jabour and Weber, 2008). It is most commonly known for providing claimant, potential claimant and non-claimant parties with the ‘Purgatory of ambiguity’ (Triggs, 1985). Each party has been able to interpret Article IV to suit their position, it can be used to support a claim, the right to claim or to reject current claims (Scott, 2010; Dudeney and Walton, 202). Jabour and Weber (2008) argue that the ambiguity of Article IV has helped the stability of the ATS and prevented further conflict. It was initially established to put aside the disputes over territory and prevent any further conflict which it has been able to achieve for the most part according to Triggs (1985). It is important to note Article IV does not ‘freeze’ the territorial claims nor does it extinguish or diminish them, it recognises they exist (Haward, 2017; Haward and Press, 2010; Hodgson-Johnston, 2015). On the other hand, scholars have also been critical of Article IV for only providing a ‘temporary solution’ for the disputes over territorial sovereignty (Dodds, 2011; Hemmings, 2008; Jabour, 2012, pp. 711–712; Kennicutt et al., 2015, pp. 13–14; Rothwell, 2010). Article IV is considered a temporary solution because it does not set out a process for resolving the disputes over territorial claims (Scott, 2010; Dodds, 2010).

The other major element of Article IV is paragraph two which sets out:

“No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force (Antarctic Treaty, 1959).”

The paragraph clearly asserts no activities will contribute to existing sovereign claims. Despite this claimant states continue to engage with activities they believe will further their territorial claim. Scott (2010) argues all states have engaged with activities on the continent that they believe will reinforce their territorial claim. This shows that territorial sovereignty is still very much in the mind of governance in Antarctica. Many scholars have noted the discrepancy between the meaning of Article IV (2) and claimant and non-claimant state actions (Scott, 2010; Triggs, 1985; Rothwell and Scott, 2007; Bray, 2017; Rothwell, 2010; Dodds, 2011). Claimant and non-claimant states have continued to engage in activities aimed at supporting their current and potential future claims to territory in Antarctica despite the existence of Article IV (2) (Scott, 2010). The next section will examine the other way states have tried to assert sovereignty in Antarctica.

Asserting Sovereignty by other means

Claimant and non-claimant states have continued to perform sovereign actions to reinforce their claims and remind others their claim still exist. This section will examine the other ways states have tried to assert sovereignty in the Antarctic. Dodds (2011) investigated the discourse and actions of claimant states in Antarctica. He found that states continue to “construct their identities as claimant with sovereign rights” which influences their actions in Antarctica. Particularly Australia, Argentina and Chile who publicly championed their claims through national discourse. Analysing national policy documents Chong (2017) found that claimant states continually shift their policy towards their Antarctic territory. Claimant states will either be promoting their nations interests or calling for increased international cooperation to promote science and protect the fragile Antarctic environment. There are many different ways claimant and non-claimant states have asserted their territorial sovereignty in Antarctica. Some are small gestures including issuing postage stamps, flag waving and conducting official ceremonies (Dodds, 2011). Others are more significant and ingrained in national policy discussions and statements. Chile and Argentina also use their geographical location to their advantage by routinely including Antarctic on territorial maps (Dodds, 2011). Additionally, claimant states including Australia, Argentina, Chile and New Zealand have actively engaged naming their Antarctic territory, for example Australian political documents refer to the ‘Australian Antarctic Territory’ to describe the area Australia claims, however the states which do not recognise Australia's territory refer to the same area as East Antarctica. Similarly, New Zealand label their territory the Ross Dependency which is not recognised by the US who also have a research station within that territory. A recent example of place naming occurred when the UK renamed their Antarctic territory Queen Elizabeth Land which was met with anger from Argentina (BBC, 2012). As mentioned earlier the British territory is contested by both Argentina and Chile. In the 1970s Argentina sent pregnant women to the Antarctic to give birth with the aim of establishing a genealogy (Dodds, 2009). (Dodds, 2011; Hemmings, 2008). Dodds (2011) even goes so far to argue scientific programs and territorial claims are interwoven. The investment into infrastructure and national science programs in Antarctica can also be seen as claimant and non-claimant states asserting territorial sovereignty (Dodds, 2011). These actions are practices by all claimant states and take place outside the ATS framework. Within the ATS one issue in particular has forced the claimant states to confront their position on territorial sovereignty, that is making a submission to the UN Commission on the Limits of the Continental Shelf (CLCS) (Hemmings, 2008; Vigni and Francioni, 2017; Scott, 2010; Hodgson-Johnston, 2015; Haward and Woolcott, 2011).

The issue of extending the continental shelf

The United Nations Convention on the Law of the Sea (UNCLOS) affords states the economic rights to the waters adjoining their sovereign territory (Bray, 2017). Each state needs to make a submission to the UN Commission on the Limits of the Continental Shelf (CLCS) which outlines the proposed areas of continental shelf they are attempting to claim. This has forced claimant states to confront their positions on territorial sovereignty as they must choose to include or exclude their Antarctic territory and the continental shelf adjoining it. The seven claimant states have made submissions to the CLCS and each has dealt with their Antarctic territory in a separate way. Australia included the Australian continent, islands and the Australian Antarctic Territory (Hodgson-Johnston, 2015; Haward et al., 2006; Bateman and Schofield, 2012; Bray, 2016). However, it did ask the CLCS not to consider the data pertaining to the AAT. Norway's submission was the same as Australia's it included its territory in the claim but asked the CLCS not to consider it (Dodds, 2011). Argentina included the 'Argentina Antarctic Sector' and South Atlantic Islands in its submission and 'did not ask the CLCS to avoid considering it' (Dodds, 2011). New Zealand on the other hand excluded the Ross Dependency from its submission (Dodds, 2011). Similarly, the French excluded its territory from its submission (Dodds, 2011). The UK has made a number of partial submission covering its Antarctic continental territory and the Falkland, South Georgia and South Sandwich Islands (Dodds, 2011). The submissions to CLCS have been flagged as a potential issue for the ATS for a number of reasons. The submissions from claimant states shows they have privileged position from their territorial claim and intend to use it for their own benefit. The submissions also provide an example of how claimant states' policy is guided by their interest in promoting their right to their Antarctic territories. It is also debatable whether the submission represent a new claim or an enlargement of a current claim, both of which are against Article IV of the Treaty. Additionally, the submission can become an issue due to the overlapping territorial claims by the UK, Argentina and Chile Finally the submission to the CLCS are an issue for the ATS because they bring the issue of sovereignty to the fore.

Role of sovereignty in the Antarctic Treaty System

The Antarctic Treaty System (ATS) is a unique governance arrangement driven by the claimant and potential claimant states. The Consultative Parties, which includes the claimant states drive the ATS system by determine the agenda and direction of Antarctic governance (Bray, 2017). With the claimant states heavily influencing the direction of the ATS their sovereign claims have therefore also shaped the ATS. The territorial claims still continue to influence the ATS despite the claims being referred to as 'historic'. Haward and Woolcott (2011) capture the role of sovereignty in the ATS through a simple statement "The fact is, the territorial claims exist and the Treaty recognises that reality". Additionally, Rothwell (2010) argues states continue to engage with Antarctica primarily because of territorial sovereignty. Territorial sovereignty continues to be an issue partly due to the prominence of the claimant states in the ATS and partly due to the number of issues concerned with ownership, including the limits to the continental shelf and bio-prospecting (Dudeney and Walton, 2012). On the other hand, the argument has been made by Keane (2015) that the ATS represents a post sovereign governance framework. Keane (2015) argued the ATS was able to "to push beyond, the modern doctrine of sovereign territoriality". Whilst the ATS does represent a unique governance the territorial claims are still recognised by the ATS. This essay has shown that territorial sovereignty continues to influence policy and the parties to the ATS have not moved passed "the old world of sovereignty (Keane, 2015). Additional Hemmings et al., (2015) has argued the claimant, and potential claimant states' actions have been drenched in

nationalism with notions of territorial and economic resources at the forefront of policy decisions.

It is clear to see that the issue of territorial sovereignty remains a major consideration of states policy and continues to influence the ATS. Therefore, it is important to investigate whether territorial sovereignty has hampered the progress of the ATS. Hemmings et al., (2015) argue nationalism has hampered international cooperation. Nationalism is seen as the expression of states sovereign interest in Antarctica. The continental shelf proved a challenge for the ATS and had the potential to destabilise the ATS. At this stage claimant states were able to prioritise international cooperation by excluding their Antarctic territory from their submissions to the UNCLOS for the most part. The continental shelf issue brought the concept of territorial sovereignty and its role in the ATS to the fore; however, it still has the potential to destabilise the ATS. Moreover, sovereign interest will continue as long as there remains a possibility to benefit from the resources in Antarctic and the surrounding ocean. The continued presence of sovereignty and its potential to destabilise international cooperation has prompted some authors to argue the question of sovereignty needs to be resolved. The next section will look at the most dominate proposal for reforming the issues of sovereignty, applying the Common Heritage of Mankind doctrine to Antarctica in the hopes of providing further stability to the ATS and removing the temptation from claimant states to assert their territorial sovereign rights on Antarctica.

The Common Heritage of Mankind

In response to the issue of territorial sovereignty and the problem of a select group of states having authority over Antarctica many alternatives have been put forward. There have been several unique proposals including: giving parties absolute sovereignty over territory which would require resolving the competing claims of Argentina, Chile and the UK and would need to address the US and Russia's right to claim; Reforming the ATS so it resembles the Svalbard treaty. Under the Svalbard treaty Norway is given territorial control over the island with oversight provided from a multilateral treaty. Under Antarctic circumstances this would require assigning one state absolute sovereignty with an overseeing multilateral treaty; Transforming the ATS into a condominium, an idea which was put forward when the Antarctic Treaty was being established (Chong, 2017; Triggs, 1985). There is however one alternative governance framework which has been given the most attention by academics and nation-states alike that is the Common Heritage of Mankind. This section will examine the proposal of a governance framework based on the notion Antarctica is the 'common heritage of mankind' and how this idea could solve the issue of territorial sovereignty. This section will also outline the beginnings of the idea and some potential issues as an alternative governance framework.

The exclusivity of the ATS and promotion of territorial sovereignty has been a cause of concern for nation-states excluded from the process. The common heritage of mankind principle has gained prominence for the following reasons: the claimant and potential claimant states practiced a type of territorial acquisition consistent with colonisation and despite the world moving into a post-colonial era the structure of the ATS reflects the colonial conquest of Antarctica and is therefore outdated (Triggs, 1985; Scott, 2010); The Antarctic treaty principles leans itself towards a 'de-facto global commons' and therefore applying the common heritage principles would merely be an extension of current practices (Triggs, 1985; Scott, 2010); Outer space and the deep seabed are enshrined as the common heritage of

mankind and due to the similarities of these spaces with Antarctic the principles could be applied (Triggs, 1985); some have argued territorial sovereignty is incompatible with protecting Antarctica (Jabour and Weber, 2008).

There is no clear definition for the common heritage of mankind principle (Frakes, 2003; Triggs, 1985). However, Frakes (2003) outlines five elements which are most commonly ascribed to the principles. Firstly, nation-states cannot appropriate the land in question; secondly any resources from the area need to be universally managed by all states; third any benefits which arise from exploitation of resources in the area must be shared equally; fourth the governance regime must promote the peaceful use of the area; finally, those managing the area must ensure it is preserved for future generations (Frakes, 2003). These elements are also present in Triggs (1985) and Scott (2010) who argue non-appropriation, equitable distribution of benefits from resources and international management of an area are the main attributes of the common heritage of mankind doctrine.

United Nation and the question of Antarctica

The common heritage of mankind came to the fore for Antarctic governance during the 'Question of Antarctica'. Malaysia asked the United Nations (UN) to discuss the 'Question of Antarctica' in the 1980s (Haward & Mason, 2011). Malaysia was concerned with the management of Antarctica and argued the UN should be involved so that all nations could benefit from the resources in Antarctica (Haward & Mason, 2011). Malaysia was also critical of the 'privileged positions' of the Antarctic Treaty Consultative Parties (ATCPs). The validity of the consultative parties' territorial claims was also questioned by developing states who argued the consultative parties had failed to show 'effective occupation' of Antarctica which a key requirement for is obtaining territorial sovereignty (Frakes, 2003; Beck, 2006; Beck, 1984). During this time the ATCP were negotiating a management regime for the exploitation of resources in Antarctica. It has been suggested the timing of the challenge to the ATS correlates with the desire to share the perceived wealth of Antarctic resources. One of the main elements of the common heritage of mankind outlines the equal sharing of benefits from resources exploitation. Additionally, the common heritage principles had recently been embedded in the UN Law of the Sea Convention (1982) and therefore developing nation-states argued this should be applied to Antarctica (Beck, 1984). However, the ATCPs were able to negotiate The Protocol on Environment Protection (1991) also known as the Madrid protocol which placed an indefinite ban on mining and exploration of Antarctica's resources which reduced the need for the common heritage of mankind principle.

The Common Heritage of Mankind in International Law

The common heritage of mankind has been applied in international customary law to the deep seabed and outer space (Wolfrum, 2017; Scott, 2010; Frakes, 2003). These instances have been described as a 'departure from traditional notions of sovereignty and territory' (Scott, 2010) and therefore have the potential to address the issue of sovereignty. The commonalities between the deep seabed, outer space and Antarctica have led some authors and nation-states to argue the doctrine should be applied to Antarctica as well (Scott, 2010; Wolfrum, 2017; Chong, 2017). Scott (2010) identifies the commonalities between the deep seabed, outer space and Antarctica as: the physical and practical challenges associated with applying sovereignty and territorial jurisdiction to the regions; the potential exploitation of resources in all three areas; the promotion of peaceful use, de-militarisation, scientific research and they can all be used for the common benefit of mankind. However, the extension of the doctrine to

Antarctica is problematic because of the territorial claims and right to claim of nine states (Kiss, 1985). Additionally, whilst the Moon and Other Celestial Bodies (Moon Treaty) does establish outer space as the common heritage of mankind the most prominent space states (US and Russia) have yet to sign the treaty therefore are not bound by these principles (Scott, 2010).

The Common Heritage of Mankind as a basis for exploitation

Thus far the focus of the common heritage of mankind doctrine has been on the shared benefit from exploitation of resources, however it could also be used to support a conservation regime. As Scott (2010) notes “there is no inherent reason why” the common heritage of mankind has to be applied to resource exploitation despite its connection in the past. Importantly it may be in the common interest of mankind to continue the *moratorium* on resource exploitation in Antarctic. It has also been argued the principle could be used to support the idea of transforming Antarctic into a world park (Wolfrum, 2017). It has also been argued by Wolfrum (2017) that in bringing up the question of Antarctica the developing states were also asking to be included in the benefits of being involved in scientific research and environmental protection in the Antarctic.

Problems with applying the Common Heritage of Mankind

The Common heritage of mankind does provide a more inclusive framework for Antarctic governance yet there are multiple obstacles to implementing it as a governance framework. The ATS principles do reflect the common heritage of mankind and as argued above could represent an extension or evolution of the ATS. However, there is one major obstacle in the way, territorial sovereignty. If the common heritage of mankind was adopted it would dissolve the territorial claims made by the UK, Australia, New Zealand, Argentina, Chile, France and Norway and the right to claim held by the US and Russia. Therefore, removing the question of sovereignty and ushering in a new era of Antarctic governance (Chong, 2017). This principle fails to take into consideration the political reality of dissolving states territorial and right to claim, as Jabour and Weber (2008) argue “sovereignty is not displaced easily”. The common heritage of mankind is not recognised by the claimant states as it poses a threat to their position and could strip them of their territorial claims (Jabour and Weber, 2008). It is also important to note that any changes to the ATS framework would need to be initiated by the claimant states and it is unlikely they would implement a new governance framework which would remove their privileged position. Additionally, Antarctic is legally distinct from the deep seabed and outer space which have been defined as ‘*res communis*’, belonging to everyone (Triggs, 1985). Antarctica has been recognised a “*terra nullius*” meaning it is open to territorial claim which are recognised in article IV (Triggs, 1985). Therefore, Antarctica does not reflect the first element of the common heritage of mankind, because it has been appropriated by nation-states (Scott, 2010; Kiss, 1985). Jabour and Weber (2008) put forward a proposal for reform of the ATS which revolves around the idea of common heritage of mankind but also keeps the current governance structure and assigns the consultative parties the role of ‘trustees’.

Potential to reform the Antarctic Treaty System

The Common Heritage of Mankind doctrine does have some potential for providing a more equitable governance framework for Antarctica. However as outlined in the section above it

does not account for the political reality of asking states to give up their sovereign right to territory. Sovereignty will continue to be an issue for the ATS as long as it remains unresolved. There have been some challenges to sovereignty and the ATS however they have been overcome. Both Scott (2011) and Chong (2017) acknowledge that whilst the 'status quo' remains sovereignty will remain an issue. The continental shelf issue, tourism, bioprospecting are still significant issues facing the ATS and have the potential to destabilise it in the future. Therefore, it is in the interest of the ATS and its claimant and non-claimant states to attempt to resolve the issue of sovereignty. Chong (2017) argues the best way to keep the issue of sovereignty in check is to ensure the ATS remains strong and central to Antarctic governance. He argues that the issue of sovereignty will subside as the ATS becomes stronger as it has done in the past. The 'Question of Antarctic' is no longer on the agenda of the UN due to the Madrid Protocol and the expansion of membership to the ATS (Beck, 2006). Similarly calls for Antarctica to be made a world park have subsided for the same reason. Scott (2011) has also argued reform of the ATS is the only way to attempt to resolve the issue of sovereignty. Specifically, reform could see the ATS evolve into a ministerial level conference with a rotating chair. This idea has been proposed by Chong (2017) and Hemmings (2009). Chong (2017) argues it is also for the ATS to communicate its agenda, achievements and process to the wider political community. However, reform of the ATS would also need to be led by the consultative parties which is unlikely. Whilst the ATS has and will continue to struggle with issues including, the extension of continental shelves, tourism, human impact and bioprospecting it is currently still serving the needs of the consultative parties. Therefore, they do not have any incentive to reform the ATS at this stage. Additionally, claimant states have been heavily investing in their territorial claims to ensure if the ATS was to fail their claims could be secured.

Conclusion

The Antarctic Treaty has been able to prevent further conflict regarding territorial sovereignty. But the issue of territorial sovereignty and the rights it affords claimant states has remained a dominant issue in the ATS and in the forefront of policy. States have continued to engage in practices of place naming, bringing pregnant women to the Antarctic, funding science and infrastructure to assert their territorial sovereign claims and make their presence on the continent known. These actions continue despite Article IV (2) clearly stating no activities undertaken by states in the duration of the treaty will contribute to their sovereign claim. These assertions of sovereignty have become commonplace and manageable by the ATS. However, the UNCLOS and the CLCS have brought the issue of territorial sovereignty to the fore of the ATS. Whilst states have so far been diplomatic with their submissions the CLCS has the potential to destabilise the delicate balance in the ATS if a claimant state chooses to include their Antarctic territory. The prominence of territorial sovereignty within the ATS has prompted calls for a different governance structure for Antarctica, one which is based on equal distribution of benefits and rejects any sovereign claims, known as the common heritage of mankind. The common heritage of mankind has been applied to outer space and the deep-sea bed. However, unlike these spaces territorial sovereignty has been claimed in Antarctica and is entrenched in the ATS. Moreover, applying the common heritage of mankind would require claimant states to put aside their sovereign claims which could not be achieved in the current political climate. Reform of the ATS has also been suggested to deal with the issue of sovereignty. This represents a more politically feasible option but would still require the claimant states to see the need for reform. Whilst the ATS may be struggling with issues of tourism, potential continental shelf claims and bioprospecting it is currently working in favour of the claimant states and therefore unlikely to be changed in the near future.

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