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Ad Hoc Working Group of Legal Experts  
on Non-Compliance with the  
Montreal Protocol

Second Meeting  
Geneva, 8-10 April 1991

REPORT OF THE SECOND MEETING OF THE AD HOC  
WORKING GROUP OF LEGAL EXPERTS ON NON-COMPLIANCE  
WITH THE MONTREAL PROTOCOL

I. INTRODUCTION

1. The Second Meeting of the Ad Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol was held in Geneva from 8-10 April 1991.
2. The meeting was attended by representatives from the following countries and regional economic integration organizations: Argentina, Australia, Brazil, Burkina Faso, Canada, Chile, China, Congo, Denmark, Egypt, the European Communities, Finland, France, Germany, Greece, India, Indonesia, Israel, Japan, Kenya, Malaysia, Malta, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Philippines, Portugal, Republic of Korea, Rwanda, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Uganda, United Kingdom, United States of America and Venezuela. The following United Nations organizations were represented: the United Nations Industrial Development Organization (UNIDO) and the United Nations Conference on Environment and Development (UNCED). The following organization was also represented: International Council of Environmental Law (ICEL).

II. ORGANIZATIONAL MATTERS

A. Opening of the meeting

3. The meeting was opened by Mrs. I. Rummel-Bulska, the Acting Secretary of the Ozone Secretariat and Chief of the Environmental Law and Institutions Unit, United Nations Environment Programme (UNEP), who welcomed the participants on behalf of Dr. M.K. Tolba, Executive Director of UNEP. In explaining the documents and the background to the issues before the meeting, she referred to decision II/5 of the Second Meeting of the Parties to the Montreal Protocol by which the Parties adopted, on an interim basis, the

non-compliance procedure contained in Annex III of its report (UNEP/OzL.Pro.2/3) and extended the mandate of the open-ended Ad Hoc Working Group of Legal Experts to elaborate further procedures on non-compliance and terms of reference for the Implementation Committee and to present the results for review by the preparatory meeting for the Fourth Meeting of the Parties with a view to their consideration at the Fourth Meeting. She also referred to the First Meeting of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol, which was held in Nairobi on 10 and 11 December 1990, and the recommendations made by the Committee, contained in its report (UNEP/OzL.Pro./ImpCom/1/2). The Note by the Secretariat (UNEP/OzL.Pro/WG.3/2/2) prepared for the Working Group had incorporated the recommendations of the Implementation Committee and had also suggested, for the consideration of the present meeting, several substantive issues arising from the Committee's deliberations.

#### B. Election of Officers

4. The meeting agreed to continue with the Bureau elected at its First Meeting and accordingly Mr. Patrick Szell (United Kingdom) was invited to take the Chair. The composition of the Bureau was as follows:

Chairman: Mr. Patrick Szell (United Kingdom)

Vice-Chairmen: Mr. Xia Kunbao (China)  
Ms. Norma Hernandez D. Gomez (Venezuela)

Rapporteur: Mr. Maurice Hartenbach (Switzerland)

5. In his introductory statement, the Chairman identified a number of subjects for consideration by the meeting. He explained the background to decision II/5 of the Second Meeting of the Parties to the Montreal Protocol, which had extended the mandate of the Ad Hoc Working Group, and suggested that the meeting should spend some time in identifying precisely what the Meeting of the Parties required the legal experts to do, and in particular whether the further elaboration of procedures on non-compliance and the terms of reference of the Implementation Committee needed to be treated as separate issues resulting in separate sections. He suggested also that the Working Group would need to address once more the question of the form in which the results of its work might be adopted by the Parties to the Protocol.

#### C. Adoption of the Agenda

6. The Chairman informed the meeting that pursuant to decision II/16 of the Second Meeting of the Parties to the Montreal Protocol and to a decision taken by the Bureau of the Montreal Protocol held in Nairobi on 14 and 15 March 1991, the Working Group was requested to consider a further item entitled "Examination of the Vienna Convention with a view to expediting its amendment procedure for protocols".

7. In considering this matter, the Working Group noted that as a consequence of the rule requiring six months' advance notice of proposed amendments to the Convention, the earliest occasion on which the Meeting of the Parties to the Vienna Convention could adopt an amendment to the Convention would now be at

the Third Meeting scheduled for the summer of 1993. In the light of the Working Group's heavy agenda for its three-day meeting and the fact that no documents had been received relating to this request, it was therefore decided that this issue should not be taken up for discussion at the present meeting. The Working Group decided to request the Executive Director to refer the matter for further clarification to the preparatory meeting for the Second Meeting of the Conference of the Parties to the Vienna Convention on the Protection of the Ozone Layer scheduled to be held in Nairobi from 10-12 June 1991. The Working Group expressed its readiness to tackle this problem at its next meeting if so requested by the Meetings of the Parties to the Vienna Convention and to the Montreal Protocol to be held in June 1991.

8. The following agenda, as contained in document UNEP/OzL.Pro/WG.3/2/1, was adopted by consensus:

1. Opening of the meeting
  2. Adoption of the agenda
  3. Substantive matters:
    - (a) Report of the first meeting of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol
    - (b) Terms of reference for the Implementation Committee
    - (c) Further procedures on non-compliance
  4. Other matters
  5. Adoption of the report
  6. Closure of the session
9. The Working Group agreed to consider items 3(b) and (c) together.

### III. SUBSTANTIVE MATTERS

(a) Report of the First Meeting of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol

10. In presenting the report of the First Meeting of the Implementation Committee (UNEP/OzL.Pro/ImpCom/1/2), its Chairperson, Ms. Carola Björklund (Norway), drew attention to the significance of the non-compliance procedure in regard to the progressive development of international environmental law. She outlined the principal issues raised at the First Meeting and the points that had emerged from the discussion of the non-compliance procedure with a view to the establishment of specific terms of reference for the Committee.

11. Some experts expressed their concern over the classification of the report of the First Meeting of the Implementation Committee as a restricted document. The Chairperson explained that the sensitive nature of the issues discussed in the Committee as well as the confidentiality of the data examined by it seemed to justify some degree of restriction. At the same time, she

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recognized the importance of keeping the Parties to the Protocol fully informed of the Committee's deliberations and sought the guidance of the Working Group in that respect. It was pointed out that under the non-compliance procedure the Implementation Committee reported directly to the Meeting of the Parties.

- (b) Terms of reference for the Implementation Committee
- and
- (c) Further procedures on non-compliance

12. It was decided to hold a general debate with a view to identifying the key issues. The following points were made during the discussion:

- (i) The adoption of the non-compliance procedure, on an interim basis, by the Second Meeting of the Parties to the Montreal Protocol amounted to a qualified endorsement of the procedure. The mandate of the Working Group of Legal Experts should be exercised with a view to further strengthening that procedure. The mandate did not, however, extend to a replacement of the procedure.
- (ii) The decision of the Second Meeting of the Parties to extend the mandate of the Working Group had been taken with a view to having the Non-Compliance Procedure examined more closely in order to enhance its efficacy. Some participants, however, considered that the Meeting of the Parties had not asked the Working Group to change the procedure, but rather to identify points of detail which had thus far been omitted.
- (iii) Within the basic framework of the non-compliance procedure there were a number of areas which might benefit from clarification and elaboration. Among these were: the size and composition of the Committee; its fundamental role in the scheme of the Montreal Protocol; the possible imposition of time-limits; the alternative approaches that the Committee could adopt in the discharge of its functions; the meaning of the terms "amicable solution" and "non-compliance"; the relationship between the non-compliance procedure and the provisions of Article 11 of the Vienna Convention; and the special situation of countries operating under Article 5 of the Montreal Protocol in relation to the Non-Compliance Procedure.
- (iv) There was a close relationship between the terms of reference of the Implementation Committee and the non-compliance procedure. This had implications for the manner in which these two distinct but interconnected matters should be dealt with by the Working Group.
- (v) The Implementation Committee's role should be exclusively advisory and not executive or judicial. Its functions should be restricted to considering whether non-compliance with the provisions of the Protocol had taken place and to seeking amicable solutions, as well as, in the view of most experts, making recommendations to the Meeting of the Parties. A few other experts, however, considered that the Implementation Committee should not make any recommendations on its own initiative.
- (vi) The various ways in which non-compliance with the provisions of the Protocol could arise needed to be identified. Non-compliance might occur, for example, through differing interpretations of the Protocol, as a result of a Party's financial difficulties or even unintentionally.

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- (vii) The Implementation Committee should be able to contact Parties directly when investigating non-compliance. However, the modalities for such contact would need to be very clearly identified.

13. On the basis of the observations made during the general debate the Working Group gave more detailed consideration to the following:

#### Implementation Committee

14. There was general agreement that the present size, composition and method of appointment of members of the Implementation Committee were conducive to its proper functioning. One expert, however, thought the membership of the Committee could be increased to provide for more equitable representation. The Working Group was unanimously of the view that the Committee should not have judicial or executive powers but should rather play an advisory role, though many were of the opinion that in performing its advisory functions it should be empowered to make recommendations to the Meeting of the Parties on its own initiative. Two experts, however, did not agree with this. The view was expressed that the Implementation Committee should have direct access to Parties in the conduct of its investigations into non-compliance. Certain experts were of the opinion that such contacts should be undertaken formally and through established procedures. One expert was of the view that such contacts should be recorded for presentation to the Meeting of the Parties.

#### Possible measures in response to non-compliance

15. Many experts supported the idea of listing the possible actions that could be taken when non-compliance was established. They were, however, firmly opposed to describing such actions as sanctions or punitive measures and stressed the need to emphasize their positive and conciliatory aspects. Three experts, however, expressed serious reservations regarding the competence of the Working Group to attempt to draw up such a list. The experts who were sympathetic to the idea of drawing up a list considered that such a list should be indicative and not exhaustive in character.

#### Role of the Secretariat

16. The discussion centred on the role of the Secretariat in initiating non-compliance procedures. The Working Group underscored the need for maintaining the non-partisan character of the Secretariat and was therefore of the view that it should not have the power to initiate the non-compliance procedures in the same way as States Parties. However, many experts recognized the fact that the Secretariat, being the recipient of much information regarding the implementation of Protocol, was in a good position to contribute to assisting in ensuring compliance with its provisions. Reference was made in this connection to the conclusions of the First Meeting of the Working Group of Legal Experts contained in document UNEP/OzL.Pro/WG.1/3. Several experts supported the strengthening of the Secretariat's role in bringing information indicating possible non-compliance to the attention of the Implementation Committee. Some experts, however, were opposed to assigning this role to the Secretariat. When discussing paragraph 3 of the Non-Compliance Procedure (see paragraph 20 below), the Working Group recognized the importance of the role that the Secretariat was being called upon to undertake. It agreed that a final decision on that paragraph could not be taken until all aspects of the non-compliance procedure had been considered.

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17. Some experts favoured the Implementation Committee being given an initiating role, but it was thought by other experts that to do so would be to create a situation of conflict of interests. One expert expressed the view that the Meeting of the Parties should also be entitled to initiate non-compliance procedures.

#### Relationship between Article 11 and the non-compliance procedure

18. Many experts were of the view that the judicial and arbitral settlement of disputes provided for in Article 11 of the Vienna Convention and the Non-Compliance Procedure referred to in Article 8 of the Montreal Protocol were two distinct and separate procedures which could well exist in parallel. It was also stated that Parties should have the right to exercise either option in any given situation. They also concluded that the provisions of paragraphs 8 and 9 of the non-compliance procedure could stand as they were and needed no revision. One expert, however, wished to establish the primacy of Article 11 over the non-compliance procedure by an appropriate amendment to that procedure. It was noted that use of the non-compliance procedure might in appropriate cases be considered as satisfying the procedural requirements contained in subparagraphs (1) and (2) of Article 11 of the Vienna Convention. One expert felt that the settlement of disputes procedure under Article 11 of the Vienna Convention and the non-compliance procedure under Article 8 of the Montreal Protocol should not be initiated simultaneously. Consequently, that expert felt that existing paragraphs 8 and 9 of that procedure were redundant and should be deleted. Another expert tabled a proposal contained in document UNEP/OzL.Pro/WG.3/2/CRP.2 to the effect that paragraphs 8 and 9 of the Non-Compliance Procedure contained in Annex III of document UNEP/OzL.Pro.2/3 should be deleted and the following new paragraph inserted: "Where the Meeting of Parties decides that a particular matter relates to the application of the Protocol, the Non-Compliance Procedure will precede the invocation of the provisions of Article 11 of the Vienna Convention."

#### Format

19. There was general agreement that the non-compliance procedure and the terms of reference of the Implementation Committee were two aspects of a single regime and need not be dealt with in separate sections of the non-compliance document.

#### Amendment to the non-compliance procedure

20. The Working Group commenced consideration of the non-compliance procedure paragraph by paragraph. It agreed to proceed on the basis of the text contained in Annex III of document UNEP/OzL.Pro/2/3. The Working Group also had before it the following documents: the report of the First Meeting of the Implementation Committee (UNEP/OzL.Pro/ImpCom/1/2, paragraph 7) and a proposal made on behalf of the European Economic Community (see Annex I). Due to lack of time, the Working Group was able to complete discussion on only paragraphs 1-3 and a part of paragraph 4 of the procedure. It was agreed that these paragraphs would read as follows:

Chapeau. Without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention, the following procedure has been formulated pursuant to Article 8 of the Montreal Protocol.

Paragraph 1. The wording remains as in paragraph 1, Annex III of document UNEP/OzL.Pro.2/3.

Paragraph 2. The Secretariat shall, within two weeks of its receiving a submission, send a copy of that submission to the Party whose implementation of a particular provision of the Protocol is at issue. Any reply and information in support thereof are to be submitted to the Secretariat and to the Parties involved within three months of the date of the despatch or such longer period as the circumstances of any particular case may require. The Secretariat shall then transmit the submission, the reply and the information provided by the Parties to the Implementation Committee referred to in paragraph 4, which shall consider the matter as soon as practicable.

Paragraph 3. Where the Secretariat, during the course of preparing its report, becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances of the case may require or the matter is not resolved through administrative action or through diplomatic contacts, the Secretariat shall include the matter in its report to the Meeting of the Parties pursuant to Article 12(c) of the Protocol and inform the Implementation Committee accordingly.

Paragraph 4. An Implementation Committee is hereby established. It shall consist of five Parties elected by the Meeting of the Parties for two years, based on equitable geographical distribution and a balance between developed and developing countries. Outgoing Parties may also be re-elected for one immediate consecutive term. At the first election, two Parties shall be elected for a one-year term.

The Implementation Committee shall elect its own [chairman] [president] and [deputy chairman] [vice-president]. Each shall serve for one year with the possibility of re-election for one further year. The [deputy chairman] [vice-president] shall in addition serve as the rapporteur of the Committee.

21. The Working Group made the following recommendations:

1. That the report of the meeting be brought to the notice of the Third Meeting of the Parties to the Montreal Protocol in June 1991;
2. That that Meeting be requested to authorize a further meeting of the Working Group, to be held at least six months before the Fourth Meeting of the Parties, to enable completion of the Working Group's work;
3. That the Third Meeting of the Montreal Parties be requested to clarify whether it wishes the Working Group, when elaborating further procedures on non-compliance, to draw up an indicative list of measures that might be taken in respect of Parties that are not in compliance with the Protocol;

4. That the Second Conference of the Parties to the Vienna Convention be requested to refer to this Working Group for consideration at its next meeting the question of expediting the amendment procedure under Article 9 of the Vienna Convention as requested by decision II/16 of the Second Meeting of the Parties to the Montreal Protocol; to this end the Secretariat should prepare a note outlining the problem that led to the adoption of decision II/16.

#### IV. ADOPTION OF THE REPORT

22. During consideration of the meeting's report, the expert from Brazil acknowledged the effort made by the drafting group on behalf of the Ad Hoc Group of Legal Experts to provide the formulation included in the report as new paragraph 3 of the Non-Compliance Procedure. The expert, however, reserved the position of his Government on this formulation as he felt obliged to object to the functions there attributed to the Secretariat. In his view, the functions of the Secretariat should be limited to those indicated in the non-compliance procedure adopted, on an interim basis, by the Second Meeting of Parties to the Montreal Protocol. He considered that this opinion had been confirmed by the general debate on this issue at the present meeting.

23. The Meeting adopted its report.

#### V. CLOSURE OF THE MEETING

24. There being no other business, the Meeting was declared closed at 6.30 p.m. on 10 April 1991.



ANNEX I

NON-COMPLIANCE PROCEDURE

(Proposal made on behalf of the European Economic Community)

1. The proposal aims to meet the mandate contained in decision II/5 by the Second Meeting of the Parties to the Montreal Protocol, which requested the Ad Hoc Working Group of Legal Experts *inter alia* to "elaborate further procedures on non-compliance and terms of reference for the Implementation Committee".
2. The attached procedure reproduces verbatim the texts of paragraphs set out in Annex III to the report of the Second Meeting of the Parties to the Montreal Protocol (UNEP/OzL.Pro.2/3), which took place in London from 27 to 29 June 1990.
3. It is proposed that Annex III should be divided into two parts. Part 1 would deal with the non-compliance procedure proper and contains the texts already adopted by the Second Meeting of the Parties with certain additions to deal with time-limits, possible irregularities with regard to compliance, conflict of interests of members of the Implementation Committee and the functions of the Committee. Part 2 would contain an indicative list of steps to bring about full compliance with the Protocol.

PART 1

NON-COMPLIANCE PROCEDURE

1. (Wording remains as in paragraph 1 of Annex III of document UNEP/OzL.Pro.2/3, page 40.)
2. The Party whose implementation is at issue is to be sent a copy of the submission within two (2) weeks and it shall be given a reasonable opportunity to reply. Any such reply and information in support thereof is to be submitted to the Secretariat and to the Parties involved within three (3) months or such a longer period as the Secretariat considers appropriate. The Secretariat shall then transmit the submission, the reply and the information provided by the Parties to the Implementation Committee referred to in paragraph 4, which shall consider the matter as soon as practicable.<sup>1/</sup>

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<sup>1/</sup> Except where underlined the text remains the same as that in paragraph 2 of Annex III of document UNEP/OzL.Pro.2/3, page 40.

3. Where the Secretariat is aware of possible irregularities with regard to the compliance of a Party with its obligations under the Protocol, it may request further information on the matter from the Party concerned. If no satisfactory comment is received within three (3) months or such a longer period as the Secretariat considers appropriate, the Secretariat shall forthwith refer the matter to the Implementation Committee for examination.

4. An Implementation Committee is hereby established. It shall consist of five Parties elected by the Meeting of the Parties for two years, based on equitable geographical distribution. Outgoing Parties may also be re-elected for one immediate consecutive term. At the first election, two Parties shall be elected for a one-year term.

Five substitute Parties shall be elected in accordance with the same rules as for the Members of the Implementation Committee. Where a Party that is a Member of the Implementation Committee is itself involved in a case of non-compliance, it shall be replaced by the substitute Party from the same region.<sup>2/</sup>

5. The Committee shall meet as necessary to perform its functions; unless it decides otherwise the Committee shall meet twice a year. The Secretariat shall arrange for and service its meetings.<sup>3/</sup>

6. The functions of the Committee shall be:

- (a) To receive, consider and report on any submission in accordance with paragraphs 1, 2 and 3.
- (b) To receive, consider and report on the Secretariat reports based on information received pursuant to Article 7 of the Protocol, and on any information or observations forwarded by the Secretariat in connection with the preparation of the reports referred to in Article 12(c) of the Protocol.

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2/ Except where underlined the text remains the same as that in paragraph 3 of Annex III of document UNEP/OzL.Pro.2/3, page 40.

It is additionally proposed that the following statement should be added to the report of the Working Group: "With regard to paragraph 4 the Ad Hoc Working Group of Legal Experts felt it ought to emphasize the importance of Parties nominating as their representatives individuals who are well qualified in the technical, economic or legal field."

3/ Except where underlined the text remains the same as that in paragraph 4 of Annex III of document UNEP/OzL.Pro.2/3, page 40.

- (c) To be informed of, consider and pursue possible irregularities with regard to the compliance with the obligations under the Protocol.
- (d) To request, where it considers necessary, further information from the Secretariat or the Parties involved.
- (e) To undertake, with the consent of the Parties concerned, any examination necessary to establish the state of compliance with the terms of the Protocol.<sup>4/</sup>

7. In the course of its examination of the submissions, replies, information and observations referred to in paragraphs 2 and 6 above, the Implementation Committee may:

- address requests for information to Parties, organizations or individuals as appropriate
- send, with the consent of the Party in question, one or more of its Members to the territory of the Party concerned for further clarification of the relevant facts

8. (Wording remains as in paragraph 6 of Annex III of document UNEP/OzL.Pro.2/3, page 40.)

9. The Committee shall report to the Meeting of the Parties with any recommendations it considers appropriate. After receiving a report by the Committee the Parties may, taking into consideration the circumstances of the case, decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Party's compliance with the Protocol, and to further the Protocol's objectives. An indicative list of possible steps to bring about full compliance with the Protocol appears in Part 2 of this Annex.<sup>5/</sup>

10. (Wording remains as in paragraph 8 of Annex III of document UNEP/OzL.Pro.2/3, page 40.)

11. (Wording remains as in paragraph 9 of Annex III of document UNEP/OzL.Pro.2/3, page 40.)

12. (Wording remains as in paragraph 10 of Annex III of document UNEP/OzL.Pro.2/3, page 41.)

13. (Wording remains as in paragraph 11 of Annex III of document UNEP/OzL.Pro.2/3, page 41.)

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<sup>4/</sup> Except where underlined the text remains the same as that in paragraph 5 of Annex III of document UNEP/OzL.Pro.2/3, page 40.

<sup>5/</sup> Except where underlined the text remains the same as that in paragraph 7 of Annex III of document UNEP/OzL.Pro.2/3, page 40.

PART 2

INDICATIVE LIST OF STEPS TO BRING ABOUT FULL COMPLIANCE  
WITH THE PROTOCOL

14. Steps taken by the Meeting of the Parties to ensure full compliance with the Protocol may include but are not limited to the following:

A. For non-compliance with data reporting requirements:

Assistance to Parties in establishing methods and institutional mechanisms to collect and report data.

Determination by the Secretariat of provisional data until data are provided by the Party.

In cases of repeated negligence to report data the Party can be treated as a non-party for the purposes of Article 4 (trade restrictions).

B. For non-compliance with control measures:

In cases of misuse of the entitlements to increase production to satisfy basic domestic needs or for purposes of industrial rationalization, a Party may lose the right to claim such increases for a specific number of years.

In cases of misuse of the right to joint fulfilment, Parties may be requested to comply individually with the provisions of the Protocol.

In cases where Parties have received assistance from the Multilateral Fund to enable them to comply with the provisions of the Protocol and they still fail to comply without fulfilling the requirements of Article 5, paragraphs 4-6, such Parties may either be treated as non-parties for the purposes of Article 4 or may lose one or more of their benefits as Article 5, paragraph 1 countries, e.g. the entitlement to delay their compliance with the Protocol for up to ten years or the right to receive funds from the Multilateral Fund.

In cases where Parties do not reduce (freeze) in accordance with the provisions of the Protocol, a Party may be requested to increase its reductions in the following year(s) or it may be treated as a non-party for the purposes of Article 4.

C. For non-compliance with trade provisions:

In cases where a Party does not implement Article 4 with the effect that non-parties benefit from it, such a Party may be treated as a non-party for the purposes of Article 4.

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