Conference organized by:

Institute for Austrian and International Tax Law Vienna

In cooperation with

Doctoral Program for International Business Taxation

WU Global Tax Policy Center

The Relationship between Taxation and Bilateral Investment Agreements

RUST CONFERENCE 2015

QUESTIONNAIRE

GUIDELINES ON ISSUES TO BE COVERED

IN THE 20-PAGE CONTRIBUTION

The Relationship between Taxation and Bilateral Investment Agreements

I. The General Framework – Policy Considerations

a) What is the general policy of your country for entering into tax treaties and bilateral investment treaties (BITs)? Has this policy recently changed or is there a current debate in your country?
b) How many double tax treaties (DTTs) and BITs has your country signed and to which bilateral or to multilateral free trade agreements is your country a party?
c) On the basis of which criteria does your country select DTT contracting states and BIT contracting states? Is there an overlap?
d) If your country does not sign BITs or DTTs or the BITs or DTTs signed by your country are not ratified, what are the reasons and policy considerations behind this? Are there alternatives under international and/or domestic law?
e) Does your country have a model BIT[1] and a model DTT? What are the general principles and standards[2] provided for in these models?
f) Do all or most of the BITs and DTTs signed by your country match these models in general? What are the major deviations from these models? Do you observe any recent trends in your country's BITs or DTTs?
g) What is the role of investment contracts and investment authorizations[3] in your jurisdiction? Do the investment contracts signed by your country include (tax) stabilization clauses or any other tax-related provisions? Is there any case law regarding the enforcement of such contracts?
h) To what extent do you think the issues discussed in this questionnaire may be affected by developments related to the BEPS project?

II. Relation to Other Tax and Non-Tax Treaties

a) In which areas might there be an overlap between a BIT and a DTT? In other words, which tax measures could fall under both treaties?
b) Can you imagine that there might be a conflict between a BIT and a DTT concluded by your country? Describe such a situation.
c) Do the BITs or DTTs signed by your country contain a provision which ensures that in case of a conflict one treaty prevails over the other?[4]

[1] Unlike double tax conventions, there is no model investment treaty that serves as a basis for negotiation universally. Instead, many countries have their model investment treaties which they use as a basis for negotiation. Therefore, the treaties around the world contain significant differences.

[2] In BITs, there are certain standards of treatment guaranteed by the host state to foreign investors. The standards of national treatment and most-favoured nation treatment oblige the contracting states to treat the investors of the other party no less favourably than its own investors and investors of a third state who are in the same circumstances. BITs also include an obligation for contracting states to provide fair and equitable treatment to the investors of the other party in their territory. In most BITs, the host states also commit themselves to providing full protection and security to investments made by investors of the home state.

[3] Often, before engaging in a certain investment project, a foreign investor may be required to get an authorization from the host state or may be required to sign an investment contract with the government, such as the product sharing agreements which are common in the extractives sector. Such instruments may include provisions on tax-related issues on the matter, e.g. tax stabilization clauses. By engaging in such tax stabilization clauses, governments generally provide a guarantee to the investor that it will not amend its tax laws in a way that has an adverse effect on the economic rights of the investor.

[4] Many BITs contain a provision which stipulates that in the event of any inconsistency between the investment agreement and a tax convention, the tax convention prevails, e.g. the Canadian Model BIT.

d) If there are no such provisions (as indicated in subparagraph c), how are conflicts solved? Which treaty prevails? Describe briefly the related case law. If there is no case law, describe a situation in which such a conflict could occur!
e) Are there any conflicts between BITs and other international treaties which contain tax clauses?
f) Are there any conflicts between DTTs and other international treaties (e.g. free trade agreements, the Energy Charter) which protect investment?

III. Coverage of Taxes and Carve-Out Clause

a) To what extent are taxes covered explicitly or implicitly in BITs signed by your country? Are there carve-out clauses which leave taxation outside the scope of BITs entirely? Instead, are there partial carve-out clauses which leave taxation outside the scope partially, e.g. only direct taxes? Please explain in detail the scope of such carve-out clauses.
b) In case there is no general carve out in a BIT signed by your country, are there nevertheless any taxes in your jurisdiction which are outside the scope of BITs?
c) Do the BITs signed by your country contain umbrella clauses[5]? Are there any disputes in your jurisdiction regarding tax-related clauses in investment agreements (e.g. tax stabilization clauses[6]) which become subject to a BIT signed by your country due to an umbrella clause?

IV. Fair and Equitable Treatment (FET) and Transparency

a) To what extent are the FET provisions in the BITs signed by your country interpreted? In which situations did or do they have practical impact on tax rules or administrative practice? Give examples! Have there been situations discussed in academic writing where a FET provision could become relevant in taxation (i.e. no denial of justice in judicial or administrative proceedings, due process, no arbitrary treatment of investors, legitimate expectations, etc.)? Are there any judgments where this became relevant? Can you think of any cases?
b) What is the impact of principle-of-equality clauses (under constitutional law, in case they exist in your country) on the interpretation of FET clauses? In which way are these clauses similar? In which way different?

[5] In some BITs there are "umbrella clauses" which determine that a host state is required to respect any obligation which is established in a particular investment and especially in an investment contract. Such clauses, therefore, enable the claims arising under the investment contracts to be enforced through the BIT signed by the host state and the home state of the investor, for example in arbitration tribunals.

[6] For example, in *Duke Energy International Peru Investments No.1 Ltd. v. Peru, ICSID Case No. ARB/03/28, Award, Aug 18, 2008* the question concerned whether Peru violated the legal stability agreement signed between the government and the investor that included an income tax stabilization clause. As the tax authorities in this case were of the view that the merger was a sham transaction concluded solely for tax benefits, they made a reassessment and levied taxes. In this case, the Tribunal decided that Peru was liable for a breach of the tax stabilization clause. See also *Revere Copper v. OPIC* as mentioned in Waelde, T. and A. Kolo (2007). "Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty." INTERTAX 35(8/9), p. 438, fn. 90.

c) Which kinds of practices or procedures applied by the tax authorities, tax courts or other administrative branch may be considered contrary to the fair and equitable treatment principle enshrined in BITs?[7] Give examples.
d) Do the tax laws in your jurisdiction provide for any unsatisfactory rules for due process? For example, are there cases where the taxpayer has been deprived of access to appeal?
e) What is the impact of non-discrimination clauses (under constitutional law, tax treaty law, etc.) on the interpretation of FET clauses? In which way are these clauses similar? In which way different?
f) Is transparency[8] explicitly stated as a part of FET provisions in BITs signed by your country or is there a provision which regulates transparency regulations? Is the transparency obligation double-sided, i.e. not only on the side of the state but also on the side of the investor? Is there any practice adopted by the tax authorities or the courts or the parliament in your country which has been or could be considered to be a violation of transparency obligation in a BIT (e.g. the non-publication of the preliminary rulings of the tax authorities or tax decisions)?

V. National Treatment (NT) and Most Favoured Nation (MFN) Treatment

a) Do any of the BITs signed by your country provide that NT and MFN clauses do not apply to existing taxation measures, therefore leading to exclusion of existing tax laws from the scope of NT and MFN clauses?
b) Do the NT and MFN clauses contain any limitations to the application of these clauses? Do they only apply to treatment provided under domestic law? Are there any sectors/industries/policy areas which are exempt from NT and MFN clauses?
c) Are there any cases in your country that were decided on the basis of NT and MFN clauses of BITs?
d) When compared to the non-discrimination clauses in the DTTs signed by your country, what are the additional protections that NT and MFN clauses in the BITs signed by your country bring to the investor in terms of scope and content? Which could be the cases of discriminatory treatment that are not covered by DTTs but covered by the NT or MFN clauses in BITs?
e) If you compare MFN clauses in BITs with MFN rules in WTO rules or free trade agreements (NAFTA, ASEAN): In which respect are they applied similarly or differently? (Different standards in general? Comparability? Justifications? Proportionality?)
f) More than 600 bilateral DTTs contain MFN clauses: If you compare the clauses contained in the tax treaties of your country (if there are any) with the MFN clauses in

[7] For example, in *Jan Oostergetel & Theodora Laurentius v. Slovak Republic, UNCITRAL, Final Award, Apr 23, 2012*, in determining whether there was a breach of the fair and equitable treatment obligation, the Tribunal focused on concepts of reasonable expectations, denial of justice and bad faith. In this case, the Claimants had particularly complained about the forced collection of tax arrears.

[8] Many BITs do not contain a separate clause on transparency; however, certain state conduct which is not transparent are considered to be in breach of FET standards in general. Even if the components of transparency obligation is not clear, four distinct transparency obligations are given: the publication of applicable laws, regulations and policies, notification requirements with respect to laws, regulations and policies and amendments, provision of a reasonable opportunity to comment on new laws, regulations or policies and the fair and transparent administration of laws, regulations and policies are distinguished as potential components of the transparency obligation. Some BITs explicitly include some of these four areas as a part of transparency requirement. Newcombe/Paradell, Law and Practice of Investment Treaties, Kluwer, 2009, p. 298.

BITs: In which respect are they applied similarly or differently? (Different standards in general? Comparability? Justifications? Proportionality?)

g) Please comment briefly on the following hypothetical case. A foreign investor has invested in your country and therefore is covered by the BIT signed between your country and investor's home country ("*BIT X*"). Your country has signed a BIT with another country ("*BIT Y*"). BIT Y contains more favourable clauses compared to BIT X. However, BIT Y has an extensive tax carve-out clause (i.e. excluding taxation from the application of treaty entirely) while the BIT X excludes only direct taxation from its application. The investor wants to rely on the MFN clause of BIT X and wants to benefit from the more favourable clauses of BIT Y in a VAT dispute. Would this more comprehensive carve-out clause of BIT Y be applicable to the investor as well or can the investor "cherry-pick" from other BITs to an extent that might go beyond the intention of negotiators?[9]

h) Are there any tax-related cases/awards where a tax-related governmental measure has been analysed with regard to NT or MFN clauses in a BIT? Can you think of any tax-related governmental measure which could potentially be incompatible with such clauses provided in BITs signed by your country?[10]

i) Is there a regional economic integration organization (REIO) clause[11] in BITs signed by your country? Do such clauses leave any room for the extension of treatment provided in any REIOs of which your country is a member to the investors of the contracting states? If your country is a member of any REIO and has signed BITs which do not contain REIO clauses, what is the tax-related preferential treatment that is provided in these REIOs and which could be extended to the investors of the contracting states?

VI. Taxation as Expropriation[12]

a) Do the provisions on expropriation in BITs signed by your country provide any criteria to distinguish indirect expropriation from legitimate regulation?[13]

b) Do these provisions provide any guidance on issues related to taxation?

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[9] Simonis, P. H. M. (2014). "BITs and Taxes." INTERTAX 42(4), p.242.

[10] For example, in *Feldman v. Mexico*, the Tribunal held that the Mexico's refusal to rebate excise taxes applied to exported cigarettes by the investor's company was a breach of the national treatment standard of NAFTA. (Marvin Feldman v. Mexico, NAFTA Case No. ARB (AF)/99/1, Award, December 16, 2002.). In *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, UNCITRAL (1976), Final Award Jul 1, 2004*, the Tribunal rejected a claim of expropriation. In this case the Tribunal held that there was no substantial deprivation but the Claimant had been subject to discrimination.

[11] REIO clauses state that the agreement may not oblige the contracting parties to extend the privileges which arise due to membership in such an agreement to the investors of the other party. A REIO clause prevents the application of an MFN clause to be applied to the cases where the REIO members grant preferential treatment to other REIO members or their investors. For an example of such clause, see Austrian Model BIT 2008, Article 3 (4) (b).

[12] BITs traditionally include a provision on protection against expropriation and taxation does not qualify as expropriation under international law. However, there might be exceptional cases where taxation constitutes a form of indirect expropriation. There are certain awards where attempts to determine what a taxation amounting to expropriation is. In addition to the other cases mentioned below, see also *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova, UNCITRAL (UNCITRAL (1976)) Final Award Apr 18, 2002* and *EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL (formerly EnCana Corporation v. Government of the Republic of Ecuador), Award Feb 3, 2006.*

[13] E. g. see US Model BIT Art. 6, Annex B.

c) Is there any case law/award in your country that discusses how taxation may amount to expropriation?[14] Can you think of any tax measures in your jurisdiction that could be considered to be an expropriation measure under a BIT?[15]
d) Is there any discussion in your country regarding the legitimacy of taxes or concerning the "legitimate expectations"/"acquired rights" of taxpayers? Under which circumstances, may a tax be identified as "abusive" in your jurisdiction? What could be considered to be "normal governmental conduct" in the area of taxation? What makes a tax "punitive"? What is the content scope of constitutional doctrine/jurisprudence in this area in your jurisdiction?
e) In your jurisdiction, is there any jurisprudence or doctrine on confiscatory taxes? Does the Constitution stipulate any principle or provide for any criteria in this respect? Which types of taxes would or are likely to constitute confiscation under your domestic law?
f) Is the application of the term "expropriation" inspired by the understanding of this term under human rights rules? Similarities? Differences?

VII. Taxation and Free Transfer of Capital[16]

[14] For example, in *Antoine Goetz & consorts c. République du Burundi, Affaire CIRDI ARB/95/3, Sentence, Feb 10, 1999*, the investor's licence to operate in an economic free zone was withdrawn prospectively. The licence was providing entitlement to tax and import duty rebates. The tribunal found that the withdrawal of licence constituted indirect expropriation under Belgium-Luxembourg- Burundi BIT. (Waelde, T. and A. Kolo (2007). "Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty." INTERTAX 35(8/9), p. 445. For the text of the award in French, see. www.italaw.com).

[15] In *RosInvestCo UK Ltd. v. Russian Federation, SCC, Final Award, Sep 12, 2010*, a minority shareholder claimed that Russia had in fact expropriated Yukos (one of the largest oil companies in the world) via a series of fraud and tax evasion charges followed by the forced sale of its main oil production subsidiary. The Tribunal concluded that the tax assessments were not a bona fide treatment (para. 497). It found that indeed the various measures taken by Russia had the aim of depriving Yukos of its assets and amounted to expropriation (para. 574). RostInvestCo v. Russia was the first among a series of awards which found that Russia violated certain bilateral investment treaties and the Energy Charter Treaty and was cited by the following awards regarding Yukos claims. Another claim was again brought by minority shareholders under the Spain- USSR BIT. The Tribunal in *Quasar De Valores SICA S.A., et al. v. Russian Federation, SCC, Award, Jul 20, 2012* (formerly known *as Renta 4 S.V.S.A., et al. v. Russian Federation*) cited the *RostInvestCo* Tribunal and stated "*the Tribunal concludes that Yukos' tax delinquency was indeed a pretext for seizing Yukos assets and transferring them to Rosneft. ... this finding supports the Claimants' contention that the Russian Federation's real goal was to expropriate Yukos, and not to legitimately collect taxes.*" (para. 177). However, the most often-discussed awards concerned the claims arising from the Energy Charter Treaty (*Hulley Enterprises Limited (Cyprus) v. Russian Federation, Final Award, PCA Case No. AA 226, July 18, 201, Veteran Petroleum Limited (Cyprus) v. Russian Federation, PCA Case No. AA 228, Final Award, Jul 18, 2014* and *Yukos Universal Limited (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Final Award, Jul 18, 2014)* The Tribunal here concluded that „"*the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets*." and "*Respondent has not explicitly expropriated Yukos or the holdings of its shareholders, but the measures that Respondent has taken in respect of Yukos, ... in the view of the Tribunal have had an effect "equivalent to nationalization or expropriation*" (*Yukos Universal v. Russia*, para. 1579-1580). However, the Tribunal also took the tax avoidance schemes implemented by Yukos into account and reduced the amount of damages by 25 %. The compensation, nevertheless, amounted to a total of USD 50 billion. Another tax-related investment dispute is *Burlington Resources INC. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, Dec 14, 2012*. For an analysis of this report, see Gildemeister, A. E. (2014). "Burlington Resources, Inc v Republic of Ecuador - How Much is Too Much: When is Taxation Tantamount to Expropriation?" ICSID REVIEW 29(2): 6. See also the pending *Lonestar* case which concerns a withholding tax on capital gains (IFA 68th Congress in Mumbai - Seminar I: Taxation and non-tax treaties (16 Oct. 2014), News IBFD.)

[16] Transfer of capital provisions guarantee the right of investor to freely transfer the investment-related financial flows into and out of the host state generally with certain restrictions.

a) What is the content and scope of the capital transfer provisions in BITs signed by your country? Do the capital transfer provisions in BITs signed by your country contain any restrictions on the freedom of transfer? If so, what types of restrictions are foreseen (e.g. balance of payment difficulties)?
b) Does taxation in general come within the scope of such restrictions?
c) Are there any cases/awards where a tax-related governmental measure has been analysed with regard to a capital transfer clause in a BIT?
d) May any withholding tax on dividends, interest or profits in your jurisdiction come under the scope of such capital transfer provisions? [17]
e) Does your country have any exit tax provisions in its tax laws? If so, do you think such provisions could be considered inconsistent with the capital transfer provisions?
f) Compare the protection of free transfer of interest, dividends and profit under BIT with free movement of capital and payments under EU law: How similar or different are the standards? Can we learn anything from one legal order for the interpretation and application of the other legal order? Is there any discussion in your country? What is your own view?

VIII. Dispute Settlement and Awards

a) Do all the BITs concluded by your country provide for investor-state arbitration? If investor-state arbitration is excluded from BITs, please explain the official reasons given for this.
b) What is the institutional framework (e.g. ICSID) for the settlement of disputes? Is your country a party to the ICSID Convention[18]?
c) Are tax-related claims excluded from the investor-state arbitration? If so, are taxes which amount to expropriation excluded as well? Are tax-related claims explicitly subject to state-state arbitration within the BITs of your country?
d) In your jurisdiction is there any debate on the whether tax issues[19] may be arbitrated? If so, please describe the scope of such debate briefly. What is your stance on this subject?
e) What has been the trend in the number of disputes and if significant changes have occurred in recent years, please explain the reason for such a change. Indicate how many of these disputes involved tax issues and what the principles contested were.
f) Has there been a recent political debate on whether investor-state dispute resolution mechanisms reduce national sovereignty? If so, please briefly summarize the arguments.

[17]Some such tax laws of EU Member States have been found to be in violation with free movement of capital. For example, in the *Santander* case, ECJ decided that national legislation which exempts dividend payments to resident UCITS while imposing a withholding tax on non-resident UCITS is not compatible with the free movement of capital. Case C-338/11, *Santander Asset Management SGIIC SA and Others v. Direction des résidents à l'étranger et des services généraux*.

[18]The Convention on the Settlement of Investment Disputes between States and Nationals of Other States. ICSID Convention provides rules for arbitration of investment disputes. See Schreuer, C. (2011). The ICSID Convention, Cambridge.

[19]Even though taxation issues have been subject to investment disputes in reality, there have been objections to the arbitrability of taxes. For example, see Carbonneau, T. E. and A. W. Sheldrick (1992). "Tax Liability and Inarbitrability in International Commercial Arbitration." Journal Of Transnational Law & Policy 1:23; Park, W. W. (2009). Chapter 10. Arbitrability and Tax. Arbitrability: International and Comparative Perspectives. L. A. Mistelis and S. L. Brekoulakis, Kluwer: 27.

g) Have proposals been put forward or have there been discussions on how to improve the transparency of arbitration procedures both in BITs and DTTs in your country? If so, please summarize them.

h) Are there any legal (e.g. constitutional) barriers against arbitration clauses under BITs in your country? Describe the different viewpoints? Is there any case law? What is your view?

i) Is there a special dispute resolution mechanism for cases concerning tax issues or expropriation claims reached via taxation, e.g. joint tax consultation or "tax veto" by the tax authorities[20]? What is the scope of such clauses?

j) Is the mechanism provided for in the BITs signed by your country comparable to the arbitration clauses in the DTTs signed by your country?

k) How many of your country's DTTs contain an arbitration clause and to what extent do they follow the OECD or UN Models? If your country has a policy of not including such clauses, please explain the policy rational put forward.

l) Can you imagine cases where a foreign investor is denied access to investor-state arbitration due to the existence of the mutual agreement procedure provided for in a DTT?

m) Are there any cases/awards in your jurisdiction where taxation on the compensation claimed by the investor in investor-state arbitration became an issue?[21]

n) Do the DTTs signed by your country include arbitration clauses? If not, what are the reasons for this? Are there any political or legal arguments for accepting arbitration in BITs but not in tax treaty law?

o) In your view, is investor-state arbitration an appropriate dispute settlement mechanism for arbitration of tax disputes? Do you believe that there is scope for adopting such a dispute settlement mechanism within the BEPS Action 14?[22]

p) The BEPS Action 6 identifies treaty abuse and treaty shopping as one of the most important areas for concern.[23] What is your view on the discussions surrounding treaty shopping practices in international investment law? Do you believe that the developments in the area of international tax law may have an impact on the practice of investment treaties?

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[20] In some international investment agreements, investors who claim that a host-state tax measure is in breach of the BIT in question may submit a claim to investor-state arbitration only if tax authorities of the parties of the BIT fail to reach an agreement. Such provisions have the significant power to prevent tax-related claims from being subject to arbitration and are referred as "tax veto" provisions. See Kolo, A. (2009). "Tax "veto" as a special jurisdictional and substantive issue in investor-state arbitration: need for reassessment?" Suffolk Transnational Law Review 32(2); Park, W. W. (2001). "Arbitration and the Fisc: NAFTA's "Tax Veto"." Chicago Journal of International Law 2(1).

[21] The compensation aims at bringing the investor in the same position as it would have been if there had been no breach of the treaty. Taxes also become an issue with regard to the compensation claimed for the breach of the BIT. There are a number of arbitral awards where the tax on compensation has been analysed by tribunals, e.g. *Nykomb Synergetics Technology Holding AB v. the Republic of Latvia, SCC, Dec 16, 2003*. See also Paul H. M. Simonis, BITs and Taxes, Intertax, Vol.42, Issue 4, 2014.

[22] Base Erosion and Profit Shifting (BEPS) Project by the OECD aims to combat the tax avoidance schemes implemented by multinational companies worldwide. BEPS Action Plan introduces 15 specific actions which will provide governments with certain domestic and international instruments to combat the base erosion and profit-shifting strategies developed by companies. The BEPS Action 14, on the other hand, has the objective to make dispute resolution mechanism more effective. For more information, see OECD BEPS-related documents at http://www.oecd.org/ctp/beps.htm.

[23] For more information, see OECD, BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, 14 March 2014 – 9 April 2014 at http://www.oecd.org/ctp/treaties/treaty-abuse-discussion-draft-march-2014.pdf and OECD, Follow up Work On BEPS Action 6: Preventing Treaty Abuse, 21 November 2014 – 9 January 2015 at http://www.oecd.org/ctp/treaties/discussion-draft-action-6-follow-up-prevent-treaty-abuse.pdf.

Some practical Guidelines

Paper length: 20 pages
Format: preferably "MS Word"
Bibliographic reference and quoting: please follow the separate guidelines.

Deadline for delivery of the report: April 30, 2015

Please let us also have **a short CV** (3-5 lines) for the "List of Contributors" in the book, and a list of abbreviations, in due time. Please make sure that **graphics and charts** for the final version are black-and-white or **greyscale only** (no color graphics allowed for the book!) and please also email them as separate files in xlsx, docx, pptx, jpg or tif format. Resolution of pictures should be **at least 300 DPI** to ensure good quality for printing.

The national reports will be placed for download on a password-protected conference website, so that the conference participants can be well prepared for the discussion.

On the basis of the national reports, we will identify the most relevant topics, and select speakers who will present selected issues in a three-minute input statement to encourage the public debate.

After the conference there will be a short period of time given for including the findings of the conference in the paper. We will organize linguistic editing.

If you have questions or doubts, please do not hesitate to contact us. We will happy to help you.

We wish you a very fruitful writing process!
Sincerely

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