

8. Appendices to “Reforming International Investment Agreements: The Case of China and Foreign Direct Investment”

Appendix A: First- and Third-Generation BITs of China

Table A1.: First-generation BITs

BIT clauses	General characteristic of BITs wrt each provision	Special issues worth mentioning	Example of wording in a typical BIT
Scope of BIT (Definition of investment)	Generally, the ‘investment definition’ is broad and vague because it may cover movable and immovable property as well as any other rights in rem, such as mortgage, lien, pledge, usufruct and similar rights; hares or other kinds of interest in companies; title to money or any performance having an economic value; copyrights, industrial property rights, technical processes, trade-names and goodwill ; and such business-concessions under public law or under contract, including concessions regarding the prospecting for, or the extraction	The broad encompassing definition of ‘investment’ in China’s first-generation BITs provides for an open-ended list of examples; it does not set forth clear definitions of ‘investment’.	The term "investment" shall comprise every kind of asset invested by investors of one Contracting State in the territory of the other Contracting State in accordance with the laws and regulations of that State (China - Sweden BIT, 1982)

BIT clauses	General characteristic of BITs wrt each provision	Special issues worth mentioning	Example of wording in a typical BIT
	or winning of natural resources, as give to their holder a legal position of some duration.		
Regulation of entry (pre-establishment)	<p>Generally, there are no pre-entry obligations placed on the investors. However, in the China-Singapore BIT, foreign investment to be protected by the BIT must be specifically approved in writing by a competent authority designed by the Contracting States.</p> <p>For an investment to be admitted, it must be made in accordance with the legislation of the Contracting Parties.</p>	<p>Even if an investment is modified in form, such a modification does not affect the character of the investment in substance if the modification does not violate the laws of the contracting states.</p>	<p>Each Contracting Party promotes in its territory investments by investors of the other Contracting Party and admits such investments in accordance with its legislation</p>
Expropriation	<p>A host state may expropriate a foreign investment in the public interest, and must be taken by means of legal proceedings, accompanied by compensation. While the broad principle governing expropriation across BITs is the same, the language used is</p>	<p>The compensation payable by the host state for the expropriation will be valued based on the value of the investment immediately before</p>	<p>Neither Contracting Party shall take any measures of expropriation nationalization or any dispossession having effect equivalent to nationalization or expropriation against the investments of investors of the other Contracting Party except under the following conditions: (1) The measures are taken for a public</p>

BIT clauses	General characteristic of BITs wrt each provision	Special issues worth mentioning	Example of wording in a typical BIT
	different in certain BITs. For example, in the China - Israel BIT (1995), expropriation can only take place for a “ <i>public purpose related to the internal needs of that Contracting Party.</i> ”	the expropriation became public knowledge.	purpose and in accordance with the legal procedure of each Contracting Party taking the expropriating measures; (2) The measures are non-discriminatory; (3) The measures are accompanied by provisions for payment of fair and reasonable compensation.
National Treatment	Some BITs only have national treatment clauses; a few have MFN clauses in place of national treatment.	While there is a free trade exception provided for the MFN obligation, there is no such exception for national treatment clauses.	<p>“Investments and activities associated with investments of investors of either Contracting Party shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting Party.”</p> <p>„Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment not less favorable than that which it accords to its own investors (national treatment)“</p>

BIT clauses	General characteristic of BITs wrt each provision	Special issues worth mentioning	Example of wording in a typical BIT
Most Favored Nation	While both BITs provide for MFN, the exceptions to the MFN clause differ.	The exception to the MFN clause in the China-Sweden BIT comprises Free Trade Areas, Customs Unions and preexisting privileges. Exceptions to the MFN clause in the China-Ghana BIT are restricted to Free Trade Areas and Customs Unions.	Investments by investors of either Contracting State in the territory of the other Contracting State shall not be subjected to a treatment less favorable than that accorded to investments by investors of third States.
Umbrella clause	Each Contracting State shall comply with any written undertakings by a competent authority to a foreign investor about an investment, subject to its law.	Not all BITs contain an umbrella clause.	A Contracting Party shall, subject to its law, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party about an investment in accordance with its law and the provisions of this Agreement.
ISDS	Only disputes for determination of compensation, in cases of expropriation, were admissible to ISDS.	While majority of the BITs did allow for disputes to be admissible to ISDS, certain BITs	If a dispute involving the amount of compensation resulting from expropriation, nationalization, or other measures having effect equivalent to nationalization

BIT clauses	General characteristic of BITs wrt each provision	Special issues worth mentioning	Example of wording in a typical BIT
		did not allow so, for instance, Chinese BITs with Sweden, France, Norway, Thailand, et cetera.	or expropriation mentioned in Article 6 cannot be settled within six months after resort to negotiation as specified in paragraph (1) of this Article by the national or company concerned, it may be submitted to an international arbitral tribunal established by both parties.

Note: The classification is based on Li and Bian (2020, Tables 2, 3 and 4 in their Appendix). Also note that their time periods naturally overlap, as different types of BITs were concluded at the same time and since ratification takes time, too.

Table A2.: Third-generation BITs

<i>BIT clauses</i>	<i>General characteristic of BITs wrt each provision</i>	<i>Special issues worth mentioning</i>	<i>Example of wording in a typical BIT</i>
Scope of BIT (Definition of investment)	Generally, these BITs set out what is regarded as an ‘investment’ and what should not be considered as an ‘investment’. Moreover, these BITs clarify that an investment must involve a	The investment concept does explicitly include movable and immovable property and other property rights, shares, debentures, stocks, equity	The term “investment” means any kind of asset that has the characteristics of an investment, invested by an investor of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, including but not limited to (a) movable and

<i>BIT clauses</i>	<i>General characteristic of BITs wrt each provision</i>	<i>Special issues worth mentioning</i>	<i>Example of wording in a typical BIT</i>
	commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.	participation, claims to money or other performance having economic value, intellectual property rights, business concessions, bonds and rights under contracts. The investment concept does explicitly exclude claims to money that arise solely from commercial contracts for sale of goods or services, marriage or inheritance.	immovable property and other property rights such as mortgages, pledges and similar rights; (b) shares, debentures, stock and any other kind of equity participation in companies; (c) claims to money or to any other performance having an economic value associated with an investment; (d) intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, technical processes, know-how and goodwill; (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources; (f) bonds, including government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom; (g) rights under contracts, including turnkey, construction, management, production, or revenue sharing contracts. An investment has the following characteristics: the commitment of capital or other resources, the expectation

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			of gain or profit, or the assumption of risk. (e.g., China - United Republic of Tanzania BIT, 2013)
Regulation of entry (pre-establishment)	No entry barrier / requirements for a foreign investor to make an investment.	In the China-Barbados BIT, there is an additional obligation on Contracting Parties to assist with obtaining visas and work permits to nationals of the other Contracting Party.	Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.
Expropriation	The expropriation clauses are far more detailed and include provisions on indirect expropriation and the factors to be considered for a measure to constitute an indirect expropriation.	The exceptions are largely the same- they must be taken for public welfare and must be non-discriminatory.	Neither Contracting Party shall expropriate, nationalize or take any other measure the effects of which would be equivalent to expropriation or nationalization against the investments of the investors of the other Contracting Party in its territory (hereinafter referred to as expropriation), unless the following conditions are met: (a) for the public interests; (b) in accordance with domestic legal procedure and relevant due process; (c) without discrimination; (d) against compensation.

<i>BIT clauses</i>	<i>General characteristic of BITs wrt each provision</i>	<i>Special issues worth mentioning</i>	<i>Example of wording in a typical BIT</i>
NT	Chinese BITs started providing for lesser limitations on the national treatment clauses.	Chinese BITs have borrowed from concepts evolved by NAFTA countries.	Usage of the phrase “in like circumstances” to indicate the meaning of the national treatment clause.
MFN	The MFN clause stipulates the actions for which the foreign investor will be accorded an equal treatment as an investor of any third state - these actions include establishment, acquisition, expansion and sale or other disposition of investments in its territory.	MFN expressly excluded from the dispute settlement mechanism. Therefore, investors are precluded from resorting to the MFN clause to import a more favorable clause from another BIT entered by China.	E.g., para. 3, Art. 5 Most-Favoured-Nation Treatment, of the China-Canada BIT (2012) stipulates that: ‘for greater certainty, the “treatment” referred to in paragraphs 1 and 2 of this Article does not encompass the dispute resolution mechanisms, such as those in Part C, in other international investment treaties and other trade agreements’. Each Contracting Party shall accord to investors of the other Contracting Party and the investments thereof treatment no less favorable than that it accords, in like circumstances, to investors and the investments thereof of any third State with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, sale or disposition of investments.

<i>BIT clauses</i>	<i>General characteristic of BITs wrt each provision</i>	<i>Special issues worth mentioning</i>	<i>Example of wording in a typical BIT</i>
Umbrella clause	The umbrella clauses are phrased broader; shall not include any written undertaking but any commitment.	There is no exception created for this umbrella obligation.	Each Contracting Party shall observe any commitments it may have entered with the investors of the other Contracting Party as regards to their investments.
ISDS	The dispute settlement mechanism of this generation is noteworthy because the investors are presented with an option to avail of ICSID arbitration in case of a dispute.	The China-Canada BIT extensively provides for the rules of selection and qualification of the arbitrators. Notably, the China-Canada BIT also provides at length on procedural issues, something that was traditionally left for institutions.	“...Settlement of Investment Disputes between States and Nationals of Other States (ICSID), unless the parties in dispute agree on an ad-hoc arbitral tribunal...” [China-Germany BIT].

Note: See Note to Table A1.

References

Li, Y. and Bian, C. (2020) China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options, *Netherlands International Law Review*, 67, pp. 503–551.

Appendix B: BIT details

Table B1: BIT details for home countries included in the analysis

	Finland		France		Germany		Korea		Netherlands		Switzerland	
Year of entry into force *)	1986	2006	1985	2010	1985	2005	1992	2007	1987	2004	1987	2010
Reference to social investment aspects (e.g. human rights, labor, health, CSR)	No	No	No	No	No	No	No	No	No	Yes	No	No
Contains "in accordance with host State laws" requirement	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes	No	Yes	No
Includes requirement of substantial business activity	No	No	No	No	No	No	No	No	No	No	No	Yes
Defines ownership and control of legal entities	No	No	No	No	No	No	No	No	No	No	Yes	No
Excludes other subject matter	No	No	No	No	No	No	Yes	No	No	No	No	No
Disputes covered	Not stipulated	Carves out pre-existing disputes	Inconclusive	Carves out pre-existing disputes	Not stipulated	Carves out pre-existing disputes	Not stipulated	Carves out pre-existing disputes	Not stipulated	Not stipulated	Not stipulated	Carves out pre-existing disputes
Type of NT clause	None	Post-establishment	None	Post-establishment	None	Post-establishment	Post-establishment	Post-establishment	None	Post-establishment	None	Post-establishment
Reference to "like circumstances" (or similar)	Not applicable	No	Not applicable	No	Not applicable	No	No	Yes	Not applicable	No	Not applicable	No

Type of MFN clause	Post-establishment	Pre- and post-establishment	Post-establishment	Post-establishment	Post-establishment	Post-establishment	Post-establishment	Pre- and post-establishment	Post-establishment	Post-establishment	Post-establishment	Post-establishment
Taxation treaties	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Type of FET clause	None	FET unqualified	FET unqualified	FET qualified	FET unqualified	FET qualified	None	FET unqualified	FET unqualified	FET unqualified	FET unqualified	FET unqualified
By reference to international law	Not applicable	None	None	International law / principles of international law	None	None	Not applicable	None	None	None	None	None
By listing FET elements (exhaustive or indicative list)	Not applicable	No	No	No	No	No	Not applicable	No	No	No	No	No
FET modifiers	Not applicable	None	None	None	None	None	Not applicable	None	FET combined with NT or MFN	None	None	None
Full protection and security	No clause	No clause	Standard	Standard	Standard	Standard	Standard	Standard	Standard	Standard	no clause	Standard
Prohibition on unreasonable, arbitrary or discriminatory measures	No	Yes	No	No	No	Yes	No	Yes	No	Yes	Yes	Yes
Relative right to compensation (comparator)	Not applicable	MFN and NT	MFN only	MFN and NT	MFN only	MFN and NT	MFN only	MFN and NT	MFN only	MFN and NT	Not applicable	MFN and NT
Absolute right to compensation in certain circumstances	Not applicable	Yes	No	No	No	No	Yes	Yes	No	No	Not applicable	No

Balance-of-payments exception	No	Yes	No	Yes	No	No	No	Yes	No	No	Yes	No
Other specific exceptions (e.g. to protect creditors, etc.)	No	No	No	No	No	No	No	Yes	No	No	No	No
Includes prohibition of PRs	No explicit PR clause	No explicit PR clause	No explicit PR clause	No explicit PR clause	No explicit PR clause	No explicit PR clause	No explicit PR clause	Explicit PR clause	No explicit PR clause	No explicit PR clause	No explicit PR clause	No explicit PR clause
Umbrella clause	No	Yes	Inconclusive	Inconclusive	No	Yes	No	Yes	Yes	Yes	Yes	Yes
Entry and sojourn of personnel (subject to local laws)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Directed at States (obligation to publish laws and regulations)	No	Yes	No	No	No	No	No	Yes	No	No	No	No
Right to regulate (any mentioning in the text of this or similar concepts, except preamble)	No	No	No	No	No	No	Yes	No	No	No	No	No
Reference to specific promotion activities in text of agreement (not preamble)	No	Yes	No	No	No	No	No	Yes	No	No	No	No
Exception included	No	Yes	No	No	Yes	No	Yes	No	No	No	No	No
Exception defined (exceptional circumstances described in more detail)	Not applicable	Yes	Not applicable	Not applicable	Yes	No	No	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Exception self-judging	Not applicable	No	Not applicable	Not applicable	No	No	No	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Other public policy exceptions (e.g.	No	Yes	No	Inconclusive	Yes	No	No	No	No	No	No	No

cultural heritage, public order, etc.)												
Scheduling and reservations (in treaty texts and annexes)	None	Negative-list reservations	None	Negative-list reservations	None	Negative-list reservations	None	None	None	None	None	Negative-list reservations
Alternatives to arbitration	None	None	Voluntary ADR (conciliation/mediation)	None	Yes	None	Voluntary ADR (conciliation/mediation)	None	None	None	None	None
Scope of claims: general approach (chapeau paragraph of ISDS clause)	Covers any dispute relating to investment	Covers any dispute relating to investment	Covers any dispute relating to investment	Covers any dispute relating to investment	Covers any dispute relating to investment	Covers any dispute relating to investment	Covers any dispute relating to investment	Covers treaty claims only	Lists specific bases of claim beyond treaty (e.g. contractual disputes)	Covers any dispute relating to investment	Covers treaty claims only	Other
Limitation of provisions subject to ISDS	Yes	No	Yes	No	No	No	Yes	No	Yes	No	No	No
Type of consent to arbitration	Provides express or implied consent	Provides express or implied consent	Provides express or implied consent	Provides express or implied consent	Requires case-by-case consent	Provides express or implied consent	Inconclusive	Provides express or implied consent	Provides express or implied consent	Provides express or implied consent	Requires case-by-case consent	Provides express or implied consent
ICSID	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	No	Yes	No	Yes
UNCITRAL	No	Yes	Yes	Yes	No	Yes	No	Yes	No	Yes	No	Yes
Other forums	Yes	No	No	No	No	No	No	Yes	Yes	No	No	No

Relationship between forums	No reference	Preserving right to arbitration after domestic court proceedings	Fork in the road	Fork in the road	No reference	No U turn (waiver clause)	no reference	"Fork in the road"	no reference	Preserving right to arbitration after domestic court proceedings	No reference	Preserving right to arbitration after domestic court proceedings
Limitation period for submission of claims	No	No	No	No	No	No	No	Yes	No	No	No	No
Affirms binding interpretation by contracting parties or their joint committee	No	Not applicable	No	No	Yes	No	No	No	No	No	No	No
Requires certain questions to be submitted to contracting parties (renvoi)	No	Not applicable	No	No	No	No	No	No	No	No	No	No
Regulates submissions by non-disputing State party	No	Not applicable	No	No	No	No	No	No	No	No	No	No
Requires documents to be made publicly available	No	Not applicable	No	No	No	No	No	No	No	No	No	No
Requires hearings to be open to the public	No	Not applicable	No	No	No	No	No	No	No	No	No	No
Regulates amicus curiae submissions by third (non-disputing) parties	No	Not applicable	No	No	No	No	No	No	No	No	No	No
Institutional framework (committee)	No	No	No	No	No	No	Yes	No	No	No	No	No
Technical cooperation/capacity building	No	No	No	No	No	No	Yes	No	No	No	No	No

Years of initial treaty term	15 years	20 years	10 years	10 years	10 years	10 years	5 years	10 years	10 years	15 years	10 years	10 years
Automatic renewal	Indefinite term	20 years	Indefinite term	Indefinite term	Indefinite term	Indefinite term	other fixed term	10 years	5 years	5 years	2 years	2 years
Includes modalities for amendment or renegotiation	No	No	No	No	No	No	No	Yes	No	No	No	No
"Survival"/"sunset" clause length	10 years	20 years	15 years	20 years	15 years	20 years	15 years	10 years	15 years	15 years	10 years	10 years

Appendix C. China's Domestic (Unilateral) Regulatory Regime towards FDI

China has come a long way from preferring inward-looking policies to being the epicenter of global commerce today. This section highlights developments in China's BIT regime. China adopted an 'Open door' policy in the late seventies allowing its active participation in the global market, aimed at bringing in FDI to accelerate economic development [B1]. These policies remained until 1997 to usher growth but were also combined with a focus on outbound investment in a bid to 'go global' ([B2], [B3]). Encouraging foreign competition was essential to improve the competitiveness of Chinese firms- mainly state-owned enterprises (SOEs).

The 'Open door' policy along with new reforms of China was discussed during the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party ('CCPCC') in 1978 under the leadership of Deng Xiaoping, who was widely credited as the "General Architect" [B4]. These reforms were pursued to achieve economic growth and development through the inflow of foreign capital and technology while maintaining the Chinese government's commitment to socialism ([B5], [B6]). These reform policies resulted in an unprecedented GDP growth of 10% between 1980-2010, coupled with a decline in the poverty rate and an increase in average income. Foreign investment had catalyzed China's economic reforms.

Article 18 of the Chinese Constitution encourages and regulates foreign investment in the nation broadly. It permits the establishment of foreign investment and economic cooperation with local enterprises to the extent consistent with Chinese law. There are other legislations like the Sino-Foreign Equity Joint Venture Enterprise Law (EJV Law), adopted in July 1979, which marked the beginning of China's foreign investment law regime; the Sino-Foreign Cooperative Joint Venture Enterprise Law (CJV Law) and the Foreign-Capital Enterprise Law (FCE Law) and the Wholly Foreign-owned Enterprise Law (WFOE Law), which govern such foreign investments within the territory of China [B7]. Administrative regulations and regulatory documents governing FDI were issued by the State Council, which included the Provisions on Guiding Direction of Foreign Investment (Guiding Regulations). Under the Guiding

Regulations, projects are divided into four categories¹: encouraged, permitted, restrictive and prohibited.²

The FDI regime was further relaxed during the 1990s. During this period, Chinese commercial laws were developed including the formal practice of resolving commercial disputes between MNEs. China, during 1992-2005, had developed a dualist commercial legal system wherein one was exclusively for domestic firms while the other was for foreign investors. However, it was soon understood that this created an unfair treatment between foreign and domestic investors. Illustrations of this include the above quoted EJV Law, CJV Law and the WFOE Law, all created for Foreign Invested Enterprise (FIE), while the PRC Company Law was tailored for domestic firms [B8]. Under the dualist regime, Chinese nationals had comparative advantages/disadvantages in core commercial activities such as the establishment of an enterprise or the tax levied on investors.

From 2006, China focused on a market with ‘freedom of contract’ and ‘interest of the rule of law’ to boost FDI. To operationalize these principles, the 17th and 18th Party Congress (2007 and 2012) suggested policies on the lines of mutual benefit, integration and win-win cooperation with foreign businesses, and a reasonable and secure financial system [B9]. These reforms enabled China to adopt a more relaxed FDI regime, with a balance between the socialist government and the free market scenario [B10]. The State Council has also formulated the Implementation Regulations³ to facilitate the laws, Provision on the Encouragement of Foreign

¹ Guiding Regulations, Art 4, available at <http://english1.english.gov.cn/laws/2005-07/25/content_16873.htm> accessed 23 July 2017.

² Guiding Regulations, Art 3, which forms the basis of applicable policies for guiding the examination and approval of foreign invested projects and foreign invested enterprises.

³ Regulations for the Implementation of the Law on Sino-foreign Equity Joint Ventures promulgated 20 September 1983.

<<http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100064563.shtml>>, the Detailed Rules for The Implementation of the Law on Sino-Foreign Cooperative Joint Ventures, promulgated on September 1995.

<<http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200301/20030100062857.html>>, and the Rules for the Implementation of the Law of the People's Republic of China on Foreign-Capital Enterprises, promulgated 12 April 2001.

<<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045769.shtml>> all accessed 23 July 2017.

Investment⁴ and Provisions on the Administration of Telecommunications Enterprises with Foreign Investment to encourage investment.⁵⁶

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⁴Provision of the PRC State Council on the Encouragement of Foreign Investment, promulgated 11 October 1986.

<<http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053822.html>> accessed 23 July 2017.

⁵Provisions of the PRC State Council on the Administration of Telecommunications Enterprises with Foreign Investment promulgated 11 December 2001<http://www.fdi.gov.cn/18000000121_39_2273_0_7.html> accessed 23 July 2017.

⁶ The Chinese law on foreign investment is also complemented by the Five-Year Plans (FYPs) issued by the government.

Appendix D. China's Bilateral and Multilateral Regulatory Regime towards FDI

China also participates extensively in the international investment regime through multilateral investment-related legal instruments and BITs. Initially, China concluded BITs with selective developed countries, which provided capital export into China, unlike other nations, which entered into such commitments through the Friendship, Commerce and Navigation (FCN) treaties [C1]. Investment promotion and protection agreements were brought in the 1970s to protect investors from certain abusive behavior of the host state.

Gradually, China's BIT policies became indifferent to whether the counter-signing State was capital importing or exporting. China's BIT framework was liberalized across the board, with a balance between the obligations and benefits stipulated in the BIT. This change began when China adopted its 'Open door' policy in 1978 (see [C2], [C3]). Further, China joined the WTO in 2001 and thus, was obligated to adhere to the WTO rules (like NT (national treatment), MFN (most favored nation), and FET (fair and equitable treatment) provisions) while conducting international trade. China also abandoned its hostile stance on national treatment of foreign investors [C4]. China has also pro-actively re-negotiated existing BITs to include investor-state dispute settlement provisions [C5].

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