



“Investor-state arbitration: Fair and equal treatment (FET), International Covenant on Civil and Political Rights (ICCPR)”

Keynote Speaker: Dr. Jane Willems

Date: Tuesday, 19 October 2021

Time: 6:00pm – 7:00pm (HKT)

Moderator & Speaker



Moderator:
Raymond Yang

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International Investment Agreement: Contents



Preamble	states the object and the purpose of the treaty
Definitions (scope of application)	investor and investment
Admission	conditions for admission of foreign investors: eg. performance requirement (US/NAFTA IIAs)
substantive rights <i>Standards of treatment of foreign investors</i>	<p>general standards of treatment</p> <ol style="list-style-type: none"> 1. fair and equitable treatment (FET) 2. full protection and security <p>specific standards of protection</p> <ol style="list-style-type: none"> 3. national treatment (NT) 4. most favoured nation (MFN) 5. protection from expropriation 6. umbrella clause
Compensation for losses (war clause)	
Free transfer of payments	
ISDS	ICSID, ad-hoc (UNCITRAL Rules), Stockholm Chamber of Commerce
State to State disputes	ad-hoc arbitration
Duration	

General (Objective) Standard of Treatment



*Absolute standard:
grants protection
independently of the host
State's treatment of its own
nationals*

Full Protection and Security

**Fair and Equitable
Treatment (FET)**

Fair and Equitable Treatment: **Concept**



- FET is one of the most common guarantees contained in modern investment treaties
- Allows independent and objective assessment of a State's behaviour
- The standard of FET is not determined by local law
- Fills gaps that may be left by more specific standards
- May overlap with principle of good faith

FET: Historical Treaty Language



Havana Charter for an International Trade Organization 1948:

Article 11(2) : just and equitable treatment

Treaty of Friendship, Commerce and Navigation between the USA and Germany, 1954

Art. I(1): “Each Party shall at all times **accord fair and equal treatment** to the nationals and companies and the other Party and to their property, enterprises and others interests”.

FET Clauses In Modern Bits: Unqualified or Qualified



1983 French Chinese BIT Article 3(1) unqualified	2007 French Chinese BIT Article 3(1) Qualified	2012 Canada-China BIT Article 4
<p>Each contracting Party commits to ensure ... to investments made by investors of the other Contracting Party a fair and equitable treatment.</p>	<p>Each contracting Party commits to ensure ... to investment made by investors of the other Contracting Party a fair and equitable treatment, in accordance with the generally recognized principles of international law.</p>	<ol style="list-style-type: none"> 1. Each Contracting Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with international law. 2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law.

FET linked to Minimum Standard of Treatment (MST)



Article 5 US 2012 Model BIT (Linked to MST)	NAFTA Article 1105 “Minimum Standard of Treatment” (Linked to CIL) + NAFTA Commission of Interpretation
<ol style="list-style-type: none">1. International law, including fair and equitable treatment and full protection and security.2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide<ol style="list-style-type: none">a. “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; [...]	<ol style="list-style-type: none">1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. <p>Binding Interpretation (31 July 2001):</p> <p>Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.</p>

FET: EU treaty Practice



Post Lisbon era (CETA, EU-Vietnam, TTIP proposal, EU-Singapore FTA) Article 14 EU-Vietnam, Treatment of Investment (Closed list)

1. Each Party shall accord fair and equitable treatment and full protection and security to investments and investors of the other Party in its territory in accordance with paragraphs 2 to 7.
2. A Party breaches the **obligation of fair and equitable treatment** referenced in paragraph 1 where a measure or series of measures constitutes:
 - a. Denial of justice in criminal, civil or administrative proceedings; or
 - b. **Fundamental breach of due process** in judicial and administrative proceedings;
 - c. **Manifest arbitrariness**; or
 - d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
 - e. abusive treatment such as coercion, abuse of power or similar bad faith conduct. or
 - f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

Unqualified Fair and Equitable Treatment: Interpretation



Article 31(1): General rule of interpretation

“A treaty shall be interpreted in **good faith** in accordance with the **ordinary meaning** to be given to the terms of the treaty in their **context** and in the light of its **object and purpose**.”

Fair and Equitable Treatment: Interpretation



- Interpretation under Article 31 of the Vienna Convention:
 - Interpretation as straightforward as possible and consonant with the object and purpose of the investment treaty
 - Primary goal of investment treaties is to create favourable environment for foreign investment/reduce political risk E.g., *MTD v Chile* (2004), para. 113
 - FET “should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.”
 - ‘ordinary meaning, the terms “fair” and “equitable” used in Article 3(1) of the BIT mean “just”, “even-handed”, “unbiased”, “legitimate”’ [referring to the dictionary meaning of these terms]

Fair and Equitable Treatment: Content



- Substantial alteration of regulatory framework on which the investor relied
 - *CME v Czech Republic* (2001)
 - Host State's legislative and regulatory changes ignored the rules governing the investor's business (a TV station)
 - The FET obligation was breached 'by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest', para. 611
- Legitimate expectations of investor (e.g., consistency of host State conduct) should be respected
 - *Tecmed v Mexico* (2003), para. 154 (quoted in DS, at pp. 130-131)

Fair and Equitable Treatment: Objective Test



- FET standard is objective
- i.e., liability may be incurred irrespective of the intention of the host-State
 - *Occidental v Ecuador* (2004), paras. 183, 186
 - ‘The stability of the legal and business framework is ... an essential element of fair and equitable treatment. ... Moreover, this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.’

Qualified Fair and Equitable Treatment: Interpretation



- The FET standard is governed by customary international law as reflected in the *Neer* case (1926)
- According to this view, a high degree of wrongfulness is required by host-State under the *Neer* test
 - In other words
 - The liability threshold is raised
 - Less protection is accorded to investors

Customary International Law (CIL)



Definition: Customary International Law (CIL) results from a general and consistent practice of States that they follow from a sense of legal obligation (*opinio juris*):

- General state practice
- *Opinio juris*

Minimum Standard of Treatment (MST) 1



As defined by OECD:

The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.

OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law",
OECD Working Papers on International Investment, 2004/03,

Minimum Standard of Treatment (MST) 2



Set of customary international law that governs the treatment of aliens

- States, regardless of their legislation and practices, must respect these norms when dealing with foreign nationals and their properties.
- MST often understood as a broad concept intended to encompass the doctrine of denial of justice along with other aspects of the law of state responsibility.
- Two conditions were necessary: (1) the nationality of the alien (corporations were also entitled to this protection), (2) the exhaustion of local remedies in the host State. Hence, the State of nationality owned the investor's claim and under such power could pursue it, settle it or just ignore it
- Investors and their countries demanded an absolute protection, a minimum standard, below which international law and their diplomatic protection would come in their defense.

Application of MST



The international minimum standard applies in the following areas:

- Administration of justice, usually linked to the notion of denial of justice;
- Treatment of aliens under detention;
- Full protection and security

OECD (2004), “Fair and Equitable Treatment Standard in International Investment Law”,
OECD Working Papers on International Investment, 2004/03,

Most Cited Expression of MST



LFH Neer and Pauline Neer (United States v Mexico): denial of Justice

Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that **the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.** Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.

Most Cited Expression of MST



LFH Neer and Pauline Neer (United States v Mexico): denial of Justice
Neer v. United Mexican States, a three-page decision rendered in 1926, is one of the most cited precedents on denial of justice, fair and equitable treatment, and minimum standard of treatment in international law.

Neer has been cited in a number of investor-State cases, including *Pope & Talbot v. Canada*, *LG&E v. Argentina*, *Thunderbird v. Mexico*, *Waste Management II v. Mexico*, *GAMI v. Mexico*, *Mondev v. United States*, *ADF v. United States*, *Glamis Gold v. United States*, and *Merrill & Ring Forestry v. Canada*.

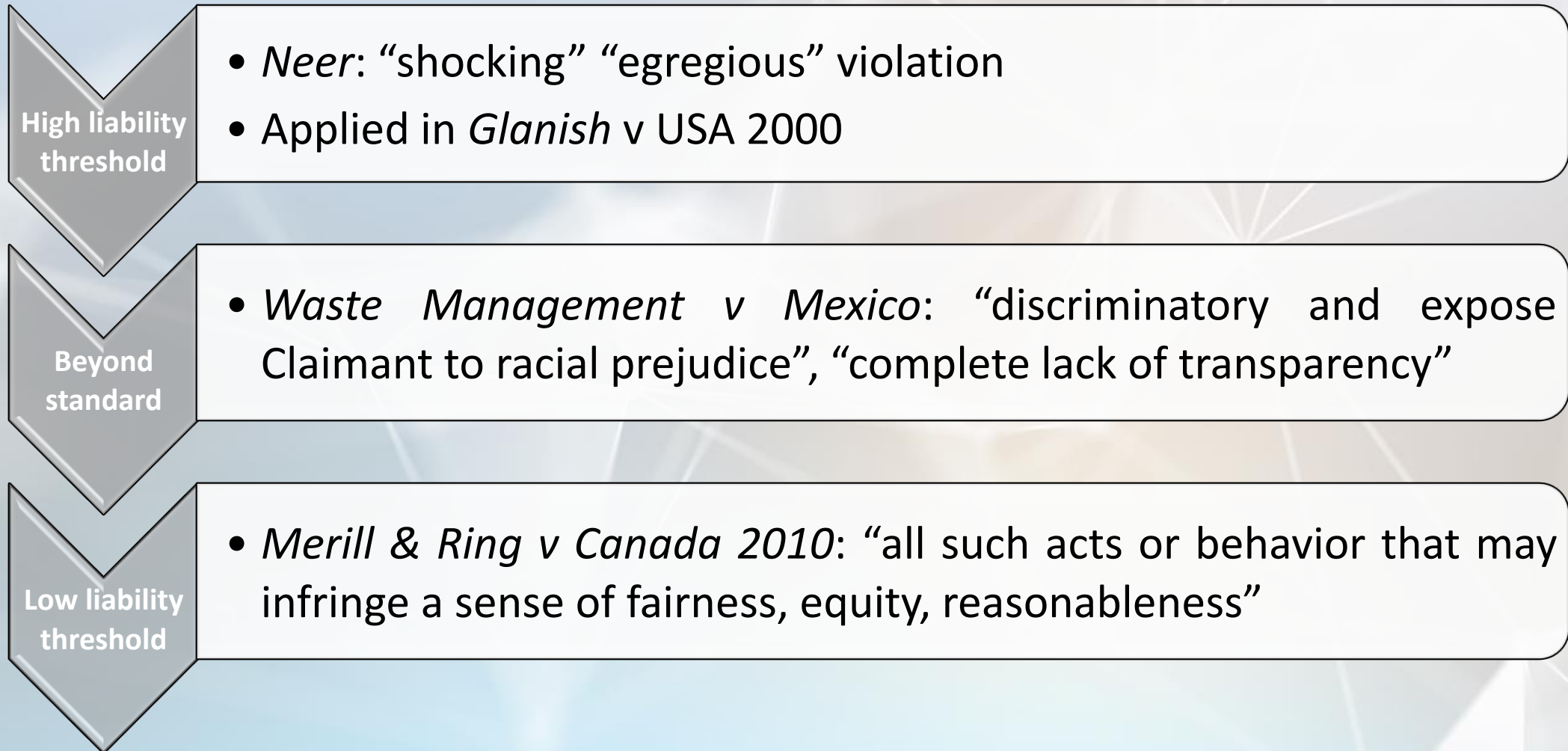
The continued vitality and evolution of the *Neer* standard of treatment has been debated by numerous arbitrators, counsel, and commentators.

Fair and Equitable Treatment: Evolution of the Law?



- Should the threshold set forth in *Neer* still apply or has the law evolved since the *Neer* era?
- *Mondev v USA* (2002)
 - “To the modern eye, **what is unfair or inequitable need not equate with the outrageous or the egregious.** In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.” para. 116
 - “the content of the minimum standard **today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.**” para. 123

Fair and Equitable Treatment: Evolution of the Law?



Applicability Of Human Rights Law in Investor-state Arbitration



Human rights norms may influence the meaning of the terms and provisions of a BIT through interpretation:

meaning of the FET standard or Full Protection and Security, identifying the international minimum standard

- What is the relevant jurisdiction: scope of the arbitration agreement
- What is the relevant applicable law: international law

Application of Human Rights Law and Investor-state Arbitration: Jurisdiction Issue



Biloune and Marine Drive Complex Ltd. v. Ghana, Award on Jurisdiction and Liability, 29 Oct 1989 (Stephen M. Schwebel, Don Wallace, Jr., Monroe Leigh)

Mr Biloune alleged that the Respondents had interfered with his investment and that by various means, including Mr Biloune's arrest and deportation from Ghana, the Respondents effectively expropriated the assets of MDCL. Mr Biloune claimed damages for expropriation, denial of justice and violation of human rights.

Application of Human Rights Law and Investor-state Arbitration: Jurisdiction Issue



- **Biloune and Marine Drive Complex Ltd. v. Ghana, Jurisdiction over the Dispute**

[60] Long-established customary international law requires that a State accord foreign nationals within its territory a standard of treatment no less than that prescribed by international law. Moreover, contemporary international law recognizes that all individuals, regardless of nationality, are entitled to **fundamental human rights (which, in the view of the Tribunal, include property as well as personal rights)**, which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights.

[61]. **This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code.** As noted, the **Government agreed to arbitrate only disputes "in respect of" the foreign investment.** Thus, other matters —however compelling the claim or wrongful the alleged act—are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, **while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.**

ECHR And Investor-state Arbitration: Jurisdiction Issue



- ***The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Netherlands-Romania BIT), Award 6 May 2013 (M. Lalonde, D. Donovan, F. Berman)**

Claimant claimed breach of the FET, FPS and Protection against unreasonable or discriminatory measures and argued that the conduct of the investigations against it intentionally circumvented procedural requirements by artificially maintaining *in rem* investigations in breach of Article 6(3)(a) of the ECHR and Romanian law.⁴⁰

[170]. The Tribunal starts from the elementary proposition that it is not called upon to decide any issue under the ECHR, whether the issue in question lies in the past or is still open. **Its function is solely to decide, as between TRG and Romania, "legal dispute[s] arising directly out of an investment"** and to do so in accordance with "*such rules of law as may be agreed by the parties,*" which in the present case means essentially the BIT, in application of the appropriate rules for its interpretation. The ECHR has its own system and functioning institutional structure for complaints of breach against States Parties.

ECHR And Investor-state Arbitration: Jurisdiction

Issue



The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3 (Netherland-Romania BIT), Award 6 May 2013 (M. Lalonde, D. Donovan, F. Berman)

[172]

i. The Tribunal is not competent to decide issues as to the application of the ECHR within Romania, either to natural persons or to corporate entities;

ii. The governing law for the issues which do fall to the Tribunal to decide is the BIT, and notably its requirements for fair and equitable treatment and non-impairment of, and full protection and security for, the investments of investors of one Party in the territory of the other Party;

[...]

iv. The claims for decision in the arbitration are those of TRG, in respect of RRC, TRG's investment in Romania, which are qualitatively different in kind from whatever complaints there might be by individuals as to the violation of their individual rights by Romanian state authorities.

ECHR and Investor-state Arbitration



Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20

Nationality of the Investor:

[88] In making its determination, the Tribunal will be mindful of Article 15 of the Universal Declaration of Human Rights according to which everyone has the right to a nationality, and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

ICCPR and Investor-state Arbitration



The international Covenant on Civil and Political Rights (ICCPR) came into force (with the exception of Article 41) on 23 March 1976.

Article 14(1)

All persons shall be equal before the courts and tribunals. In the determination of [...] his rights and obligations in a suit at law, everyone shall be entitled to a **fair and public hearing** by a competent, independent and impartial tribunal established by law. [...]

Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12



“158. On the other hand, Lebanon is a party to the ICCPR, Article 14.1 which requires the right to a fair hearing [...]

The right to a fair hearing entails a number of requirements, including the requirement that the procedure before the national tribunals be conducted expeditiously.

159. Under the Optional Protocol to the ICCPR, a State may accept that individual persons file a complaint against the State before the ICCPR Commission, which then gives its opinion. However, Lebanon has not ratified this Protocol and thus cannot be summoned before the Commission. Nevertheless, the decisions of the Commission are relevant to interpret the scope of Article 14 of the ICCPR.”

Al Warraq v. Indonesia, UNCITRAL, 15 Dec 2014 (M. Cremades, M. Hwang, F. Nariman)



Meaning of “basic rights” under Article 10(1), The Agreement On Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference ("OIC Agreement").

“The host state shall undertake not to adopt or permit the adoption of any measure itself or through one of its organs, institutions or local authorities if such a measure may directly or indirectly **affect the ownership of the investor's capital or investment by depriving him** totally or partially of his ownership or of all or part of his **basic rights** or the exercise of his authority **on the ownership, possession or utilization of his capital**, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realisation of its benefits or guaranteeing its development and growth.”

Al Warraq v. Indonesia, UNCITRAL, 15 Dec 2014



[520]. The Tribunal approaches the interpretation of 'basic rights' in accordance with the general rule of interpretation in Article 31.1 VCLT. The object and purposes of the OIC Agreement [...] is investment promotion and protection by conferring a broad range of rights on investors.

[521]. Nevertheless, when Article 10(1) is considered as a whole it refers to measures affecting the ownership or the exercise of ownership rights over an investment. [...] The 'basic rights' referred to in Article 10(1) are "basic rights ... on the ownership, possession or utilization of[the investor's] capital". In short, properly interpreted in its context 'basic rights' refers to 'basic property rights' and is not a general reference to civil and political rights such as the right to a fair trial pursuant to Article 14 of the ICCPR relied upon by the Claimant.

[522] For these reasons, the Claimant's submission that his right to a fair trial is guaranteed by Article 10(1) of the OIC Agreement is rejected.

Al Warraq v. Indonesia, UNCITRAL, 15 Dec 2014



Applicable law and binding obligation:

[558].The ICCPR is now regarded as "a part of general international law" It constitutes an extension of the rule first established by the Permanent Court of International Justice in 1925 that "rights under international law could be conferred on individual".

[559]. The most signally important feature of the ICCPR is that it is a universal instrument which contains binding legal obligations for the States parties to it.
[...]

Q&A



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