INSIGHT

expert talk

INVESTMENT LAW CLAIMS BY CHINESE INVESTORS AGAINST INDIA

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LAWYERS OF TOMORROW

I. INTRODUCTION

1. In June 2020, the Indian Ministry of Electronics and IT ("MEIT") had temporarily banned several Chinese mobile applications ("apps") in the backdrop of escalating tensions at the India-China border. In a detailed insight, Singularity Legal had explored possible recourses for Chinese investors against this ban.[i] Subsequently in January 2021, the MEIT made the ban permanent for 59 of these apps, including TikTok.[ii] The reported reason for this action was that the answers and clarifications provided by these apps in response to the show-cause notices by the MEIT were found inadequate. The same suit may be expected to follow with the 208 other apps that were similarly temporarily banned, including PUBG Mobile and AliExpress.

2. Since then, India has taken a series of actions against Chinese businesses in other sectors as well. The Indian Department of Telecommunications reportedly has been seeking to restrict the participation of Chinese telecom companies like Huawei and ZTE in the 5G rollout trials in India.[iii] This includes the setting up of the National Security Directive on Telecommunication Sector with the object to prevent participation of Chinese vendors that are labelled as not "trusted".[iv] Similar developments are expected in the infrastructure, and Micro, Small and Medium Enterprise ("MSME") sectors.[v]

3. 21st century diplomacy seeks to insulate foreign investors from the spillage of geo-political tensions into business and trade. This is reflected in bilateral or multilateral investment treaties, under which States commit to offer certain minimum standards and protections to foreign investors. Both Chinese and Indian businesses economically benefit from mutual cooperation and interdependence.[vi] The aforementioned measures taken by India may not agree with the protections afforded to foreign investors under these treaties.

4. This article explores India's possible exposure to actions under international investment law in light of the such measures – including which commitments may be triggered, and mechanisms available to Chinese investors through investor-state dispute settlement ("ISDS") to seek remedies. For the purposes of simplicity, we use the ban on Chinese apps as the primary example below, but similar considerations might apply to other actions of a like nature. Part I lays out the eligibility criteria for Chinese investors to claim protection under investment treaties. Part II deals with substantive claims that may be argued and the likelihood of their success. Part III, contributed by Montek Mayal (a valuation and damages expert), analyses how investors might think about their monetary claims and quantify the losses they may have suffered due to India's measures, if any. Part IV presents how investors may approach litigation funders to finance such actions –

an increasing source of capital to pursue legitimate claims.

II. ELIGIBILITY OF CHINESE INVESTORS UNDER INVESTMENT TREATIES

5. Chinese companies have invested into India through not only China, but also other countries in Asia, such as Singapore, which is a major regional business hub.[vii] India has investment treaties with many such Asian countries. Specifically, India had a bilateral investment treaty with China, entered into force in 2007 ("India-China BIT"). Despite its termination in October 2018, the India-China BIT continues to protect investments made prior to termination.[viii] India also has a Comprehensive Economic Cooperation Agreement with Singapore entered into force in 2005 ("CECA").[ix]

6. To claim protection under these treaties, aggrieved companies must satisfy the requirements to be "investors" therein. The India-China BIT only requires that companies be incorporated or established in the territory of China.[x] This simplistic "incorporation test" covers all kinds of investors and offers broad protection. However, some treaties include additional tests. For example, under the CECA, Singaporean companies would additionally have to show "necessary economic activity" within the territory of Singapore.[xi] Similarly, the Comprehensive Economic Partnership Agreement between India and South Korea entered into force in 2005 ("CEPA") requires an enterprise to show "substantial business activities" in South Korea, to be protected as an investor.[xii]

7. Not only must the company qualify as an investor, but its business or assets must qualify as an 'investment' under the applicable treaty. The India-China BIT includes intangible properties such as intellectual property rights, as well as contractual rights having financial value within the meaning of 'investment'.[xiii] Our previous insight discussed how these two limbs may be sufficient to protect the banned Chinese apps. Similarly, in the case of telecom companies, the India-China BIT also protects business concessions conferred by law, which would protect the operation and business licenses that investors have procured to conduct business in India.[xiv]

8. As discussed above, multiple apps have faced the same fate by the actions of the Indian government under similar circumstances. It is possible that the investors behind these apps may wish to collectivise their claims, and pursue a "class action" or "mass claim". ISDS jurisprudence on admission of "mass claims" is quite contentious with varying positions. Tribunals have allowed mass claims where the nature of the investment itself requires collective relief (such as actions by sovereign bond holders),[xv] and where the claimants show a single dispute, i.e., identical nature of the illegality, the legal basis and the relief sought.[xvi] However,

this area of law is unsettled, and investors may not necessarily succeed in this strategy.[xvii]

III. POSSIBLE CLAIMS THAT MAY BE BROUGHT BY CHINESE INVESTORS

9. Investors and investments covered by a relevant treaty enjoy a range of protections. Our previous insight had discussed how the banning of the apps may amount to an indirect expropriation of the investment, as well as a violation of the fair and equitable treatment standard ("FET") provided for in the India-China BIT.[xviii] Similar protections have also been accorded to investors under the CECA and the CEPA.[xix]

10. The action against the apps may amount to an indirect expropriation on account of the following factors:

    (a) The purported public purpose of India's action is national security. However, in the time since June 2020, MEIT has been unable to explain whether the security threat was in fact real. This is clear from the decisions to ban apps that are arguably not even controlled by China, and therefore, not bound by Chinese Data Law.[xx] Whether the responses of the companies to the show-cause notices were inadequate, would have to be separately ascertained.

    (b) India's action may be considered discriminatory, on account of the selective bans on apps, in various stages. There is no ban on apps from other countries where the purported security threat is similar. Furthermore, the ban is not even limited to solely "Chinese" apps. For instance, the gaming app PUBG is actually based in South Korea.[xxi]

    (c) For a lawful expropriation, any expropriatory action against an investor must be followed with fair and equitable compensation, as per the standard provided in the applicable treaty.[xxii] It appears that no compensation has been provided to the aggrieved app companies.

11. There have been various procedural irregularities by the Indian government in the time since the first ban that violated the FET standard. The Information Technology (Procedures and Safeguards for Blocking for Access of Information by Public) Rules, 2009, under which the apps were banned, mandate that a complaint has to be decided within 7 working days from the date of receiving it from the nodal officer. However, the confirmation of the block on the apps banned in June 2020 has occurred after 7 months. The confirmation for the remaining 208 apps banned remains pending.

12. Given the stated reasons for which the apps have been banned, India is highly likely to invoke certain 'defences'. Specifically, the India-China BIT, CECA and

CEPA exempt actions taken by host states to protect essential security interests from liability.[xxiii] While the circumstances in which the apps were banned would not ordinarily be considered essential security interests,[xxiv] this clause in the CECA is 'self-judging', i.e., India has discretion to determine what it considers an 'essential security interest'.[xxv] However, international law mandates that India must do so in good faith. App owners may argue that the action was not in good faith,[xxvi] but rather to appease public patriotic sentiment.

13. In the same vein, India may not be able to avail the public international law defence of necessity, which can only be invoked when situations such as the very survival of the state, or protection of its peace or territory are at stake.[xxvii]

14. Other defences available under the treaties may also not hold much water:[xxviii]

    (a) 'Extreme emergency' is unlikely to be made out, since these Chinese apps have operated in India for years together;[xxix]

    (b) 'Maintenance of public order' is unlikely to be made out, since no violent or non-violent disturbances of any kind has reportedly occurred due to the operation of the apps.[xxx]

    (c) 'Securing compliance with laws relating to the protection of personal data' is also unlikely to be made out, as there is no reported instance of non-compliance with local data protection laws.

    (d) Measures taken in 'public interest' must be non-discriminatory, and it may be argued that the actions are specifically discriminatory against Chinese companies.

IV. DAMAGES CONSIDERATION IN INVESTMENT ARBITRATION CLAIMS

15. In terms of relief under the applicable treaties, investors may seek either restitution, i.e., withdrawal of the ban on the apps, or monetary compensation. However, in our experience, in ISDS, there tends to be a preference for the latter. Most treaties, including the India-China BIT and the CECA, provide a standard for the measure of compensation for a violation under the treaty. For instance, under the India-China BIT, the standard for compensation in the event of expropriation is the *genuine value* of the investment expropriated, immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier, and includes interest at a fair and equitable rate until the date of payment.[xxxi]

16. In cases where a specific standard of compensation is not prescribed by the treaty, the investor might seek "full reparation" under customary international law. The principle of full reparation requires a damages award to *"as far as possible, wipe*

out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[xxxii] Thus, damages are typically assessed by preparing a calculation of the financial position the injured party would have been in, but for the alleged wrongful act, and comparing that with the financial position the injured party actually is in, given the alleged wrongful act. The monetary difference between these financial positions will be the amount of money that compensates the injured party for the economic loss it has likely sustained on account of the alleged wrongful act.

17. However, in practice, questions often arise on the appropriate approach – and the application of the approach – to calculate compensation. There is no one method that is applicable to all cases and situations. Rather, the appropriate approach will differ depending on the circumstances of the relevant case.

18. Many investment arbitration claims concern the alleged expropriation of an asset. In that case, the corresponding framework for calculating damages is clear: but for the alleged expropriation, the injured party would have owned a potentially valuable asset or business. Given the alleged expropriation, it does not. The monetary difference between these two is the economic value of the expropriated asset.

19. Many bilateral investment treaties refer to 'fair market value' (FMV) as the appropriate measure of compensation for expropriation.[xxxiii] For instance, the India–UAE BIT states that, in the event of expropriation, *"compensation shall amount to the actual value of the expropriated Investment and shall be determined and computed on the basis of the fair market value."* While treaties tend not to define FMV, it is a term that is commonplace in the US tax system.[xxxiv] Although authorities might differ in their precise definition of FMV, the key attributes are often common to many definitions. By way of example, the tribunal in *CMS v Argentina* defined FMV in a way consistent with the standard definitions as follows:[xxxv]

    the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

20. While the India-China BIT refers to *"genuine value"*, certain tribunals have earlier equated genuine value with fair market value.[xxxvi]

21. The following groups of valuation methods are often used to value the affected business/ asset or the impact of alleged breaches on that value:[xxxvii]

(a) income-based approaches, under which projections are made of the cash flows an asset is expected to generate. Those cash flows are then discounted back to the valuation date at an appropriate rate reflecting time value of money (a dollar today is worth more than a dollar tomorrow) and risk (which is the uncertainty around the amount the owner of the asset will eventually receive);

(b) market-based approaches, under which prices paid in transactions in assets similar to the subject of the valuation are used to determine its value; and

(c) cost-based and asset-based approaches, under which the value of the subject asset is determined by reference to its cost (i.e., cost incurred to build or replace the relevant asset).

22. An income-based approach can, in principle, be applied to any cash-generating asset if it is possible to prepare a sufficiently robust cash flow projection. Cash flow projections can be adjusted to take into account the relevant characteristics (including growth and risk factors) and circumstances of the subject asset. It is this flexibility that often explains the popularity of income-based approaches – at least in the valuation community.[xxxviii] This flexibility in application is also relevant to early-stage businesses including those which may not be profitable as at the date of valuation. Such flexibility may not be available when applying the other valuation approaches described.

23. However, to prepare a projection of an asset's cash flows, it is necessary to make explicit assumptions about the future of that asset and the markets it operates in. Any uncertainty of appropriate inputs and assumptions is likely more difficult in the case of early-stage businesses that lack any track record of steady historical cash flow generation. This, in my view, does not necessarily undermine the use of income-based approaches where the information allows. Instead, it necessitates a more robust approach to the application of income-based approaches, and, where possible, a comparison of the valuation conclusions to those of other valuation methods or to other evidence of value.

24. There might be an additional benefit of using income-based approaches in cases where the operations of an asset are affected but only for a specific period of time (for example, say a temporary ban on apps). This is because losses for a finite period are often measured by reference to reduced profits until the business regains the position it would have been in had the alleged breach not occurred.

25. Market-based methods seek to estimate the value of a business or an asset at the date of valuation based on transactions occurring prior to that date. Market-based approaches are relevant only where reliable information on transactions in or

information on assets sufficiently comparable to the subject asset is available. However, in cases of early-stage businesses or businesses with unique business models or products and services, finding sufficiently comparable assets can often be difficult leading to market approaches being unsuitable for valuing the asset.

26. Cost-based approaches are based on the principle that a notional buyer will not spend more on an asset than it will cost to actually construct or (re)produce that asset. The value calculated this way in certain circumstances may be thought of as a 'floor' value, as it would not include any expected future rate of return or cash flows from the investment. The cost approach is helpful for valuing assets if there have been limited changes either to the asset and its use in question since it was acquired. The cost approach can also be used to cross-check value estimated under the other approaches.[xxxix]

27. The appropriate valuation approach will depend on the specific considerations of each case, the characteristics of the subject business/ asset, the availability of information and the legal standard for compensation.

28. The choice of the approach can have a large impact on the final valuation conclusions. Tribunals can often be reluctant to rely on income-based approaches when the subject of the valuation has no or limited history of operating profitably or is in early stages of its business. For example, the tribunal in *Metalclad v Mexico*,[xl] rejected the use of the income approach and noted that *"where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value"*.[xli]

29. In such situations, the tribunals have tended to award damages by reference to costs (incurred by the affected business and/ or the investor) which can usually be measured reliably. However, an award of damages made by reference to costs often puts the claimant in the position it would have been in had it never made the investment in question. It remains less clear that such an award puts the claimant in the position it would have been in but for, say, the expropriation of that investment – and at least with any more certainty than other valuation approaches allow (namely, income and market-based approaches).[xlii]

30. In the current context, a few factors may become quite relevant in understanding the damages questions:

    (a) life cycle stage of a company – whether it is an early-stage business or one with track record of steady historical profits;

    (b) availability of information, especially contemporaneous forecasts and business plans for the affected business;

(c) transactions in the affected businesses, which might provide benchmarks of value (and hence any loss suffered by the investors);

(d) amounts invested by the claimant in the affected businesses;

(e) time period over which operations of a company are affected, i.e., a permanent shut down or a temporary one for a limited period; and

(f) identifying any longer-term effects such as losing market share because of shut down and difficulties in regaining such lost share (including higher costs to regain the lost share) and other effects of any increased competition.

31. It is pertinent to note that the loss of revenue from the ban of the apps is currently estimated at nearly $200 million per annum.[xliii]

V. LITIGATION FINANCE

32. A case such as this would be of keen interest to litigation funders as well. The usual process to obtain litigation finance is to begin by preparing an 'information memorandum', which would discuss in detail all issues of fact, jurisdiction, merits, damages and recovery, and identify a case strategy. In addition, it also contains information on the litigant's legal team, estimated legal budget and tentative timeline for resolution. A litigant typically presents the information memorandum to several funders, until one or more show further interest. At this stage, the funder and litigant enter into a non-binding term sheet, wherein they usually agree on broad commercials and a period of exclusivity during which the funder and litigant will attempt to negotiate funding for the case.

33. Funders utilise this exclusivity period to diligence the case thoroughly, and if it is lucrative, present it to their investment committee for approval. Once approval is granted, the litigant and funder negotiate the funding agreement in detail, usually based on a draft provided by the funder. Funders are offering increasingly bespoke products to litigants, and depending on each funder's appetite, litigants may be able to obtain working capital, obtain funding jointly for a mass claim, obtain insurance against adverse costs, etc.

VI. CONCLUSION

34. Despite momentary de-escalation of the tensions at the border, India appears reluctant to change its current stance towards Chinese investment.[xliv] China has recently raised objections to India's measures against Chinese businesses, including the banning of apps, before the WTO.[xlv] However, in the absence of any agreement between the countries on protections to the specific affected sectors, it is unclear how the talks at the WTO will proceed. In the interim, Chinese investors, especially those that operate at small to medium scales, may need to

take some steps to protect their investments in India. Exploring the possibility of making claims under international investment law may be a viable option, which may succeed in either continued business operations, or fair and equitable compensation under the treaty for their losses.

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[i] Available at: https://singularitylegal.com/ourThinking/Illegality_of_Indias_ban_on_Chinese_apps_under_international_law/

[ii] https://economictimes.indiatimes.com/tech/technology/india-to-permanently-ban-59-chinese-apps-including-tiktok/articleshow/80451148.cms?from=mdr

[iii] https://economictimes.indiatimes.com/industry/telecom/telecom-news/chinas-huawei-zte-set-to-be-shut-out-of-indias-5g-trials/articleshow/77528916.cms?from=mdr ; https://www.bloombergquint.com/business/china-s-huawei-zte-set-to-be-shut-out-of-india-s-5g-trials

[iv] https://www.business-standard.com/article/economy-policy/india-to-set-up-national-security-panel-on-trusted-telecom-sources-devices-120121600742_1.html

[v] https://auto.economictimes.indiatimes.com/news/industry/india-to-ban-chinese-companies-from-highway-projects-nitin-gadkari/76741192

[vi] https://qz.com/india/1895866/india-banning-huawei-will-hurt-airtel-vodafone-idea-help-jio/

[vii] https://www.businessinsider.in/tech/apps/news/tencent-joins-alibaba-and-bytedance-in-making-singapore-its-new-headquarters-after-india-ban-and-tensions-in-the-us/articleshow/78125459.cms

[viii] See supra note I.

[ix] Article 6.1(6), CECA

[x] Article 1(a)(ii), India-China BIT

[xi] Article 6.1(6), CECA

[xii] Article 10.1, CEPA

[xiii] Article 1(b), India-China BIT

[xiv] Article 1(b)(v), India-China BIT

[xv] *Abaclat & Another v. The Argentine Republic*, ICSID CASE NO. ARB/07/5, Decision on Jurisdiction and Admissibility ("*Abaclat*") at [490]

[xvi] *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6; *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3; *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1

[xvii] Dissenting Opinion in Abaclat, supra note xvi.

[xviii] See supra note I.

[xix] Article 6.5, CECA; and Articles 10.4 and 10.12, CEPA

[xx] https://www.thequint.com/tech-and-auto/is-pubg-chinese-or-korean-theories- over-games-origin-ownership-ban-india-china-tensions-explained#read-more

[xxi] https://indianexpress.com/article/technology/gaming/pubg-responds-to-pubg-mobile-ban-in-india-6587578/

[xxii] Article 5(1), India-China BIT; Article 6.5(2), CECA; and Article 10.12(2), CEPA

[xxiii] Article 14, Indian-China BIT; Article 2.13(2), CECA; and Annex 10B, CEPA

[xxiv] UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking (UN 2007) 84; See supra note I.

[xxv] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009) ("Newcombe & Paradell"), p. 484

[xxvi] *LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, Decision on Liability of 3 October 2006; Newcombe and Paradell, p. 494

[xxvii] Necessity can only be invoked to protect an essential interest, which is a high threshold as explained in Documents of the Thirty-Second Session (1980), 2 Y.B. Int'l L. Comm'n 14, UN Doc A/CN.4/SER.A/1980/Add.1 (Part 1).

[xxviii] See Article 14 of the India-China BIT, and Articles 6.10-6.12 of the CECA for a complete list.

[xxix] See supra note I.

[xxx] UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking (2007), p. 84

[xxxi] Article 5(1), India-China BIT

[xxxii] *Factory at Chorzów, Judgment No. 13*, Permanent Court of International Justice, 13 September 1928, *Series A, No. 17*, p. 47

[xxxiii] Use of FMV as the appropriate standard for compensation is not necessarily without any resistance. Similarly, FMV may not be the appropriate standard for unlawful expropriation. A more detailed discussion on this topic can be found at https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2020/article/dcf-gold-standard-or-fools-gold

[xxxiv] Treasury Regulation §20.2031-1(b) (as amended in 1965)

[xxxv] *CMS Gas Transmission Co. v The Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 402, citing International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, 6 June 2001, p.4

[xxxvi] For instance, *see Rusoro Mining Ltd. v. Bolivarian Rep. of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para 404 and 647

[xxxvii] International Valuation Standards Council, *International Valuation Standards effective 31 January 2020*, IVS 105

[xxxviii] T Koller, M Goedhart and D Wessels, Measuring and Managing the Value of Companies (4th ed., 2005), p.103

[xxxix] For a more detailed discussion on valuation approaches, please see Montek Mayal, *Role of experts and calculation of economic damages in commercial disputes*, Commercial Arbitration: International Trends and Practices, 2021

[xl] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para 120

[xli] A more detailed discussion on this topic can be found at https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2020/article/dcf-gold-standard-or-fools-gold.

[xlii] It may be important to distinguish between: (1) FMV being the correct measure of damages, and cost being an appropriate measure of FMV; and (2) the invested costs being the correct measure of damages.

[xliii] https://www.businesstoday.in/technology/news/apps-ban-to-cost-chinese-200-million-a-year---and-a-future-pubg-to-lose-100-million/story/415094.html#:~:text=With%20the%20raging%20concerns%20about,%2C%20and%20ShareIt%2C%20among%20others.&text=For%20PUBG%20Mobile%20alone%2C%20the,at%20%24100%20million%20a%20year.

[xliv] https://www.hindustantimes.com/trending/indias-hasn-t-changed-its-mind-on-chinese-investment-will-make-no-exceptions-101614092083010.html

[xlv] https://www.livemint.com/news/india/china-raises-india-s-ban-on-apps-fdi-curbs-at-wto-11615228846156.html

ABOUT US

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These disputes were in various parts of the world including Egypt, India, Israel, Indonesia, Kazakhstan, Nigeria, Malaysia, the Philippines, Turkey, UK, UAE, United States, Sierra Leone, Singapore and Somalia.

In the four years since our inception, we are already recognized as market leaders:

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- Advising an Indian company for its dispute against a Turkish employer relating to the construction of a circulating fluidized bed combustion boiler in Istanbul, Turkey (ICC Rules, Turkey seated, Turkish law)
- Representing a Singaporean and an Indian company in an ad-hoc arbitration concerning termination of a contract for conversion of a mobile offshore drilling unit to a mobile offshore production unit, against an Indian state-owned enterprise (India seated, Indian law)
- Representing two Singaporean upstream oil and gas companies in an arbitration for their disputes under a joint venture agreement against their ex-managing director for breach of fiduciary duties and non-compete agreement (SIAC Rules, Singapore seated, Singapore law)
- Representing an Indian company in an arbitration concerning the termination of a contract for the

construction of an ethanol and power plant in Philippines against an Australian employer and Filipino co-contractor (SIAC Rules, Singapore seated, English law)

- Advising a Singaporean company for its disputes under a charter party settlement agreement with a shipping company based in Bahamas (LMAA Rules, London seated, English Law)

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- Mr. Tom Glasgow, CIO (Asia) of Omni Bridgeway

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