

Reviewing the Implication of RCEP in the Development of Indonesian Investment Law

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Abstract

One of the biggest challenges facing both foreign and domestic investors in Indonesia has always been the issue of investment regulation. After the RCEP Agreement was ratified, this study was carried out to examine the issue of investment regulation in Indonesia, with a focus on Law No. 11 of 2020 on job creation. It also examined the significance of the RCEP, particularly with regard to the advancement of investment law in Indonesia. In this normative study, the legal materials were analyzed using a descriptive-qualitative method. On the basis of legal standards, the data was processed methodically. There are shortcomings in the regulation of investments, including a lack of transparency, community involvement, investment protection, the execution of fair and equal treatment, and legal certainty, even though Law No. 11 of 2020 has an impact on numerous legislative amendments. The ratification of the RCEP will provide Indonesia with prospects to expand market access, provided that the response to the agreement is positive. As a result, the Indonesian government must lift certain restrictions, facilitate economic transactions, adapt laws and regulations as needed, and uphold the public interest.

KEYWORDS

Implications, RCEP, Job Creation Act, Investment.



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Introduction

One of the objectives of the Association of Southeast Asian Nations (ASEAN) as stated in the ASEAN Declaration is to maintain close and fruitful cooperation with existing international and regional organizations with similar aims and objectives, and to explore all avenues for closer cooperation among themselves (Brill Nijhoff, 2004). In its implementation, this is addressed by the ASEAN Free Trade Area, which aims to increase competitiveness and encourage foreign investment into ASEAN as a favorite region to invest in. ASEAN also initiated the establishment of the Regional Comprehensive Economic Partnership (RCEP) as a response to economic dynamics.

RCEP was first discussed at the 21st ASEAN Summit in Phnom Penh, Cambodia, November 18, 2012 by the leaders of ASEAN member states and cooperating partner countries. The purpose of RCEP is to achieve a comprehensive and mutually beneficial relationship among participating countries, while prioritizing the establishment of AEC (ASEAN Economic Community) in 2015 (Parna Dedi, et al, 2017). RCEP was also formed as a result of overlapping regulations in the ASEAN and Asia Pacific regions. In relation to investment, RCEP facilitates and enhances the openness of investment and trade relations among member countries which ultimately aims to strengthen global and regional supply chains.

With Indonesia's entry into the RCEP agreement, the presence of foreign investors can absorb labor in the recipient country; create demand for domestic products as raw materials; increase foreign exchange, especially export-oriented foreign investors; increase state revenue from the tax sector; transfer of technology and knowledge (Sembiring S. 2007). One of the concerns of foreign investors in investing their capital is the legal certainty that must be the main priority of the government of the recipient country. Therefore, regulations related to the law on foreign investment (FDI) that are currently perceived as overlapping must be updated and

managed in accordance with the development of the international business world (Cambridge University Press, 2004).

In its development, investment law is not only regulated in Law No. 25 of 2007 concerning Investment, but also needs to be regulated in several investment agreements, both bilateral, regional, and multilateral (Anisah S. et al, 2017). These agreements include BITs, TRIPS, TRIMs, GATS, RCEP, AFTA, ACIA, APEC, and MIGA. RCEP is present in the framework of economic reform in the fields of goods, investment, intellectual property, trade in services, dispute resolution, economic cooperation, and competition in other fields.

The objective of RCEP's investment procurement is to create a liberalized, facilitative and competitive investment environment in the region. In RCEP, investment includes 4 pillars, namely promotion, protection, facilitation, and liberalization (Gultom D., 2020). The establishment of RCEP is expected to have a direct and indirect effect on improving the Indonesian economy, so Indonesia needs to make improvements in the investment legal system in order to compete in the international arena. At the same time, the challenge is how Indonesia should negotiate economic power policies and implement ratified agreements consistently.

Legal certainty is an issue that investors have long complained about. Resolving this issue should be the government's top priority. Legal certainty means the existence of definite laws and regulations and certainty in law enforcement. With many regulations hampering trade and investment performance, this has implications for the level of effectiveness and lack of infrastructure as one of the determining factors for foreign investors. To attract investors, especially after the RCEP agreement, the consistency of laws and regulations is a major factor in creating political and economic stability because it is a reflection of a country's legal certainty. Another effort that must be made to encourage investment growth is to create a conducive business climate (Guiso L, et al, 1999: 185-227). A conducive business

climate for investment is in the form of security and ease of doing business. In addition, the governments focus should be on improving the national economy

With the enactment of the Job Creation Law on October 5, 2020, it is considered a structural reform in Indonesia that is expected to reduce problems that hinder investment. After the signing of RCEP, it turns out that new legal issues arise, given that there are some inconsistencies in the substance of the regulations in the Job Creation Law and RCEP (Ansar, Muhammad I. 2020). The challenges of regional economic integration face internal obstacles such as political instability, corruption, deteriorating infrastructure and increasingly stringent labor regulations in their implementation, the implementation of free trade cooperation (Zakhrov, Nikita. 2019). With global supply chains hampered, international companies began to move their production sites to other countries that are closer to their supply chains and even make a recovery. This is used to facilitate economic recovery after the pandemic as foreign direct investment (FDI) can be used by neighboring countries to increase domestic production capacity and create jobs (Paris: OECD, 2022). In addition, the pandemic has changed the flow of globalization in terms of structural changes that impact international trade relations and governance. The International Monetary Fund (IMF) projects that financial growth in developing Asia will decline from 5.5 percent in 2019 to 1.0 percent in 2020 with a projected GDP decline of more than 2 percent in early 2020. RCEP has potential benefits for Indonesia such as opening market access, increasing Foreign Direct Investment (FDI), and increasing Indonesia's Gross Domestic Product (GDP) (Gonzales, Marcellino. 2021).

So with the ratification of RCEP, it has many potential benefits for Indonesia, but it can be lost if Indonesia does not focus on resolving legal uncertainties. Indonesia must have a strategy in implementing RCEP, because Indonesia is moving to become a destination country for imported products. Indonesia must also make the right policy choices, because Law

No. 11 of 2020, which is expected to provide opportunities for ease of doing business for investors, has actually received a lot of resistance in its implementation. Based on the description above, the author formulates two problem formulations in this study. First, what are the weaknesses of the investment provisions in Law No. 11 of 2020 on Job Creation related to the ratification of the RCEP Agreement. Second, what is the urgency of RCEP, especially for the development of investment law in Indonesia.

Methods

This research is a normative research, namely legal research conducted by examining legal materials whose focus of study is in the form of regulations related to the formulation of the problem. The focus of the research is to analyze the weakness of investment regulation in Indonesia and the urgency of RCEP, especially for the development of investment law in Indonesia. This research uses a statute approach to examine regulations related to investment, especially the Job Creation Law and RCEP. This approach provides an analysis for researchers to see whether there is compatibility between one law and another. The legal materials used are primary legal materials in the form of laws and RCEP agreements, especially investment; secondary legal materials in the form of books, journals, other scientific works; and tertiary legal materials in the form of dictionaries and encyclopedias. The collection of legal materials is done by conducting a literature study, namely by collecting, reviewing, and systematizing laws and regulations, secondary and tertiary legal materials related to the subject matter of the research. The data analysis method in this research is descriptive qualitative and comparative.

Result and Discussion

The RCEP agreement has many advantages for Indonesia, such as opening market access, increasing foreign direct investment in new industrial sectors, and increasing Indonesia's gross domestic product. However, the problem for Indonesia at the same time is the increasing trade deficit between Indonesia and other RCEP members. This can be seen from how structural and policy adjustments to improve the competitiveness of the national economy are possible for Indonesia.

1. Investment Provisions After the Passage of Job Creation Law Related to the Ratification of RCEP Agreement

The Indonesian government has ratified RCEP following the passing of Law No. 11 of 2020 on Job Creation. The passing of the Job Creation Law by the House of Representatives on October 5, 2020 has brought development to the legal system in Indonesia. Overlapping and unsynchronized laws are finally simplified by trimming regulations into a more open climate for investment. The existence of the Job Creation Law is expected to resolve regulatory conflicts in both horizontal and vertical relationships (Kristiyanti, Eko. 2020). Although the Job Creation Law has changed many regulations that previously applied, the ratification of RCEP has actually raised new problems related to investment regulations. First, in article 3 of the RCEP Negotiation principles, it is stated that RCEP will contain provisions to facilitate trade and investment and to increase transparency in trade and investment relations between participating countries, as well as facilitate the involvement of participating countries in global and regional trade supply chains. In addition, as described in Article 10.17 Investment Facilitation, it states that each Party shall endeavor to facilitate investment between the Parties. This includes by creating the

necessary environment for all forms of investment; simplifying procedures for investment applications and approvals; promoting the dissemination of investment information including investment rules, laws, regulations, policies, and procedures.

However, in practice, investment facilitation and investment policy transparency still have many obstacles. As stated in Law No. 15 of 2019 amending Law No. 12 of 2011 in Article 96 concerning the Formation of Laws and Regulations, it is stated that in the formation of laws and regulations, public participation is required. However, the academic paper and material for the amendment to the Job Creation Law, it is found that it does not provide space for community participation to realize national goals in accordance with the mandate of the opening of the 1945 Constitution, so it is very risky if we do not make adjustments to good investment policies in competing with other RCEP member countries (Saputra, Dany. 2021).

Secondly, article 10.1 of the definition of investment states that investors have rights granted in accordance with the laws and regulations of the host country or contract, such as concessions, licenses, powers, and permits, including for the exploration and exploitation of natural resources. This article states that investors have rights granted by the host country in the form of permits and licenses, but the complicated bureaucratic system in Indonesia seems to be inseparable from officials in the government and stateowned enterprises. For example, there are quite a number of investors who want to invest in Pertamina and PLN, but complicated bureaucratic problems have caused the potential investors to withdraw (Satya, Venti E. 2019). Government bureaucracy is considered to still tend to lag behind and adhere to conventional communication, this makes Indonesia lose in terms of digital communication competitiveness. In addition, overlapping regulations are also a factor inhibiting investment so that Indonesia is known as a convoluted investment. In terms of licensing, investors complain about the difficulty of getting access to land, land and buildings,

especially the unskilled workforce in Indonesia is a consideration for investors in investing in Indonesia.

Third, investment regulations in RCEP regulate better investment facilitation provisions that also regulate investor aftercare, such as assistance in resolving complaints and grievances that may arise (ASEAN Secretariat, 2020). The ease of doing business in the RCEP Agreement is related to the quality of human resources in Indonesia, where it is found that the high cost of labor in Indonesia that is not in accordance with the skills possessed results in the low ease of doing business in Indonesia, only stuck at level 73 in 2021. However, the complaints raised by investors against the host country have not been responded well considering that the Job Creation Law only focuses on job creation, not increasing worker productivity. The law only touches on the country's structural economic issues with the main focus on ease of investment and easing labor regulations, not on fundamental economics.

The World Economic Forum states that the main problems of investment are corruption and legal uncertainty. The quality of investment in Indonesia is minimal due to corruption and convoluted state bureaucracy. Although there has been simplification of licensing for investment, and the On-line Single Submission (OSS) system has been implemented, regulations still face obstacles from the other side in the form of corruption. For example, corruption committed by public officials who ask for additional money in the licensing process. As a result of corruption, the investment climate becomes unhealthy. Investors will rethink investing in a country if the costs incurred in bureaucracy are higher due to the high cost of unofficial activities when doing business (Ministry of Finance, 2018).

The non-achievement of the foreign capital inflow target in Indonesia is the main problem related to the lack of investor confidence to invest in Indonesia. In addition, legal certainty, legal consistency and infrastructure policies in Indonesia are the most highlighted things because foreign

investors consider Indonesia cannot provide investment guarantees given the unstable laws. In addition, Indonesia has also not been able to apply the principle of fair and equitable treatment because Indonesia has overlapping central and regional regulations, as well as convoluted bureaucratic flows (Iswaningsih, et al. 2021).

The RCEP agreement in this case emphasizes on investment protection rather than investment liberalization. In this case, investment arrangements in RCEP are sought to have a transparent nature in investment relations (Directorate of ASEAN Negotiations, 2019). Therefore, it cannot be denied that investment policy must be done clearly so as not to hamper the process of investment law formation because the formulation of investment policy is one of the requirements in the formation of investment regulation. Therefore, every investment activity needs to consider the supporting and inhibiting factors of an investment (Suratman, et al. 2015).

According to Article 4 paragraph (2) of Law No. 25/2007 on Investment, the government in establishing basic investment policies is obliged to provide equal treatment to domestic investors and foreign investors while taking into account national interests; guarantee legal certainty, business certainty, and business security for investors; and open opportunities for the development and protection of MSMEs and cooperatives. The main purpose of establishing a Free Trade Area (FTA) is to create easy access that can be an opportunity as well as a threat to Indonesia. Globalization in the form of regional integration is expected to provide the same benefits for all member countries, but it becomes a threat when trade liberalization results in an increase in product demand, which if the domestic industry is not ready, then increased imports will have a negative effect on the trade balance (Laksono, et al. 2020).

This is especially so when we consider the existence of poor infrastructure, poor public and private institutions and agencies, inefficiency in goods, inadequate education and labor, and low labor market

efficiency, as well as low capacity for new technologies. This requires Indonesia to improve production efficiency and effectiveness in order to compete and create a good investment climate. As we know that the reason ASEAN partners are reluctant to invest in a country is due to the lack of fair investment protection and equitable treatment. Indonesia is one of the countries with the highest number of FDI barriers such as regulations, taxes, human resources, infrastructure, and others. In the field of regulation, especially the Job Creation Law, the burden of regulation is borne by investors, even though security is stable and the economy is considered good (Violita, Cindy W. 2020).

In terms of fair and equal treatment in the RCEP agreement, Article 8.4 National Treatment on RCEP Agreement states that different treatment will be considered less favorable if it changes the conditions of competition in favor of services. This is because there are 2 regulations in Indonesia that are considered to violate national treatment, the first is related to the local content requirement, which is the requirement and obligation to purchase local products, the second is the trade balancing policy, which is the use of imported products that are linked to the value of local products exported. This is still a problem for the central government until now, especially since the government has not been able to provide balanced benefits to investors both from abroad and from within the country, so that fair and equitable treatment still cannot support the implementation of the RCEP agreement in the context of investment in Indonesia.

Therefore, investment issues in Indonesia cannot be separated from legal certainty. As a result, investment in Indonesia is often doubted by some ASEAN partner countries because it is considered unable to create predictability, fairness, and efficiency. The absence of a balance of interests between the community and the authorities does not realize the contents of the second and fourth paragraphs of the opening of the 1945 Constitution. This can be seen in the unequal treatment of investors.

2. Implication of RCEP in the Development of Investment Law in Indonesia

The formation of RCEP is the result of the dependence of large countries such as China to provide motivation for Asian and ASEAN member countries to form a mutually beneficial economic region. China has become a new mecca for Indonesia's economic dependence, this is due to the change in new economic power from the European Union and the United States in the west to the east by creating trade blocs to support supply chains (Ragimun, et al. 2021). Several previous studies have stated that there are concerns for Indonesia in exporting manufactured products that will be smaller than other imported products from China.

As previously known, the establishment of RCEP was originally an idea to integrate ASEAN trade with other trading partner countries. The establishment of RCEP initiated by Indonesia is the result of ASEAN's response to maintain ASEAN centrality over China's proposal to initiate the East Asia Free Trade Agreement (ASEAN+3) and also the Closer Economic Partnership in East Asia (ASEAN+6) initiated by Japan. And also with the level of liberalization of goods in the ASEAN Free Trade Cooperation (ATIGA) and ASEAN+1 (AANZFTA, ACFTA, AIFTA, AJCEP, AKFTA).

As explained in article 1.3 Objective of the Regional Comprehensive Economic Partnership that the objective of RCEP is to create a liberal, facilitative, and competitive investment environment in the region, which will enhance investment opportunities and investment promotion, protection, facilitation, and liberalization among the parties (ASEAN Secretariat, 2020). With RCEP representing almost half of the world's population and accounting for about 30 percent of global GDP and more than a quarter of world exports, RCEP has a greater value compared to other regional trading blocs (Moenardy Dewi F. 2021). Some previous studies stated that Indonesia is advised to strengthen its ability to utilize the Regional Value Chain considering that as many as 6,050 Indonesian tariff

posts have strong linkages in terms of exports and imports in the RCEP region.

In accordance with the important role of investment, the legal regulation of investment must be in accordance with the interests of society. The role of investment in a country's development is as a source of funds for production activities that are expected to provide benefits not only in the macro context but also in the micro context (Sihombing Jonker, 2009). Therefore, investment is stated as the engine of economic growth and development (Engine of growth).

The guiding principles have influenced the legal structure of RCEP, RCEP will enhance the ASEAN+1FTA and will not reduce commitments in existing FTAs. This approach has the challenge of eliminating the noodle bowl syndrome of Asian FTAs. As for RCEP to secure GATS and ASEAN+1 FTA targets, RCEP will substantially remove barriers in services trade. In addition, to implement RCEP member countries' commitments to the UN. Sustainable Development Goals, trade in services is essential for development policies that eradicate poverty and increase employment.

Under the AEC Blueprint 2025, ASEAN aims to strengthen the ACIA-based investment regime through the establishment of an open, transparent and predictable investment regime in the region. In the ASEAN Investment Report 2020-2021, it is mentioned that RCEP provides opportunities for investors to promote intra-RCEP trade, investment, services, as well as e-commerce development which is highly relevant to the existence of efficiency-seeking investments. The RCEP investment chapter includes several elements such as most-favored-nation, national treatment, booking schedule, and investment promotion and facilitation that will help RCEP members to attract intraregional investment, FDI, and GVC activities.

The effect of RCEP on the investment climate in Indonesia can be seen from research conducted by Aprilianti which shows that tariff reductions in the RCEP agreement will increase trade intensity which will lead to welfare

and production specialization. With reduced trade barriers in the RCEP agreement, foreign investors will be freer to find more effective factory and production locations (Maulana, Mochamad Rifki. 2021). In addition, evidence shows that when the exchange rate depreciates, it will increase exports because domestic prices are lower than prices abroad, so it greatly affects Indonesia's trade.

ASEAN countries are still in the developing stage, on the other hand, China's development in dominating its role in RCEP will result in dependence on it. This is not only detrimental to RCEP member countries, but also has an impact on government policies in making rules that will be influenced by the largest entity in the agreement. This is none other than because in 2021 Indonesia has experienced a trade deficit between exports and imports of goods of US\$ 844.5, this is because the value of China's imports to Indonesia is US\$ 4.4 billion and the value of Indonesia's exports to China is only US\$ 3.5 billion.

Rachmi Hertanti, Executive Director of IGJ, believes that the government gives full hope to Indonesia to be able to participate in the Regional Value Chains (RVC) game in the RCEP Agreement. This is because the benefits obtained by Indonesia are not only participating in RCEP ratification but also can have a good impact on leading companies in developed industrial countries related to investment factors (Indonesian for Global Justice, 2021). In this case, the host country can offer foreign investors the efficiency of production costs such as easy taxation, cheap labor, licensing and ease of doing business.

With a population of 48% of the world's population and a total GDP of 32%, RCEP is a world trade market where foreign direct investment (FDI) entering the region reaches 22% of the world's total FDI (Gultom, Donna. 2020). For Indonesia, RCEP is not only an opportunity for foreign investors to enter but also a challenge and opportunity to gain access to export markets in various industrial sectors. In terms of challenges faced by

Indonesia, related to the legal perspective, the problem faced is the regulatory burden because Indonesia must choose the policy provisions of RCEP into its national law.

Many studies have shown and estimated the impact of RCEP on a country's economy. However, for Indonesia, in 2018 Indonesia's exports to the RCEP market were in eighth position out of 16 countries. In UNCTAD's 2020 report, James Zhan as the director of investment and enterprise of UNCTAD, stated that the existence of RCEP can help revive post-pandemic economic growth, encourage foreign investment, and encourage world trade cooperation, he also stated that 40% of investment in ASEAN comes from RCEP members (UNCTAD, 2020).

With the Covid-19 pandemic, investment in several countries has decreased, but after this pandemic some foreign investors will look at countries that are able to handle various infrastructure problems, clean energy and good investment levels. If we look at Indonesia, which is still struggling with handling the decline in Covid-19 pandemic cases lately, coupled with the emergence of Covid-19 variants such as delta and omicron, investors will hesitate in choosing Indonesia as an investment destination. Therefore, the benefits of Indonesia as a member of RCEP are predicted to stimulate investment with progress in terms of exports because if the level of investment value is the same as trading partner countries, there can be similarities in bilateral export variations from several partner countries.

Research conducted by Yunarwanto, in the Study of the Ministry of Economy and Finance shows that the GDP of RCEP member countries statistically affects Indonesia's trade volume by 0.47 percent due to geographical proximity (Yunar, Yunarwanto. 2019). But on the other hand, Indonesia's trade volume will be more integrated in the RCEP agreement, namely with institutional effectiveness, corruption improvement and clarity of licensing systems and legal certainty. Although GDP is very influential to

Indonesia's investment and economy, tariff policy is also a determining factor in regional trade competition such as RCEP.

In terms of investment regime, to capitalize on competitiveness in opportunities in the digital industry sector, the RCEP agreement will also encourage FDI growth in new industry sectors that have the potential to become domestic and global supply chains. So, as I explained earlier, just relying on business and industrial climate alone will not work, because investors will look at countries that are best prepared to develop the 4th Industrial Revolution that also support the investment regime in terms of ease of doing business in the Host Country. Therefore, the urgency of RCEP for Indonesia is how to deal with the various opportunities that exist both from the investment factor and infrastructure development and support opportunities for MSMEs in supporting RCEP market needs. This is in line with the initial idea to change various regulations contained in the Job Creation Law.

Foreign investors cannot simply expect laws, regulations, towards ASEAN members to remain unchanged during the investment period, but foreign investors will pay more attention to investment risk by looking for the latest news related to policies contained in ASEAN regional investment agreements such as RCEP (Desierto, Diane A. 2017). So it is inevitable that ASEAN member states such as Indonesia may find itself to take interesting steps to ensure the investment treaty community. In this case, the RCEP agreement will provide transparent and predictable investment rules for members to be able to commit to the draft RCEP investment chapter which will provide a positive signal for investors.

Donna Gultom as the Board of Directors of the Center for Indonesian Policy Studies (CIPS) stated that Indonesia should ratify the Regional Comprehensive Economic Partnership (RCEP) because Indonesia will get real economic benefits by making structural adjustments and adjustment policies with the implementation of the Job Creation Law (Rahman, M.

Razi. 2021). Donna also added that the implementation of RCEP will increase investment in creating conducive new industries by removing tariff barriers.

Realistically, the development of investment in Indonesia is greatly influenced by the RCEP agreement with its advantages in terms of tariff elimination and harmonization of rule of origin. With the reduction of tariffs by RCEP member countries, it will affect the supply chain that reduces dependence on external parties and provides opportunities for investors to invest in member countries. Thus, RCEP provides an opportunity for Indonesia to open market access and provide answers to problems related to harmonization of standards, regulations, mutual recognition, and increased investment transparency. RCEP will come into force on January 1, 2022, so it must be addressed appropriately because Indonesia lacks competitiveness, infrastructure, connectivity, and education.

Conclusion

The conclusions of this research are: First, the weakness of Indonesian Investment Law in the RCEP Context, especially in Law No. 11 of 2020, is the absence of transparency, public participation, investment protection, fair and equal treatment, and the absence of legal certainty for foreign investors to invest in Indonesia which is not in accordance with the investment objectives in the RCEP Agreement. In addition, corruption and the Covid-19 pandemic are also one of the obstacles to the quality of investment in Indonesia. Second, the urgency of the RCEP Agreement to form a mutually beneficial economic area especially to support the development of investment in Indonesia. Thus, RCEP will encourage the growth of foreign investment into Indonesia and at the same time become an opportunity for Indonesia to create new industries that are conducive to the existing investment climate, provided that Indonesia is able to respond

well. The government must be able to take advantage of this opportunity by removing various barriers, supporting ease of doing business, changing laws and regulations flexibly, and applying the principle of openness to the wider community. Meanwhile, business players in Indonesia must also take advantage of this opportunity to innovate superior products that have regional competitiveness such as RCEP. Therefore, the existence of these provisions is needed to create a good investment climate that can provide benefits for both investors and host countries.

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DECLARATION OF CONFLICTING INTERESTS

The authors declared that this work is original and has never been published in any form and any media, nor is it under consideration for publication in any journal, and all sources cited in this work refer to the basic standards of scientific citation.

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