
**SUMMARY OF SOUTH CENTRE ANALYSIS OF IMPLEMENTATION ISSUES LIKELY TO ARISE FROM
TRADE FACILITATION RULES**

INTRODUCTION

1. This note provides a summary of the South Centre's analysis of the implementation issues that might arise from new trade facilitation rules as proposed under Section I of the trade facilitation negotiating text (based on TN/TF/W/165/Rev.16). It also highlights few general considerations in regard to the overall negotiations on trade facilitation.
2. The General Summary considerations in regard to the current negotiations of trade facilitation are based on latest consolidated negotiating text TN/TF/W/165/Rev.16.

I. GENERAL CONSIDERATIONS IN REGARD TO THE CURRENT NEGOTIATIONS OF TRADE FACILITATION

3. **Difference from needs of developing countries and least-developed countries (LDCs):** Negotiations for a trade facilitation agreement are focused on measures and policies intended for the simplification, harmonization and standardization of border procedures, thus covering a narrow definition of trade facilitation that deals with only trade procedures. Therefore, it may only partially serve the interests of developing countries and LDCs, for whom the bigger issue is lack of enabling infrastructure for facilitating trade¹. Thus, there is a need to disentangle what the potential TF agreement addresses and sets in place, in terms of interests and obligations on one hand, and what developing countries and LDCs actually need in terms of building productive and trade capacity and inter-regional trade on the other hand.
4. **Binding obligations:** It is vital to affirm the difference between achieving the benefits sought from this agreement voluntarily and signing on an agreement that stipulates a whole sum of implementation requirements that members need to align, within a specific period of time, and commit to, without testing and without a full and realistic estimation of its cost implications on the short, medium, and long terms.
5. **Implementation:** The implementation of these provisions will take different forms across countries given how it will be integrated in national systems, and the way it will interact with the national legislative/ judiciary systems.
6. **Relationship with technical and financial assistance:** Many provisions under the negotiating text have no relationship with the provision of technical and financial assistance and support for capacity building, but are purely a policy matter. Thus, technical and financial assistance will not help a Member State in overcoming the implementation challenges and associated implications of such articles.
7. **The implications of the rules under negotiations as part of Section I of a trade facilitation agreement would be witnessed at the regulatory, institutional, legislative levels, and would carry short-term and long-term costs.**

ON THE REGULATORY FRONT

¹ In its broader sense, Trade Facilitation covers infrastructure development including ports, railways and roads; logistics; trade finance; energy supply, among others.

8. The rules as currently designed and negotiated undermine the regulatory capacities and space of developing countries and multiply the grounds based on which laws and regulations of Member States could be challenged under the WTO dispute settlement understanding (DSU).
9. The negotiating text is charged with undefined and vague legal terminology, as well as ‘necessity tests’, which will establish multiple grounds for challenging the future customs and customs-related measures, rules, and regulations of Members as unnecessary or commensurate to trade barriers.
10. The implications of accepting binding commitments in a new TF Agreement and the cost of non-compliance could be significant; a non-complying country may in certain cases have to invest in infrastructure and incur substantial costs to comply with its binding commitments, and not only withdraw a measure or amend a domestic legislation. It may also accept commitments for activities that may get outsourced to the private sector and over which there might be little control.
11. Moreover, several provisions open the influence on national legislative processes to undefined open-ended category of ‘interested parties’, which could tilt the balance in national regulatory and legislative processes away from the national constituencies and development priorities.

IN RELATION TO COSTS

12. Costs include: regulatory costs, institutional costs, human resource costs, equipment/ IT infrastructure costs, other infrastructure costs.
13. Many obligations under a potential TF agreement necessitate substantial investments in the form of development of physical infrastructure and human resources.
14. WTO Member States should consider the amount and nature of the costs, which are often not limited to initial costs of investing in infrastructure. Many costs are of a long-term and recurring nature, which may prove to be burdensome and could lead to a disproportionate diversion of limited resources from other vital institutions to customs administration.
15. **Possible increase in imports:** Problems identified with a potential trade facilitation agreement include the possible significant increase in imports. Accordingly, Member States need to estimate the likely net macroeconomic impact of implementing a potential trade facilitation agreement under the WTO, particularly on its visible implications on trade balance and balance of payments.
16. **Loss of tariff revenue:** A potential trade facilitation agreement is expected to lead to irreplaceable loss of tariff revenue. Compared to developed countries, the share of customs revenue in the total tax collection is much higher in developing countries and LDCs. Given the limited reliance on customs duties in the former, there is less chance of an importer filing a false import declaration intended for evasion of customs duties in developed countries compared to developing countries and LDCs.
17. **Could be less trade facilitative in some cases:** Several provisions multiply the layers of customs-related procedures set in place, and thus could end being less trade facilitative and could expand the potential for corrupt practices.
18. **Mandate of the Committee:** Members should closely monitor discussions on the Mandate of the Committee on trade facilitation to be established by the agreement. A broad mandate of the

Committee is under discussion, including reviewing the operation and implementation of the TF agreement, developing procedures, managing notification and categorizations of provisions under Section II, and the extension of deadlines for Members facing difficulty. This could hinder the access of developing and LDC Members to special and differential treatment in the implementation phase of the agreement.

19. **Lack of clarity between Article XX GATT and a potential TF agreement:** The TF negotiating text includes reference to Articles XX and XXI GATT under the preamble section (currently included under Article 15). Beyond that, it does not currently include an explicit reference to Article XX GATT on ‘General Exceptions’ or to other exception language from the GATT. The TF negotiating text currently includes limited reference to ‘legitimate objectives’ in some articles, such as Article 7.4. The availability of Article XX GATT as a defense under specialized WTO agreements has been an open question; there has been mixed-up state of jurisprudence on this question prior to the case *China-Raw Materials (DS394)*. In *China-Raw Materials*, the panel and appellate body gave a clear opinion² on the matter, indicating that attempts to invoke Article XX will be evaluated on a case-by-case basis, allowing its use where there is evidence that the drafters intended the defense to be available to address an exceptional violation of the specific provision³. This highlights the need to address the relation between Article XX GATT, as well as other relevant exception articles under GATT, with the potential TF agreement in a more explicit and crosscutting manner.
20. **Obligation of Member States for acts by private entities:** Several provisions under the negotiating text refer to the obligation on a Member States for acts undertaken by ‘bodies that act on behalf of governmental agencies’, which would encompass private entities. The overall practice under WTO law indicates that the extent to which private actions may be attributed to a government entails difficult judgments that the WTO panel and appellate body had to deal with on a case-by-case basis. It is not a settled question⁴. In the case that a trade facilitation agreement covers an obligation by Member States for acts undertaken by private actors, it would be changing the practice under the WTO thus far.
21. **Mandatory nature of the language in the negotiating text:** The negotiating text includes a wide variety of formulations that attempt to qualify the mandatory nature of the provisions (for example: “shall, as appropriate”, “shall endeavor”, “shall to the extent possible”, “shall where practicable”, “shall to the extent practicable”...). While a qualified “shall” presents a level of mandatory obligation associated with some flexibility, there is no clarity or certainty on the extent of that flexibility. The WTO jurisprudence show that the opinions of the dispute settlement bodies have tended to differ in the extent of strictness they apply when interpreting these terms. Overall, the trade facilitation negotiating text is currently designed based on mandatory language in most provisions, which includes limited and uncertain flexibilities in some parts.
22. **Comparison with WCO Conventions:** Most TF provisions under negotiations are entirely new or go far beyond what the WCO Revised Kyoto Convention (RKC) requires. The arguments that the TF Agreement is largely a copy of the RKC, or that the TF Agreement is simply reaffirming what most Member states already agreed to in the RKC, do not hold. Furthermore, any obligation undertaken under a new agreement on trade facilitation could be enforced through the dispute

² See: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm

³ See : Danielle Spiegel Feld and Stephanie Switzer (2012) ; “Whither Article XX; Regulatory Autonomy under Non-GATT Agreements after *China- Raw Materials*” (2012)- Yale Journal of International Law Online.

⁴ See: Panel in *Japan -Film* (panel report, para. 10.52); see also *Argentina-Hides and Leather and Canada-Autos*.

settlement body of the WTO and through sectoral cross retaliation among countries, unlike the Kyoto Convention.

23. **Imbalance within the negotiating text and process:** Overall, there is still a significant imbalance within the text; negotiations on Section I TF rules are set in a binding language whereas the discussion on section II on technical and financial assistance and capacity building is stalled at the conceptual discussion level and based on non-binding language. A pre-requisite to a balanced text is a strong Section II that preserves the intent reflected in the mandate of the negotiations (Annex D, 2004), which conditions implementation on acquisition of capacity, and technical and financial assistance.
24. **The way the agreement is being promoted:** The TF agreement is being promoted through regional trade facilitation related meetings at the capitals level, whereby the needs of developing countries and LDCs in terms of building productive and trade capacity and inter-regional trade is being mixed with the agenda promoting the trade facilitation agreement under the WTO. Moreover, the trade facilitation negotiations are being linked to the aid-for-trade agenda, which could blur the negotiations process and orient the discussion away from focusing on the regulatory, legislative, institutional, financial implications, and implementation challenges associated with a potential agreement.
25. **The use of needs assessment:** The 'needs assessment' linked to the trade facilitation assistance are currently driven by the WTO secretariat and not the WTO membership. The way the need assessments have been designed often focuses on advancing Section I of the agreement and issues involved there. The assessments have not been designed within a broader perception of trade facilitation needs that extend beyond what the agreement focuses on. Furthermore, some Members have indicated that the exercise took the form of a 'compliance measurement' assessment that intruded into areas and information that are central to their negotiations position.
26. **Overall note:** New TF commitments should be approached in a way that would provide developing Members with policy space and flexibility to adopt and implement commitments commensurate with their capacity to do so, and subject to the provision of technical assistance and capacity building where needed. Developing Members could then, at their discretion, progressively move into higher levels or standards of implementation as and when capacity exists to do so, taking into account their development context⁵.

⁵ See: South Centre (2011) « Trade Facilitation State of Play and Implications of an 'Early Harvest' on Developing Countries ».

II. SUMMARY OF IMPLEMENTATION ISSUES THAT MIGHT ARISE FROM NEW TRADE FACILITATION RULES

Summary of implementation issues that might arise from new trade facilitation rules proposed under Section I of the trade facilitation negotiating text (TN/TF/W/165/Rev.16)

<p>Article 1: Publication and Availability of Information</p>	<p>Article 1 expands the obligations stipulated under Article X GATT (Publication and administration of trade regulation). Implementation of this provision would be administratively burdensome, and would imply high recurring costs.</p> <p>Article X GATT was used as grounds for challenging Member States practices under the WTO dispute settlement mechanism; the proposed language under Article 1 adds additional grounds based on which Members could be challenged.</p> <p>The proposed language also broadens the scope of laws, regulations, and measures that could be challenged based on the grounds of Article 1.1. Article 1 refers to “other interested parties”, which is new language that does not appear under Article X GATT, and as currently used could encompass a wide range of stakeholders that could claim rights under this provision.</p> <p>Article 1.3 on enquiry points prohibits certain types of fees; it thus extends beyond GATT disciplines, which link fees to the approximate cost of services rendered, and could be considered an intrusion on policy space. Moreover, answering enquiries would have significant legal implications, especially if there were no restrictions on who could enquire.</p>
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<p>Article 2: Prior Publication and Consultation</p>	<p>Article 2 holds cost implications, is administratively burdensome, and could prove intrusive on national policy space.</p> <p>The Article gives the right to traders and other interested parties to comment on the introduction or amendment of laws and regulations. It extends the rights to the category of “interested parties” including foreign entities not located in the territories of the concerned Member State. This could lead to speculation, lobbying pressures, profiteering by interest groups that seek to block the changes.</p> <p>While national trade related laws and regulations should primarily be defined according to the developmental priorities and interests at the national level, this provision could distort this process with significant influence from foreign entities and private interests. Implementing this Article would entail changes to the legislative process in many Members in order to accommodate publishing new or amended trade laws and regulations prior to their entry into force, and accommodate the right of the parties covered by the article to comment.</p> <p>This Article extends beyond the negotiation mandate.</p>
<p>Article 3: Advanced Rulings</p>	<p>Article 3 has significant implications in terms of costs and administrative burdens, and could have implications on the revenues of governments.</p> <p>The Article does not consider the specifics of advanced rulings based on the nature of the goods being treated, although advanced rulings on tariff classification may be easier for some goods versus others.</p> <p>The provision leaves the category of “applicant” who has a right for advanced ruling broad without any clear qualification. This could cause significant burdens on Members (see 3.7, definitions). It also requires advanced rulings for 6 different areas, which adds the complications and costs of the advanced ruling system required from Members.</p> <p>The Article provides limited grounds for declining rulings (Article 3.2). The grounds for revoking rulings should be safeguarded (Article 3.3).</p> <p>By using terminology like ‘promptly’ and ‘reasonable’ (Article 3.1), the Article provides grounds based on</p>

	<p>which a Member could be challenged in regards to implementing the provision. The WTO dispute settlement body would examine the adequacy of the time a Member undertook to issue an advance ruling or the time span between the moment a Member declines to issue an advance ruling and the time it notifies the applicant in writing of its decision.</p> <p>This Article extends beyond the mandate of negotiations.</p>
<p>Article 4: Appeal or Review Procedures</p>	<p>The article entails significant administrative burdens and is intrusive on national appeal procedures. It expands the appeal obligation to cases of administrative decisions by customs and other relevant border agencies (4.1.1), whereas the GATT X focuses on customs matters.</p> <p>The use of terminology like “non-discriminatory manner” (4.1.3) to qualify appeal or review procedures sets ground for interpretation and questioning of the national appeal procedures. Other terminology like “within set periods as specified in its laws or regulations or without undue delay” (4.1.4) establishes grounds outside the national legal system upon which appeal procedures could be questioned.</p> <p>The requirement of harmonization of systems at the national level (4.1.6) is not in practice in most countries, and would cause significant burden.</p> <p>The reference to customs unions under the article would require: certain level of harmonization of appeals against customs decisions; binding effect of an appeal decision across various members of the customs unions; in addition to creation of supranational institutions to ensure uniform interpretation.</p> <p>There is lack of clarity of the implications on customs unions in which some countries are WTO members and others are not.</p>
<p>Article 5: Other Measures to Enhance Impartiality, Non-discrimination, and Transparency</p>	<p>This article addresses the systems of import alerts, which often result in significant non-trade barriers. The Article could help in addressing such challenges, but is currently not articulated in a useful manner.</p> <p>As currently proposed, the provision could impose a mandatory ‘import alert’ system on Members, many of which do not implement such a system. If the Article is mandatory, then it would entail significant administrative burdens to ensure the procedures of import alert/ rapid alert system are undertaken as stipulated</p>

	<p>in the overly prescriptive provisions of 5.1.2. and 5.3.</p>
<p>Article 6: Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation</p>	<p>Article 6 could carry significant implications on government revenues as well as on regulatory space. Compared to Article VIII GATT, Article 6 introduces additional requirements for publishing specified information about fees and charges (6.1.4 & 6.1.5), publishing any new or amended fees or charges and making available “adequate time” prior to their entry into force, and undertaking mandatory periodical review of fees and charges in order to reduce their number and diversity.</p> <p>The Article prohibits fees or charges on ad valorem basis (still bracketed). It is expected that poorer countries are more adversely impacted because they seem more likely to use ad valorem fees than richer countries. Moreover, specific rates for fees and charges can create inequitable results.</p> <p>The Article sets a list of ‘costs of services’ based on which assessment of fees and charges would be undertaken (6.1.2), and which could impose limitations on Members when evaluating any new or existing fees and charges for compliance and aligning them with these rules. Such a list is not included under Article VIII GATT.</p> <p>Article 6.2 on penalty disciplines could dilute the penalty system and limit the ability to deter breachers, which is counter intuitive within a system where extensive facilitative measures are taken for the interest of the trader. It is also overly prescriptive and intrudes on national policy space, especially when it comes to grounds for: evaluation of ‘penalty’ (6.2.2) that usually differs from country to the other; setting the remuneration of a government official; and setting time limitations for initiating penalty disciplines.</p> <p>Overall, this article extends beyond the mandate of negotiations.</p>
<p>Article 7: Release and Clearance of Goods</p>	<p>This Article is one of the longest and most complicated provisions in the text, and its various parts carry significant implications in terms of costs, administrative burdens, and impacts on revenues of government, as well as intrusion on national regulatory space.</p> <p>As currently articulated, the Article includes multiple grounds for challenging Members’ practices.</p> <p>Pre-arrival processing (7.1) is considered as an “exception” to normal declaration processing and thus</p>

implementation of this provision requires changing the workflow at the national level. It also necessitates administering a complex guarantee system.

The provision on electronic payments (7.2) could extend beyond or contradict the mandate of minimizing the incidence and complexity of import and export formalities and decreasing and simplifying import and export documentation requirements. In many countries it will necessitate legislative changes to allow for electronic payments of customs duties, taxes, fees and charges, and would necessitate significant infrastructure investments.

The provision on separation of release from final determination of customs duties, taxes, fees, and charges (7.3) would intrude on the sovereign function of collecting customs duties. It could hold significant impacts on governmental revenues. It could also prove unfair for SMEs, which may not be in a position to furnish guarantees/ securities stipulated under this provision.

The provision on risk management (7.4) establishes categories of 'high risk consignments' and 'low risk consignment', and the obligation to expedite release of the former. Thus, it establishes potential preferential treatment for some goods versus others. The provision sets wide grounds for questioning and challenging the manner in which Members design and apply the risk management system. It includes a list of criteria to be used as the basis for the risk management system (7.4.3), which would be used to evaluate and judge the adequacy of the Members' practices.

Post-clearance audit (7.5) could increase the hazards and risks associated with some goods, and especially those that cannot be easily retrieved after release in the market. It may make developing countries' borders more porous with serious consequences.

Establishment and publication of average release time (7.6) could be extremely administratively difficult. It is based on non-mandatory language. The published averages are critical, as they would be used as benchmarks to evaluate the Member's practices under other provisions of Article 7, such as the obligation under 7.3 (separation and release).

The provision on 'authorized operators' (7.7) establishes grounds for special or preferential customs treatment

	<p>to be provided to reliable traders, and includes over-prescriptive provisions on criteria defining this category. The schemes and selection criteria under this article are over prescriptive and linked to international standards. International standards are often established in a selective manner; it often do not reflect the concerns and realities of various countries and especially developmental concerns, which could leave the developing countries and their traders at a disadvantage in terms of applying and meeting these standards.</p> <p>The provision on expedited shipments (7.8) is administratively burdensome and has serious financial implications. By setting a minimum benchmark focused on goods entered by air cargo, the provision is tilting the preferential treatment among traders to this category of goods.</p> <p>The provision on ‘perishable goods’ (7.9) stipulates preferential treatment for a wide range of goods, that is not limited to perishable food or goods that would undertake decay naturally in the case of delay. The provision lacks a useful definition of ‘perishable goods’ that would be covered by the Article. The provision could create tensions with undertaking the SPS –related checks and requirements.</p>
<p>Article 8: Consularization</p>	<p>This Article clearly goes beyond the mandate.</p> <p>Article VIII.4 of the GATT explicitly allows Members to undertake consular transactions in connection with importation and exportation. Accordingly, many developing countries oppose this provision.</p>
<p>Article 9: Border Agency Cooperation</p>	<p>This Article would entail substantial costs to re-engineer border processes in order to synchronize or harmonize data capture, controls and all other formalities, including human resource training. It also entails setting automated processing systems that can accommodate the domestic transit operation and track effective clearance procedures (9 bis Alt 1).</p>
<p>Article 10: Formalities Connected with Importation and Exportation and Transit</p>	<p>This Article entails significant cost implications and is highly intrusive on national regulatory processes.</p> <p>The Article extends beyond the negotiating mandate, especially in terms of the limitations it sets on pre-shipment and post-shipment inspections and prohibition on introduction of pre-shipment inspections (10.6). This would over-ride Members’ rights under the Agreement on Pre-shipment inspections and extend beyond the mandate of clarifying and improving Article V, VIII, and X GATT.</p>

	<p>The Article sets the ‘decrease and simplification’ (10.2.2) of formalities and documentation as benchmark for evaluating the practice of Members in reviewing the formalities and documentation. It thus limits the consideration of other objectives that could be commensurate and needed within the national context. It also includes a list of criteria to be taken into account in this review process. Accordingly, it restricts the grounds based on which Members would address formalities and documentation relating to import, export, and transit (See 10.1).</p> <p>The Article includes reference to ‘interested parties’ as a stakeholder whose input should be taken into account in the review of formalities and documentation (10.1); inclusion of such an open-ended category would be highly burdensome and intrusive on Members practices.</p> <p>It also sets multiple grounds for challenging formalities and documentation requirements, through language such as “less trade restrictive manner” and “in a manner as not to constitute an unnecessary obstacle to trade” (See 10.2).</p> <p>Accordingly, Members would be significantly prone for being found in violation of their obligations under this Article.</p>
<p>Article 11: Freedom of Transit</p>	<p>This Article extends beyond Article V GATT on traffic in transit and intrudes on national policy space.</p> <p>The Aarticle will specifically impact those Members with fixed infrastructure for transit of energy products within their territory (e.g., transit pipelines or high-voltage transmission grids) and those Members who have state enterprises (e.g., state-owned railways) or private enterprises with exclusive or special privileges (e.g., pipeline operators or toll road concessionaires) that regulate or apply formalities or fees to transit traffic.</p> <p>It extends beyond the GATT, especially in: requiring prohibition of calculating charges on ad valorem basis; requiring periodic review of charges on traffic in transit with a view to reducing them; and prohibiting customs convoys except in specific ‘high risk’ cases (leaving high risk undefined).</p> <p>Moreover, the requirement of national treatment for goods in transit extend beyond what the GATT stipulates;</p>

	<p>goods in transit and domestically produced goods are not “like” goods (see 11.5).</p> <p>According to this article, Members may not be allowed to apply controls of compliance with technical standards on goods in transit, which may restrict Members’ abilities to address concerns with hazardous goods. Members would be required to limit customs controls, data and document requirements and formalities on goods in transit to those ‘necessary to identify the goods and ensure compliance with transit requirements’. There is no clarity whether this would take into consideration transit requirements on certain goods as stipulated under national law.</p> <p>Overall, the article as designed would establish multiple layers that could challenge the ability of Members to administer formalities, documentation, and controls with a view to limit hazardous spills from certain kind of goods in transit, including through the use of language as ‘more restrictive on traffic in transit than necessary’(11.3), ‘addressed in a less restrictive manner’(11.3), ‘not applied in a manner that constitute disguised restriction on transit traffic’ (11.3), and ‘not more burdensome than necessary’ (11.8).</p>
<p>Article 12: Customs Cooperation</p>	<p>This Article regulates customs-to-customs exchange of information for purposes of verifying doubtful goods’ declarations submitted by an importer, exporter, or its agent. The article clearly states the scope of requests and obligations of the “requesting members” vis-à-vis the confidentiality of information received and the use of this information solely for the purpose for which it is intended. The Article also spells out the obligations and rights of the “requested Member”.</p> <p>Given that the TF agreement would be putting in place multiple measures in order to facilitate and enhance trade flows between countries, such cooperation between customs on exchange of information would play an essential role in assisting Members in controlling against criminal activities and loss of customs revenue, which is crucial for developing countries.</p> <p>Yet, as currently drafted, the article includes very wide grounds that could dilute the functionality and effective use of this article (see for example provisions 12.7 and 12.8 on use of the exchanged information, and provisions 12.9 and 12.16 on grounds for refusal by requested Member). It would need revision to make these provisions more in line with the objectives of the Article.</p>

<p>Article 13: Institutional Arrangements</p>	<p>This Article establishes a committee on trade facilitation. Besides the stipulations under this Article, the role of the committee is addressed across the different provisions of the negotiating text. A broad mandate of the Committee is under discussion, including mandates related to reviewing the operation and implementation of the TF agreement, developing procedures, managing notification and categorizations of provisions under Section II, including the extension of deadlines for Members facing difficulties in implementation. This could hinder the access of developing and least-developed country Members to special and differential treatment in the implementation phase of the agreement.</p>
<p>Article 14: National Committee on Trade Facilitation</p>	<p>Members may face capacity, infrastructural, or resource constraints, as well as challenges with ensuring legal consistency with domestic laws and regulations, with respect to complying with new obligations in relation to setting up national committees or mechanisms on trade facilitation.</p>
<p>Article 15: Preamble/ Cross-Cutting Matters</p>	<p>This section is expected to be addressed after the substantive rules under the agreement have been established.</p>



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