

Investor-State Dispute Settlement (ISDS) Mechanisms: A Comparison Between India and Global Arbitration Hubs

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Abstract

Investor-State Dispute Settlement (ISDS) mechanisms play a crucial role in international investment protection by providing a legal framework for resolving disputes between foreign investors and host states. As globalization has led to increased cross-border investments, the effectiveness of ISDS has become a key determinant in shaping investor confidence. While global arbitration hubs such as Singapore, the United Kingdom (UK), the United States (USA), and the European Union (EU) have developed robust and investor-friendly ISDS mechanisms, India has taken a more cautious approach. This article compares India's ISDS framework with leading global arbitration hubs, analyzing legal frameworks, enforcement mechanisms, judicial intervention, and investor confidence. India's ISDS journey has evolved significantly since the 1990s, when the country signed numerous Bilateral Investment Treaties (BITs) to attract foreign direct investment (FDI). However, following a series of unfavorable arbitration awards, including *White Industries v. India*, *Vodafone*, and *Cairn Energy* cases, India shifted towards a more state-centric approach. The introduction of the 2016 Model BIT marked a fundamental shift, limiting investor protections, imposing stringent local remedy exhaustion requirements, and excluding fair and equitable treatment (FET) clauses. This policy change has led to concerns over investor confidence and India's attractiveness as an investment destination. In contrast, arbitration hubs like Singapore, UK, USA, and the EU have taken a more pro-investor stance. Singapore, with its Singapore International Arbitration Centre (SIAC), offers a well-structured, neutral, and internationally recognized arbitration framework. The London Court of International Arbitration (LCIA) ensures minimal judicial interference and a strong enforcement mechanism. The USA, under its Bilateral Investment Treaties (BITs) and USMCA (formerly NAFTA), provides a robust ISDS system with clear protections for investors. The EU, while moving towards a Multilateral Investment Court (MIC) model, still ensures strong investor protection through its investment agreements. These jurisdictions prioritize efficiency, neutrality, and enforceability, making them attractive for global investors. The key differences between India and these arbitration hubs lie in judicial intervention, enforceability of arbitral awards, and investor confidence. India has faced challenges in enforcing ISDS rulings due to prolonged legal battles and inconsistent interpretations of arbitration laws. Unlike global hubs that ensure speedy dispute resolution, India's arbitration framework still struggles with delays, overreach by domestic courts, and a lack of institutional arbitration infrastructure for ISDS cases. This article argues that for India to remain competitive in global investment arbitration, it must reform its ISDS framework. Possible reforms include aligning with international best practices,

strengthening institutional arbitration (e.g., MCIA, NDIAC), and renegotiating BITs to balance investor protections with state sovereignty. By addressing these challenges, India can enhance its investment climate while ensuring fair and transparent dispute resolution. This comparative analysis provides insights into how India can refine its ISDS framework to attract FDI while maintaining regulatory autonomy.

Keywords: Investor-State Dispute Settlement (ISDS), Bilateral Investment Treaties (BITs), Arbitration, Foreign Direct Investment (FDI), International Investment Law, Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), Judicial Intervention, Fair and Equitable Treatment (FET), Multilateral Investment Court (MIC), Enforcement of Arbitral Awards, India's 2016 Model BIT, Institutional Arbitration, Regulatory Autonomy.

Introduction

Global investment flows have increased significantly in the past few decades, necessitating a robust legal framework to protect foreign investors from unfair treatment by host states. Investor-State Dispute Settlement (ISDS) mechanisms play a crucial role in this context, offering foreign investors a legal recourse against host states for alleged violations of investment agreements. ISDS is typically included in Bilateral Investment Treaties (BITs), free trade agreements, and multilateral investment agreements, ensuring that investors can seek redress through neutral arbitration rather than relying on domestic courts. BITs serve as the foundation of ISDS, defining the rights and obligations of investors and states. They establish fair and equitable treatment (FET) standards, protection against expropriation, and dispute resolution mechanisms. Countries with strong BITs and efficient arbitration frameworks attract more foreign direct investment (FDI), as investors seek legal certainty and enforceability of awards. However, the approach to ISDS varies across jurisdictions. Leading global arbitration hubs, such as Singapore, the United Kingdom (UK), the United States (USA), and the European Union (EU), have developed pro-investor ISDS systems that prioritize neutrality, efficiency, and enforceability.

India, on the other hand, has taken a more cautious and state-centric approach to ISDS. While it initially signed numerous BITs to attract FDI, a series of adverse arbitration awards led to a policy shift. The introduction of the 2016 Model BIT marked a departure from conventional ISDS frameworks by imposing stringent local remedy exhaustion requirements and excluding FET clauses, thereby limiting investor protections. These changes have raised concerns about India's attractiveness as an investment destination. This article aims to provide a comparative analysis of India's ISDS framework with leading arbitration hubs by examining:

1. Legal frameworks governing ISDS in India and global hubs.
2. Enforcement mechanisms for arbitral awards and investor rights.
3. Judicial intervention in ISDS disputes and its impact on dispute resolution.
4. Challenges and potential reforms in India's ISDS approach.

By understanding these key aspects, the article seeks to evaluate whether India's current ISDS model effectively balances investor protections and regulatory autonomy or if reforms are necessary to enhance its investment climate.

Evolution of ISDS in India

India's approach to foreign investment protection has evolved significantly since the economic liberalization of 1991. To attract Foreign Direct Investment (FDI) and integrate into the global economy,

India signed Bilateral Investment Treaties (BITs) with several countries. These agreements provided strong investor protections, including safeguards against expropriation, Fair and Equitable Treatment (FET), and access to Investor-State Dispute Settlement (ISDS) mechanisms. By the mid-2010s, India had signed over 80 BITs, making it one of the most investment-friendly emerging markets. However, as foreign investments increased, so did disputes, leading to a rise in ISDS claims against India. (World Investment Report 2020 (Overview), 2020)

Several high-profile arbitration cases exposed weaknesses in India's ISDS framework and raised concerns over regulatory unpredictability. *White Industries v. India* (2011) highlighted India's judicial inefficiencies when the country was held liable for failing to enforce an arbitration award. The *Vodafone Case* (2014-2020) and *Cairn Energy Case* (2015-2021) further emphasized the risks of retrospective taxation, leading to adverse rulings against India. These cases damaged investor confidence and pushed the Indian government to rethink its approach to investment arbitration. (Chapter III, 2020)

In response to repeated ISDS claims, India introduced the 2016 Model BIT, which significantly altered the country's investment protection framework. The new BIT removed the Fair and Equitable Treatment (FET) clause, introduced an Exhaustion of Local Remedies (ELR) requirement (forcing investors to litigate in Indian courts for five years before seeking international arbitration), and narrowed the definition of investment. Additionally, taxation measures were excluded from ISDS claims, making it harder for foreign investors to challenge retrospective tax laws. This shift aimed to reduce India's exposure to ISDS cases but also raised concerns over declining investor protections. (Chapter III, 2020)

To align with the 2016 Model BIT, India terminated or renegotiated over 70 BITs, including treaties with key investor countries like the UK, Netherlands, Germany, and Singapore. While this move strengthened India's regulatory autonomy, it also led to legal uncertainty for foreign investors. Without strong BIT protections, investors had to rely on India's domestic judicial system, which is known for delays and enforcement challenges. This shift contributed to reduced investor confidence and concerns over the ease of doing business in India.

India's ISDS evolution reflects its attempt to balance sovereign regulatory powers with the need for a stable investment climate. While the 1990s-2010s framework promoted FDI, it also led to costly arbitration claims. On the other hand, the 2016 Model BIT and BIT withdrawals reduced ISDS risks but created uncertainty for investors. To remain an attractive global investment destination, India must focus on strengthening institutional arbitration mechanisms, renegotiating BITs with balanced protections, and ensuring predictable regulations. A well-structured ISDS framework, aligned with international best practices, will help India maintain investor confidence while protecting its national interests. (Dolzer, 2022)

ISDS Mechanisms in Global Arbitration Hubs

Investor-State Dispute Settlement (ISDS) mechanisms vary across global arbitration hubs, with some jurisdictions adopting pro-investor frameworks while others emphasize state sovereignty and regulatory control. Leading arbitration hubs such as Singapore, the United Kingdom (UK), the United States (USA), and the European Union (EU) have well-developed ISDS systems that ensure neutrality, efficiency, and enforceability of arbitral awards. Examining these jurisdictions provides insights into how investor-friendly legal frameworks contribute to attracting foreign investments and managing disputes effectively. Singapore has emerged as one of the world's most preferred arbitration destinations, primarily due to the Singapore International Arbitration Centre (SIAC). SIAC provides a neutral, efficient, and internationally

recognized arbitration system, making it a favored choice for investors and states alike. It ensures expedited dispute resolution, minimal judicial intervention, and enforceability of awards under the New York Convention.(ModelBIT_Annex_0.Pdf, n.d.)

Singapore's legal framework is pro-investor, supported by the Arbitration Act and International Arbitration Act, which align with international standards. Additionally, the Singapore Convention on Mediation (2019) strengthens the dispute resolution landscape, further enhancing its attractiveness as an arbitration hub.(“The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstr” by Prabhash Ranjan and Pushkar Anand, n.d.)

The London Court of International Arbitration (LCIA) is one of the world's oldest and most respected arbitration institutions, offering a highly independent ISDS framework with minimal judicial interference. The LCIA's arbitration procedures ensure fairness, efficiency, and enforceability of awards, making it a preferred venue for resolving investment disputes.(“The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstr” by Prabhash Ranjan and Pushkar Anand, n.d.)

The UK is a signatory to the New York Convention, which facilitates the smooth enforcement of arbitral awards globally. Governed by the Arbitration Act 1996, the UK's legal framework prioritizes party autonomy, impartiality, and efficient dispute resolution, strengthening investor confidence in the country's arbitration system.

The United States has historically supported ISDS through Bilateral Investment Treaties (BITs) and trade agreements. Under NAFTA (North American Free Trade Agreement), investors enjoyed broad protections, including access to ISDS arbitration. However, NAFTA has now been replaced by the United States-Mexico-Canada Agreement (USMCA), which limits ISDS claims but retains protections for specific sectors such as energy and infrastructure.(Ranjan & Ranjan, 2019)

The Federal Arbitration Act (FAA) governs arbitration in the USA, ensuring that ISDS awards are legally binding and enforceable. The USA has consistently upheld arbitration agreements, providing investors with legal certainty and enforceability. However, recent political and legal developments have led to debates about reforming ISDS mechanisms to balance investor rights with state sovereignty. The European Union (EU) has moved away from traditional ISDS mechanisms in favor of a Multilateral Investment Court (MIC) or Investment Court System (ICS). Unlike ad-hoc arbitration tribunals, the ICS model introduces a permanent court with full-time judges, enhances transparency, and allows state appeals against arbitration awards, aiming to balance investor protections with state regulatory autonomy.(Ranjan & Ranjan, 2019)

In the landmark *Achmea v. Slovakia* (2018) case, the Court of Justice of the European Union (CJEU) ruled that intra-EU ISDS mechanisms were incompatible with EU law. This ruling invalidated BITs between EU member states, prompting the EU to shift toward a more structured ICS model. As a result, many EU nations have begun terminating ISDS provisions in their investment treaties.(The Judgment of the CJEU in *Slovak Republic v. Achmea* – A Loud Clap of Thunder on the Intra-EU BIT Sky! - Kluwer Arbitration Blog, n.d.)

The ISDS frameworks in Singapore, the UK, the USA, and the EU demonstrate different approaches to investor protection and dispute resolution. While Singapore and the UK maintain pro-investor arbitration-friendly systems, the USA has adjusted ISDS mechanisms within trade agreements, and the EU is moving towards a more state-controlled investment court system. These diverse models reflect varying levels of investor protection, judicial intervention, and enforceability, providing valuable lessons for countries like India that seek to refine their ISDS frameworks while balancing regulatory sovereignty.

Differences Between India and Global Arbitration Hubs

The Investor-State Dispute Settlement (ISDS) mechanisms in India differ significantly from those in leading global arbitration hubs such as Singapore, the United Kingdom (UK), the United States (USA), and the European Union (EU). While these jurisdictions have pro-investor frameworks ensuring efficient dispute resolution, minimal judicial interference, and strong enforcement mechanisms, India has taken a more restrictive and state-centric approach. The key differences between India and these global arbitration hubs can be categorized into four major areas: legal framework, judicial intervention, enforcement of awards, and investor confidence.

India's 2016 Model Bilateral Investment Treaty (BIT) introduced a restrictive approach to ISDS, requiring investors to exhaust local remedies before pursuing international arbitration. It also removed the Fair and Equitable Treatment (FET) clause, which is a fundamental protection for investors in most global BITs. These changes have reduced investor protections and made India a less attractive destination for foreign direct investment (FDI). In contrast, arbitration hubs like Singapore, the UK, the USA, and the EU have pro-investor BITs that provide strong legal protections, transparent dispute resolution mechanisms, and broader access to ISDS arbitration. These jurisdictions ensure legal predictability and investor security, which are crucial for attracting and retaining foreign investments. One of the biggest challenges in India's ISDS framework is excessive judicial intervention. Indian courts have frequently intervened in arbitration proceedings, leading to delays, uncertainty, and inconsistent enforcement of arbitral awards. (United States-Mexico-Canada Agreement, n.d.) Domestic courts have, at times, overturned ISDS decisions, creating an unpredictable environment for foreign investors. In contrast, Singapore (SIAC), the UK (LCIA), and the USA (ICC) maintain minimal judicial interference in arbitration proceedings. These jurisdictions have clear arbitration laws (e.g., Singapore's Arbitration Act, UK's Arbitration Act 1996, and the US Federal Arbitration Act) that ensure independent and legally binding dispute resolution. This enhances investor confidence by guaranteeing that arbitration outcomes are respected and enforced without unnecessary court interference. The enforceability of arbitration awards is a key factor in the effectiveness of any ISDS system. India has faced significant challenges in enforcing ISDS rulings, as seen in cases like Cairn Energy and Vodafone, where arbitration awards were met with government resistance and prolonged legal battles. These enforcement issues have damaged India's reputation as an arbitration-friendly jurisdiction.

On the other hand, arbitration hubs such as Singapore, the UK, and the USA have robust enforcement mechanisms under the New York Convention, ensuring that ISDS rulings are quickly recognized and executed. Investors in these jurisdictions benefit from legal certainty, efficient dispute resolution, and strong institutional support for arbitration. The ability to reliably enforce ISDS awards in these hubs makes them far more attractive for global investors compared to India. The combined effect of restrictive BITs, judicial intervention, and enforcement issues has lowered investor confidence in India's ISDS framework. Foreign investors are often hesitant to invest in India due to legal uncertainties and the risk of prolonged arbitration disputes. (The Investment Court System | Access2Markets, n.d.) The government's decision to withdraw from multiple BITs has further weakened investor trust, as it limits access to ISDS protections. By contrast, Singapore, the UK, the USA, and the EU have built strong reputations as pro-investor arbitration hubs. Their stable legal frameworks, efficient enforcement mechanisms, and commitment to ISDS neutrality continue to attract significant FDI. These jurisdictions ensure that investor rights are safeguarded, making them preferred destinations for cross-border investments.

India's ISDS framework differs significantly from global arbitration hubs, primarily due to its restrictive legal framework, frequent judicial intervention, and weak enforcement of arbitration awards. In contrast, jurisdictions like Singapore, the UK, the USA, and the EU provide pro-investor environments with efficient dispute resolution mechanisms. For India to compete as a global investment destination, it must reform its ISDS system by strengthening institutional arbitration, improving enforcement mechanisms, and ensuring legal predictability for foreign investors.

Challenges and Reforms in India's ISDS Framework

India's Investor-State Dispute Settlement (ISDS) framework has evolved significantly over the years, particularly with the introduction of the 2016 Model Bilateral Investment Treaty (BIT). While this shift was aimed at reducing legal liabilities for the Indian government, it has also introduced several challenges, including a restrictive legal framework, judicial intervention, lack of institutional arbitration mechanisms, and the need for policy reforms. Addressing these issues is essential for enhancing investor confidence and attracting foreign direct investment (FDI). The 2016 Model BIT introduced stringent conditions for foreign investors, making India's ISDS framework less investor-friendly compared to global arbitration hubs. (Evolution, Challenges, and Reforms in India's Investor-State Dispute Settlement Mechanisms | VIA Mediation Centre, n.d.) One of the most critical changes was the narrow definition of investment, which excludes intangible assets such as intellectual property, goodwill, and contractual rights. This deviation from international standards reduces the legal protections available to investors. Additionally, the Model BIT requires investors to exhaust local remedies for at least five years before initiating international arbitration. This prolonged dispute resolution process increases legal costs and uncertainty, discouraging foreign businesses from pursuing investment opportunities in India. Another major drawback is the removal of the Fair and Equitable Treatment (FET) clause, which is a fundamental protection in most BITs worldwide. The absence of this provision raises concerns about potential arbitrary government actions affecting investor rights. One of the most significant barriers to effective ISDS in India is the excessive judicial intervention in arbitration proceedings. Unlike global arbitration hubs where courts play a minimal role, Indian courts often interfere in the enforcement of arbitral awards, leading to delays and inconsistencies in legal outcomes. This creates uncertainty for foreign investors who may face prolonged legal battles even after winning arbitration cases. Notable cases, such as Vodafone and Cairn Energy, highlight the challenges in enforcing ISDS rulings in India. Despite favorable arbitration awards, India contested the rulings, leading to lengthy legal disputes and concerns over India's commitment to honoring international arbitration decisions. These challenges contrast sharply with arbitration hubs like Singapore, the UK, and the USA, where ISDS rulings are enforced efficiently with minimal government intervention. Unlike global arbitration hubs that have well-established institutions like the Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA), India lacks a strong ISDS-specific arbitration framework. (Anand, 2024a) While centers such as the Mumbai Centre for International Arbitration (MCIA) and the New Delhi International Arbitration Centre (NDIAC) (The New Delhi International Arbitration Centre (Amendment) Bill, 2022, n.d.) exist, they have not gained significant global recognition. As a result, investors prefer resolving disputes in foreign jurisdictions, leading to higher costs and procedural complexities. India's lack of expertise in handling ISDS disputes is another concern. Arbitration institutions in India primarily deal with domestic commercial disputes, and there is limited specialization in investor-state disputes. To enhance its arbitration infrastructure, India must strengthen its institutions and develop internationally recognized ISDS expertise.

To address these challenges, India must undertake significant reforms to create a balanced ISDS framework that ensures both investor protection and state sovereignty. One key reform is revising the 2016 Model BIT by broadening the definition of investment, reducing the exhaustion period for local remedies, and reintroducing limited FET protections. These changes would make India's BITs more competitive and aligned with global investment standards. Limiting judicial interference is also crucial. India must establish clear legal provisions that prevent excessive court involvement in arbitration cases, ensuring that ISDS rulings are respected and enforced efficiently. Additionally, strengthening institutional arbitration mechanisms such as MCIA and NDIAC can help develop India into a trusted global arbitration hub. Lastly, instead of withdrawing from BITs, India should renegotiate investment agreements that balance investor rights with national interests. A more predictable and transparent ISDS framework would improve investor confidence and make India a more attractive destination for foreign investment. India's current ISDS framework presents significant challenges, particularly due to the restrictive provisions of the 2016 Model BIT, judicial delays, weak institutional arbitration infrastructure, and declining investor confidence. While India aims to protect its regulatory autonomy, these policies have also made it less attractive for foreign investors. (Wittmeier, 2023) To remain competitive in global investment arbitration, India must reform its ISDS framework by revising BITs, limiting judicial intervention, and strengthening its institutional arbitration capabilities. By adopting international best practices, India can enhance its investment climate while safeguarding its sovereign regulatory interests.

Future of ISDS in India: The Way Forward

India's Investor-State Dispute Settlement (ISDS) framework has undergone major transformations, especially with the adoption of the 2016 Model Bilateral Investment Treaty (BIT). However, the restrictive nature of India's ISDS policies has raised concerns among foreign investors. To improve its investment climate while maintaining regulatory autonomy, India must explore reforms that strike a balance between investor protection and national interests. One potential path forward for India is to adopt an ISDS mechanism similar to Singapore or the European Union's Investment Court System (ICS). Singapore has established itself as a global arbitration hub by ensuring a pro-investor legal framework with strong enforcement mechanisms while maintaining state control over key regulatory aspects. The EU's Investment Court System (ICS) provides an alternative approach, introducing a permanent dispute resolution body with appointed judges instead of ad-hoc tribunals. This model aims to reduce biases, increase transparency, and balance investor rights with public policy considerations. If India adopts a hybrid approach, it could create a more predictable and efficient dispute resolution system that meets global standards.

To reduce dependency on foreign arbitration centers, India must strengthen its domestic arbitration institutions such as the Mumbai Centre for International Arbitration (MCIA) and the New Delhi International Arbitration Centre (NDIAC). Currently, these institutions lack the recognition and credibility needed to handle complex ISDS cases. By developing specialized expertise, improving procedural efficiency, and ensuring neutrality, India can position itself as a preferred destination for investment dispute resolution. Strengthening these institutions would also help reduce costs and legal uncertainties for both investors and the Indian government. (Anand, 2024b) One of the primary concerns for foreign investors is the uncertainty surrounding India's legal framework for investment disputes. To address this, India must create a more transparent and predictable ISDS mechanism that clearly defines investor rights, government obligations, and dispute resolution timelines. At the same time, it is crucial to safeguard

India's right to regulate in the public interest, particularly in areas such as environmental protection, labor laws, and public health policies. Striking this balance will make India a more attractive and reliable investment destination without compromising its sovereign policy-making authority. India's decision to terminate or renegotiate many of its Bilateral Investment Treaties (BITs) has created uncertainty for investors. Instead of completely moving away from BITs, the government should engage in strategic renegotiations to draft agreements that provide reasonable investor protections while ensuring India's regulatory flexibility. (The Future of Investor-State Dispute Settlement (ISDS) - International Arbitration in 2021, n.d.) By aligning its BITs with international best practices, India can boost investor confidence, attract Foreign Direct Investment (FDI), and reduce legal disputes. A balanced and well-structured ISDS framework would also strengthen India's position in global trade negotiations and multilateral investment agreements.

India's ISDS framework has evolved significantly, but its restrictive approach under the 2016 Model BIT has led to challenges in investor confidence, enforcement of arbitral awards, and prolonged legal disputes. Compared to global arbitration hubs like Singapore, the UK, and the USA, India's ISDS system is less investor-friendly and prone to judicial delays. To enhance its global investment standing, India must undertake key reforms, including adopting a balanced ISDS approach, strengthening its domestic arbitration institutions, increasing legal predictability, and renegotiating BITs to attract FDI. By aligning with international best practices while protecting its regulatory autonomy, India can establish itself as a competitive investment destination with a fair, transparent, and efficient ISDS framework. In the evolving landscape of international investment law, India's future depends on its ability to adapt and reform while ensuring a harmonious balance between investor rights and national interests.

Conclusion

India stands at a critical crossroads in its Investor-State Dispute Settlement (ISDS) journey. As global competition intensifies for foreign direct investment, the need for a robust, transparent, and investor-friendly dispute resolution framework has never been greater. While India's cautious, sovereignty-driven stance reflected in the 2016 Model BIT has sought to shield the state from excessive liabilities, it has also inadvertently undermined investor confidence by limiting protections, prolonging dispute resolution, and deterring international investment flows. In contrast, global arbitration hubs such as Singapore, the UK, the USA, and the EU have successfully harmonized the twin objectives of safeguarding state interests while fostering a predictable and efficient legal environment for investors.

For India to emerge as a credible alternative in the global arbitration ecosystem, it must embrace meaningful reforms that recalibrate the balance between investor rights and regulatory autonomy. This requires not only revisiting its Model BIT to reinstate critical protections, such as fair and equitable treatment (FET), but also minimizing judicial interference, enhancing enforcement of arbitral awards, and developing world-class institutional arbitration centers like MCIA and NDIAC. By drawing lessons from established global hubs and adopting a hybrid model that respects domestic priorities while meeting international expectations, India can secure its place as a trusted destination for cross-border investment and dispute resolution.

Ultimately, the future of India's ISDS framework depends on its willingness to evolve. In an era where global investors seek certainty, efficiency, and fairness, India must demonstrate its commitment to creating a legal ecosystem that is not only protective of its sovereign interests but also inviting, reliable, and globally competitive. With thoughtful reforms and a forward-looking strategy, India can transform its ISDS landscape from a cautionary tale into a global success story.

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