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Quiet legal (r)evolutions? TRIPS, TTIP and corporate power in post-democratic times

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> "The basic constitutional idea [of] neo-liberalism is the idea of changing law from something that functions as the immune system of society into something that functions as the immune system of transnational capitalism, triggering an autoimmune disease by declaring civil war against the rest of the societal body and its legislative organs."
>
> Brunkhorst 2014a, 445-446

Introduction

Near the end of his fascinating socio-historical account of two millennia of legal revolutions, Hauke Brunkhorst (2014a) offers a scathing critique of the rise of the neoliberal constitutional mindset in the European Union (EU). Brunkhorst argues that the neoliberal project, in constitutional terms, aims at nothing less than dismantling 'democratic legislative control' and subsuming the 'political constitution' – the set of fundamental democratic rights and freedoms hard-won through social struggles - under that of 'law and economics' and the prerogatives of transnational capital. At the core of this '*great transformation*', unfolding across Europe and beyond since the late 1970s, lies "the transformation *of state-embedded and state-controlled markets into market-embedded and market-controlled states*" (Brunkhorst 2014a, 446; original emphasis). Brunkhorst's Polanyian diagnosis closely resembles David Harvey's dissection of neoliberalism as an elite political project. Its central aim, Harvey maintains, is to 'disembed' capital from the post-war Keynesian "web of social and political constraints" (2007, 11) or, in Brunkhorst's words, to reverse the achievements of the 'Egalitarian Revolution', which ushered in the constitutionalization of social and economic rights and the consolidation of 'democratic capitalism' since the early twentieth century.

The evolution of EU governance since the 2008 financial crisis has made the pervasive grip of this mindset dramatically apparent, including its tragic social consequences in the EU's periphery. Following the electoral victory of Syriza in Greece in January 2015, Jean-Claude Juncker, the European Commission president, issued a stark warning to those who wish to deviate from the script laid out by Europe's elites: 'there can be no democratic choice against the European treaties' (Hewitt 2015) nor, by extension, against the constitutionalization of neoliberal orthodoxy. The rule of the Troika, warns Brunkhorst, constitutes an outright assault on the Kantian mindset of collective democratic self-determination, spelling "the *end of democracy as we know it*" (Brunkhorst 2014a, 452).

In this article, I take a cue from Brunkhorst's analysis of the hegemony of the neoliberal mindset for the survival of meaningful democratic politics. Focusing on a central pillar of contemporary international economic law - the World Trade Organization (WTO) Trade-related Intellectual Property Rights (TRIPS) Agreement - the aim is to highlight an important limitation of Brunkhorst's reading of the unravelling of Kantian advancements in international and national law in recent decades. The key argument proposed here is that Brunkhorst's account is, in a nutshell, too *state-centric*, neglecting the central role of *transnational corporations* (TNCs) in shaping the content, interpretation, and enforcement of the international legal framework governing actually-existing neoliberalism capitalism. Recent decades

have witnessed a vast expansion in the rights of TNCs vis-à-vis states and their populations, to the point where the 'global firm' is now considered by some observers as the "key institution of the post-democratic world" (Crouch 2004, 31; see also Chomsky 1999; Sklair 2002; Wilks 2013). Yet, aside from a brief discussion of the Dutch and British East India Companies during the colonial era, the modern business corporation – a legal invention of the nineteenth century managerial mindset *par excellence* – is conspicuously absent from Brunkhorst's otherwise prescient account of the evolution of international law. The expansion of corporate power, I argue, is not only a root cause of the contemporary post-democratic predicament in the Global North but also contributes to endemic violations of basic social and economic rights of the global poor. Therefore, taking the role of TNCs in shaping the evolution of international law seriously is indispensable towards a critical theory of legal revolutions that engages with contemporary struggles for global social justice.

Corporate power and post-democratic law-making

The modern business corporation is in large part a product of a 'legal revolution' in the nineteenth century which saw a dramatic transformation and expansion of the rights of joint-stock companies in the United States (Sellers 1991).[1] Since then, corporations have become a 'constitutive element of modern capitalism' (Djelic 2013). Permeating virtually all spheres of the life-world, they have become "accepted...as the irreplaceable organisation constituting the free enterprise system" (Wilks 2013, 168). Propelled by the forces of economic globalization, trade and capital liberalization, and revolutions in communication technologies, there has been an exponential growth in the number of TNCs in recent decades (Sklair 2001). Despite its avowed commitment to 'free trade' and 'free markets', the neoliberal project has thus greatly expanded the influence of these 'concentrations of private power', which now occupy a central role in the global economy (Chomsky 1999, 160). TNCs account for one third of international trade and, in 2007, made up 48 of the '100 largest economic units' globally, with the sales revenues of the world's largest company, Wal-Mart Stores, higher than the GDPs of all but the 25 wealthiest countries (Wilks 2013, 6).[2]

In capitalist democracies, this kind of phenomenal concentration of economic wealth inevitably translates into political power exerted directly via political lobbying, advocacy and political party funding, and indirectly by shaping the ideological milieu within which policy-making processes unfold and by diffusing cultural norms favourable to corporate interests within public spheres. Indeed, since the 1970s a vast, multi-billion institutional complex of public-relations companies, corporate-funded consultancies and think-tanks has emerged whose core purpose includes diffusing the neoliberal *lingua franca* of 'free markets' and 'free trade' across the globe and shaping the laws and regulatory standards governing markets and corporations (Miller & Dinan 2008).

In the *Strange Non-Death of Neoliberalism*, Colin Crouch (2011) provides a compelling account of how giant corporations have effectively blurred the distinction between the putatively autonomous spheres of the state and the market so sacrosanct to classical liberal thought by gradually colonising both spheres. While global markets in many sectors have become structured along oligopolistic lines, the state has not so much been weakened as captured by corporate capital to its own ends through complex (and contested) processes of deregulation, marketization and privatization (Leys 2003; van Appeldoorn 2000). Consequently, relations between states and transnational capital have become so intimately intermeshed that "the state, seen for so long by the left as the source of countervailing power against markets and corporations, is today likely to be the committed ally of giant corporations, whatever the ideological origins of the parties governing the state" (Crouch 2011, 145).

Sustained by pervasive corporate lobbying activities, in the most advanced post-democracies such as the UK and the US, "the large corporation is a privileged institution integrated into government itself through elite interaction" (Wilks 2013, 62). In the United States, corporations' rights of political speech were further extended by the Supreme Court in 2010 in the *Citizens United* case "which effectively lifted all restrictions on corporate political spending" (Wilks 2013, 11). For example, in the case of 'the health-care-industrial complex' in Washington DC alone, this has reached beyond US$5 billion since 1998 (Brill 2013). Needless to say, such resources to influence law-making processes at all levels of global governance vastly outnumber those of counter-veiling forces, be they trade unions, activist groups, NGOs, or progressive social movements.

Though ubiquitous in contemporary political systems, the term 'lobbying' is, however, somewhat problematic:

"The origins of the term 'lobby' lie in the literal meaning of the word, denoting…a space outside a ruler's council chamber…where persons wishing to plead a cause with members of the council would a seek a chance to speak with them on their way in …The representatives of today's TNCs are not in the lobby, outside the real decision-making space of government…They are right inside the room of political decision-making. They set standards, establish private regulatory systems, act as consultants to government, even have staff seconded to ministers' offices" (Crouch 2011, 131).

A similar process of corporate capture of policy-making is unfolding at the EU level, too; the institutional complex in Brussels has become a key site for corporate political activity. In fact, particularly in the realm of EU trade policy, the relationship between the European Commission and private-sector interest groups at times assumes the form of "reverse lobbying" where "the public authority lobbies business to lobby itself" (Woll 2011, 48).[3]

The neoliberal reconfiguration of global capitalism has been an extremely lucrative affair for the privileged few, generating concentrations of wealth and levels of economic inequality across the industrial world not seen since the Great Depression. Together with the growing political power of TNCs, this constitutes both a key causal factor and symptom of the wider shift towards 'post-democracy', a system in which "politics and government are increasingly slipping back into the control of privileged [political and economic] elites in the manner characteristic of pre-democratic times" (Crouch 2004, 6). Post-democracy is the political counter-part to the neoliberal transformation of the economy; they are two sides of the same coin. As Wofgang Streeck (2011) notes, "economic power seems today to have become political power, while citizens appear to be almost entirely stripped of their democratic defences", a diagnosis lent empirical support by the 2012 *Democracy Audit* of the UK. The audit found

"very firm grounds to suggest that the power which large corporations and wealthy individuals now wield on the UK political system is unprecedented. Bolstered by pro-market policy agendas and deregulatory measures, corporate power has expanded as a variety of countervailing forces, such as trade unions, have declined in significance…[P]olicy-making appears to have shifted from the democratic arena to a far less transparent set of arrangements in which politics and business interests have become increasingly interwoven" (Wilks-Heeg et al. 2012, 16).

In Habermasian terms, this suggests that the impulses on which the legislative and administrative apparatus acts rarely originate in communicative action between citizens in public spheres but rather in the 'unofficial circulation of this unlegitimated power' within national and transnational sites of political decision-making (Habermas 1996: 328). Writing about the European context, Brunkhorst alludes to the post-democratic predicament as

"the *hegemony of the managerial mindset*, and the *reduction* of politics to technocracy that today allows the political and economic elites to bypass and manipulate public opinion and democratically legitimated public law *on both levels*: the European *as well as* the respective national level. At the same time as it is growing legally, the public power of the people and its representative organs is more and more deprived of real power and replaced by grey networks of *informal government"* (Brunkhorst 2014b, 46).

According to Brunkhorst this 'evolutionary process was performed under the lead of the managerial mindset of Europe's political elites and professional experts' (ibid). While this is certainly correct, it is also the case that this process has been driven by the concerted efforts of Europe's transnational *corporate* elites since the 1980s, acting via powerful peak business organisations such as the European Roundtable of Industrialists, as extensively documented by van Apeldoorn (2000). The same argument, as discussed further below, applies to processes of economic constitutionalization at the international level as well. Before we turn to the illustrative case of the WTO TRIPS agreement however, this raises the question of whether the notion of the 'managerial mindset' is not perhaps assigned too much explanatory work. At times, it appears as a transhistorical force, assuming the quality of a *deus ex machine* in Brunkhorst's account. But if it is indeed the case, as Brunkhorst maintains in his typically dialectical fashion, that *the managerial mindset need not be normatively oriented towards serving dominant class interests*, then the question arises: who are the concrete political actors relentlessly pushing it in that direction?

Beyond the private/public dichotomy

An attempt to answer this question necessitates a political sociology of corporate power and an account of the specific strategies and practices whereby large TNCs attempt to shape the international legal framework and construct a system of global rules in line with their interests (Danielsen 2005). In other words, the role of 'private' actors must be incorporated into an analysis of not only private international law but international *public* law as well, which far too often is seen as the preserve of states alone. One reason for this is that, historically, international law has been state-centric. Despite recent developments in international human rights and economic law, non-state entities such as TNCs do not as yet constitute clearly defined *subjects* of international public law (Duruigbo 2008). Nonetheless, the deeply problematic nature of the public-private distinction in liberal theories of international law was recognised by Wolfgang Friedman some four decades ago:

"International companies or cartels - though often controlling enormous assets and exercising vast powers not only over their members in different countries but over economic and political decisions of great magnitude - have been treated as institutions and arrangements of private law. In this field perhaps more than in any other, the unreality of any watertight distinction between 'public' and 'private' law... is becoming increasingly apparent" (Friedman 1957, 172).

Today, the distinction has clearly become even more empirically untenable. What is more, as Cutler (1997) argues, the public/private dichotomy effectively "operates ideologically to obscure the operation of private power in the global political economy" (Cutler 1997, 279) and the extent to which organised corporate interests have been able to shape the evolution of international public law in recent decades.

Indeed, in parallel to the Egalitarian Revolution and the constitutionalization of social and economic rights around the world, the post-1945 era has witnessed the emergence of an international legal and institutional framework which has greatly facilitated the growing importance of TNCs as political actors in global governance (Wilks 2013). Decision-making in core economic policy domains has shifted beyond Westphalian boundaries towards an institutional architecture consisting of

international financial institutions and the WTO, elite clubs such as the G8/20 and the OECD, together with rather more opaque but important bodies like the World Banks' International Center for the Settlement of Investment Disputes (ICSID). Alongside these institutions, various transnational elite policy planning forums have emerged such as the ERT, the World Economic Forum, and the Transatlantic Business Dialogue – key sites of power inhabited by factions of transnational political, economic, bureaucratic elites who operate with minimal publicity and, thus, accountability to wider publics.

At the same time, a complex web of international treaties from the General Agreement on Trade and Tariffs (GATT) to the WTO, plus thousands of bilateral and regional trade and investment agreements, has significantly enhanced the prerogatives of transnational capital and corporations in the global economy and imposed new legal and normative constraints on state behaviour. A prime example is the instrument of investor-state dispute settlement (ISDS) - a core feature of the international investment regime - which allows foreign investors to challenge a host state in international arbitration courts if they deem that their investments are being harmed by regulatory or legislative changes.[4] ISDS arbitration panels can override domestic courts, penalise states and award multi-billion compensations to investors. What is more, ISDS does not provide for an appeals process, proceedings and rulings are often kept confidential, while arbitration panels consist of elite lawyers trained in international investment law who normally work for corporate clients (Corporate Europe Observatory & Transnational Institute 2012). ISDS thus effectively constitutes a parallel international legal system "intended to shield the market from the intrusion of vulgar democratic politics" (Schneiderman 2001, 531). In other words, it embodies the 'categorical imperative' of the neoliberal constitutional mindset: "Give the judges what you have taken from the democratic legislator and the parliamentary controlled government!" (Brunkhorst 2014a, 444).

Yet, while the codification of second-generation human rights in the form of the International Labour Organisation (ILO) and the Universal Declaration of Human Rights (UDHR) is explored in considerable detail, an analysis of international economic law is comparatively sparse in Brunkhorst's account. This seems particularly odd given the fact that international trade and investment law is supported by precisely those enforcement mechanisms – such as the WTO's dispute settlement mechanism and ICSID – that are currently lacking in the case of the ILO or the UDHR.

Let us now briefly turn to the instructive case of the WTO TRIPS agreement, the origins of which reveal much about the capacity of TNCs to translate private interests into public law.

TRIPS: A quiet revolution in international economic law

As Susan Sell argues in her authoritative account, the WTO agreement represents "a stunning triumph of the private sector in making global IP rules and in enlisting states and international organizations to support them" (Sell 2003, 163). In brief, the origins of the agreement lie in the concerted agency of a small number of US-based corporate executives of some of the largest pharmaceutical, chemical and software corporations such as Pfizer, Merck, IBM and Monsanto, who were determined to globalize American intellectual property standards. With privileged access to trade policy-makers and by skillfully framing stronger intellectual property protection as a means to address the perceived loss of competitiveness of the US economy since the late 1970s, the corporate lobby was able to conscript the power of the American state to coerce developing countries into ever-stricter TRIPS standards by imposing trade sanctions for alleged violations of the intellectual property rights (IPRs) of US corporations.

The US-based lobby then engaged in a 'massive consensus-building exercise' to get their initially reluctant private sector counterparts and governments in the EU and Japan to endorse a binding treaty that would significantly expand IPRs around the world (Drahos & Braithwaite 2002, 116). The Union of Industrial and Employers' Confederations of Europe (UNICE)[5] – 'the key portal of European business influence' in Brussels – together with influential organisations such as the European Federation of Pharmaceutical Manufacturers and Associations lobbied heavily to enlist the support of the European Commission and key EU member states (Drahos & Braithwaite 2002, 128). By the time the GATT Uruguay Round negotiations were in full swing in the late 1980s, the EU was fully committed to the TRIPS project (Pugatch 2004).

The ideological pre-condition for what became a radical expansion of the rights of intellectual property owners was to tie the protection of intellectual property to the wider project of creating a global 'liberal trading order' that 'would place investors first' (Drahos & Braithwaite 2002, 68). As Sell explains: "By wrapping themselves in the mantle of 'property *rights*' the private sector activists suggested that the rights they were claiming were somehow natural, unassailable, and automatically deserved" (2003, 51). Henceforth, violations of patents, trademarks, and copyrights were tantamount to piracy and expropriation and, given the massive rise in trade in knowledge goods, antithetical to the neoliberal vision of the global economy that was taking hold at the time. Once intellectual property was grafted onto the 'free' trade agenda - hence the term *trade-related* - the issue was simply how far the new regime would go in expanding those rights. Indeed, early drafts of what eventually became the TRIPS agreement were drafted by corporate-funded lawyers and, in the case of the United States, corporations "provided considerable legal support to the negotiating team" (May 2000, 82). Facing little organised opposition from civil society or the Global South (with the exception of India and Brazil), the corporate lobby ultimately "got 95 percent of what it wanted" (Sell 2003, 115).

The WTO agreement came into force in 1995. As Drahos and Braithwaite note, it marked "the beginning of a quiet revolution in the way that property rights in information were defined and enforced in an emerging global information economy" (Drahos & Braithwaite 2002, 19). In brief, the TRIPS agreement stipulates the minimum level of intellectual property protection that member states must enforce in domestic law, with significant implications for the creation, ownership, dissemination of, and access to, knowledge goods (May 2000). Most contentiously, WTO members must guarantee patent protection for a minimum of twenty years, including in the field of pharmaceuticals. During this period, patent-owners are effectively granted monopoly power. Consequently, "pharmaceutical patents, by design and function, increase the price of medicines to consumers" (Abbott 2002, 18). In the case of life-saving HIV treatment, this enabled pharmaceutical companies to charge more than US$10 000 per patient per year in the late 1990s, including in the poorest countries of the Global South. To fully appreciate the significance of the agreement for public health, we must recall that pharmaceutical products were not patentable in most developing countries prior to TRIPS, or only with significant limitations (Hoen 2009).[6] In India and Brazil, this allowed for the emergence of generic pharmaceutical industries which supply affordable medicines to the rest of the world. One major consequence of the new system has been to significantly diminish the policy space available to countries for promoting their knowledge-based industries and to limit their capacity to provide citizens with affordable essential medicines.

Intellectual property revolves around a delicate balance between private and public interests, that is, "between the private ownership of the fruits of intellectual labour and the social benefit of the distribution or useful ideas or knowledge" (May 2000, 10). The social contract between rights-holders (say, pharmaceutical corporations) and the rest of society is therefore maintained only if the benefits of, for example, developing medicines that extend or enhance the quality of life, outweigh the costs

of temporary monopoly power. But, as many critical observers contend (Sell 2003; May 2000), the WTO agreement has shifted the balance between public and private interests decisively towards the latter. It has effectively created an international legal system for the transfer of rents from the Global South to the North or, more precisely, major American and European corporations who are the primary owners of intellectual property and the agreement's erstwhile architects.

The WTO agreement was a project whose success lay in the ability of the private sector lobby to forge an *elite consensus* amongst a relatively small number of senior corporate executives and key policy-makers at different levels of global governance. For the senior executive of Pfizer, which spearheaded the campaign since the 1980s, this was about 'influencing the public policy agenda and ultimately securing the right regulatory agenda':

"Like the beat of a tom-tom, the message about intellectual property went out along the business networks to chambers of commerce, business councils, business committees, trade associations and peak business bodies. Progressively Pfizer executives...were able to enrol the support of [business] organizations for a trade-based approach to intellectual property. With every such enrolment the business power behind the case for such an approach became harder and harder for governments to resist" (Drahos & Braithwaite 2002, 69-70).

The campaign to establish the existing TRIPS regime thus occurred almost entirely *outside* the public sphere. The general public simply did not figure in the equation and the mass media played only a subsidiary role in the lobbying effort. Instead, the corporate lobby mobilised influential policy think-tanks like the Heritage Foundation and the American Enterprise Institute to disseminate pro-TRIPS messages within policy elite circles (Drahos & Braithwaite 2002, 70). The TRIPS project thus did not constitute a 'normative learning process' (Brunkhorst 2014a) in sociological terms, in so far as mass publics were almost entirely excluded from elite considerations. As international trade negotiations are conducted with minimal publicity, it is unlikely that many outside the insular trade policy arena were aware of the agreement's existence, let alone its possible disastrous implications for the global poor (see below). Yet, although it occurred outside those momentous historical shifts that are the focus of Brunkhorst's work, TRIPS is emblematic of how contemporary international economic law is made. It is a product of the 'factual strength of privileged interests to assert themselves' by circumventing the public sphere (Habermas 1996, 150) that characterises the exercise of political power under conditions of globalised post-democracy.

Conclusion

TNCs have become key actors in transnational class struggles and the dialectical interplay between the Kantian and managerial mindsets in recent decades, struggles whose outcomes steers the evolution of international law. Through the example of the 'quiet' legal revolution in international property rights law, I have tried to illustrate the importance of bringing the corporation into the centre of analysis.

The expansion of the rights of these largely unaccountable institutions is at the root of many emancipatory civil society struggles around the world, including those led by victims of corporate human rights abuses (Amnesty International 2014). Indeed, as Brunkhorst shows time and again, Kantian ideals of freedom, universal human rights, and political autonomy can be repressed but they can, and often do, "strike back against the law's oppressive (and frequently effective) use as class justice" (Brunkhorst 2014a, 3). The global campaign for access to AIDS medicines is a case in point. At the turn of the millennium, a transnational network of NGOs, activists and ordinary citizens emerged to protest against the injustice of denying life-saving medicines to millions of people dying of HIV/AIDS. The campaign exposed that the high cost of these medicines was not an ineluctable, if regrettable, predicament of

the social world. Rather, it was, at least in part, the product of the existing global patent regime and the pricing policies of pharmaceutical corporations which had succeeded in capturing the trade agendas of the most powerful economic blocs, and thus susceptible to political change. And although the WTO TRIPS agreement remains firmly in place and is, in fact, being expanded via various bilateral and plurilateral trade agreements (Sell 2011), the inherent tension between two rights enshrined in international law - the private rights of intellectual property-owners and the human right to health – can no longer be effaced from public discourse.

The WTO TRIPS agreement was one of the main grievances around which the alter-globalisation movement had coalesced in the late 1990s, a movement which has challenged the colonization of ever more spheres of social and political life by corporate capital. Most recently, a key arena of political struggle is the Transatlantic Trade and Investment Partnership (TTIP), currently being negotiated between the US and the EU. With potentially far-reaching and detrimental economic, social and environmental impacts, a growing civil society campaign in Europe is challenging the treaty's substantive content and democratic illegitimacy. One of the most contentious clauses of the proposed agreement concerns ISDS. As Colin Crouch (2014) argues, TTIP is a thoroughly post-democratic treaty and what binds the campaigns against TRIPS and TTIP together is opposition to attempts by transnational elites to undo the 'normative constraints' of the Egalitarian Revolution – namely, the system of national and international laws designed to protect public health, workers, consumers and the biosphere from the (self-)destructive forces of unregulated markets dominated by concentrations of private power.

To conclude, if we accept that TNCs are perhaps the dominant institutions of the post-democratic era and demonstrably implicated in systemic violations of basic human rights, then no critical theory of legal revolutions – which Brunkhorst's work has done so much to advance - can proceed without addressing the question of unaccountable corporate power, a force driving the hollowing-out of democratic systems, or whatever is left of them.

Notes

1] "[T]hrough a bizarre legal alchemy", the US Supreme Court's recognition of corporate personhood affected the radical transformation of corporations from institutions with narrowly defined purposes into legal 'persons' with an indefinite lifespan, the right to acquire property, limited liability for shareholders, the First Amendment right to political speech, and protection by the 14th Amendment rights of due process "originally entrenched in the Constitution to protect freed slaves" (Bakan 2005, 16). Over the course of several decades, "the political rights of individual citizens came to be conferred on" these legal entities, with "profound implications for American democracy" (Wilks 2013, 11).

2] Some economists would no doubt point to the problematic nature of the analogy between national GDP rates and company revenues but the point about the concentration of economic wealth holds nonetheless.

3] For example, the influential Brussels-based European Services Forum - whose members include the Deutsche Bank, HSBC, and the European Banking Federation - was created in the late 1990s at the instigation of EU Trade Commissioner Leon Brittan. The intention was to enable major European corporations across the financial and other services sectors to more effectively communicate their demands to EU trade officials regarding ongoing WTO negotiations (Lietaert 2009).

4] In recent years, ISDS has been used to challenge public health policies (e.g. plain cigarette packaging proposals in Uruguay and Australia), environmental legislation (e.g. Germany's post-Fukushima nuclear phase-out), and labour standards (South Africa's post-apartheid Black Economic Empowerment programme).

5] Since then renamed BusinessEurope.

6] In fact, pharmaceutical products were excluded from patentability in parts of Europe until the late 1970s (Hoen 2009, 9).

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