

# **PUBLIC PROCUREMENT AND SUSTAINABILITY: WTO RULES, GENERAL PRINCIPLES AND THE PRACTICE OF STATES' AUTONOMY**

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*Abstract (ita):* recentemente il tema della sostenibilità ha conosciuto una attenzione crescente, anche in ambito accademico. Tale interesse è proprio a diversi campi di ricerca, tra cui la filosofia, le scienze economiche, la sociologia e le scienze politiche. Eppure il concetto di sostenibilità è di per sé poco chiaro, e infatti se ne è fatto e se ne continua a fare un uso diverso. Inizialmente, in realtà, ci si concentrava soprattutto sul rapporto tra umanità e natura, ed erano principalmente considerati i limiti all'attività umana idonei a preservare l'ambiente e le risorse naturali, soprattutto al fine di non compromettere la capacità delle generazioni future di soddisfare le proprie necessità. Successivamente, però, l'idea di sostenibilità è stata più ampiamente raffigurata, includendosi all'interno della stessa obiettivi sociali e politici, come la riduzione delle disuguaglianze, la dignità della vita umana, il contrasto alle discriminazioni e, più in generale, la qualità della vita. Anche in ambito giuridico il tema della sostenibilità sta ricevendo particolare attenzione nel campo del diritto, e si constata il consistente aumento della letteratura sull'argomento. Lo scopo di questo lavoro è quello di procedere innanzi con il discorso giuridico sulla sostenibilità, non semplicemente considerando i limiti che le norme legali possono imporre alle attività umane ed economiche, ma invece sottolineando il ruolo degli Stati e delle amministrazioni pubbliche nel favorire la sostenibilità attraverso "azioni positive". Il *focus* dell'analisi si concentra quindi sugli appalti pubblici, considerati quale strumento essenziale per supportare la sostenibilità attraverso l'uso strategico della domanda pubblica. L'articolo muove dall'idea che i problemi legati alla sostenibilità sono di rilevanza globale, e quindi devono necessariamente essere analizzati da tale punto di vista. Tuttavia, l'articolo considera anche l'importanza di ogni singola azione ("locale") al fine di supportare la sostenibilità (a livello globale). Si pone dunque una rinnovata attenzione alla relazione tra problemi globali e problemi locali, considerandosi l'attività (legislativa e amministrativa) degli Stati come fondamentale al fine di incidere anche sulla soluzione dei problemi globali relativi alla sostenibilità. L'articolo cerca di specificare il significato giuridico di sostenibilità, ragionando su documenti giuridici prodotti a livello internazionale e cercando di "estrarre" da essi alcuni fondamentali principi. Essi possono rappresentarsi utili al fine di interpretare le leggi nazionali, secondo un ragionamento circolare che riconsidera il ruolo dei singoli Stati nel promuovere "autonomamente" la sostenibilità. L'articolo analizza quindi l'impatto in tale ambito della normativa internazionale relativa ai contratti pubblici, proponendo argomenti utili al fine di valorizzarne l'applicazione, e altresì affermando la necessità di garantire tramite la stessa una connessione funzionale tra sostenibilità e innovazione.

*ABSTRACT (ENG):* recently there has been a growing concern over the topic of sustainability, which also gained traction in scholarly work and university life. Such

*interest has been connected to several field of research, including philosophy, economic sciences, sociology and political sciences. Yet the concept of sustainability is in itself unclear, and in fact there are different usages of the same. Indeed, at the beginning the focus was on the relationship between humanity and nature, and were mainly considered limits to the human being apt to preserve the environment and natural resources, and so gain the needs of the present without compromising the ability of future generations to meet their own needs. Later, the idea of sustainability has been widely intended, and it now includes social and political objectives, such as the reduction of inequalities, the dignity of living, the contrast to discriminations and, more in general, the quality of life. Sustainability is also receiving attention in the realm of Law, and there is quite a literature progressively emerging on the topic. The aim of the article is to reinforce the legal discourse on sustainability, not simply considering the limits that legal norms may impose on human and economic activities but instead emphasizing the role of States and Public Administrations in fostering sustainability by the means of positive actions. The focus of the article will be on public procurement, considered as an essential instrument to support sustainability from the demand side. The article moves on from the idea that the problems related to sustainability are of global relevance, and thus they necessarily need to be analyzed from that viewpoint. However, the article also considers the importance of each singular action for supporting sustainability (globally). Then there is a fresh attention over the relationship between global and local problems, and the link(s) proposed is(are) useful to consider that States' legal activities are fundamental to support the solution of global issues (as well). The article tries at first to specify the legal meaning of sustainability, working on legal documents produced at the international level and trying to "extract" from them some fundamental legal principles about sustainability. These principles may be useful in enriching the interpretation of national laws, or even support the role of States' autonomy in fostering sustainability. Then the article analyzes the impact of supranational procurement law on sustainability (both at the international and regional level, including the European Union), considering arguments to find the right balance between a fair obtainment of sustainability goals and the related issues of (potentially) discriminatory practices. Finally, the article affirms the necessity to secure a linkage between sustainability and innovation through procurement law, analyzing the most current issues and perspectives in this field.*

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## 1. The Legal Understanding of the Sustainability Concept.

Sustainability is a concept linked with the future of humanity, and it has plenty of philosophical implications. From a logical point of view, sustainability highlights the property of any activity, practice or process that can be continued in more or less the same way without ending. If this basic consideration refers to the human progress in its entirety, that should lead us to think about social and economic development in such a way as to meet the needs of the present without compromising the ability of future generations to meet their own needs.

When the notion of sustainability has started to be conceived it was primarily focused on the relationship between humanity and nature, and mainly consisted in the identification of limits to the human being apt to preserve the environment and natural resources. Later the idea of sustainability has been widened, to include social and political objectives within its meaning, such as the reduction of inequalities, the dignity of living, the contrast to discriminations and, more in general, the quality of life. If this way of thinking is adopted, then political and ideological problems arise, starting from the belief that we can impose monetary values on everything. It is thus questioned if we could still examine all the sustainability issues through a typical approach of gains and losses.

The concept of sustainability has also a legal relevance, and that could be found both at the international and the domestic level even before the Resolution adopted by the General Assembly of the United Nations on the 2030 Global Agenda.

Indeed, when it first appeared in the law's empire the principal argument taken into account was related to the consequences of the economic activities on the environment. For example, a remarkable opinion of the International Court of Justice held in the *Argentina versus Uruguay* case concerning "Pulp Mills" (2010) pointed out the (juridical) need to strike a "balance between economic development and environmental protection that is the essence of sustainable development". Yet, coherently with its impacts on the economic, sociological and philosophical fields, after the United Nations resolution, the concept of sustainability achieved a fundamental change in the legal connotation, so that it now also embraces social and political objectives.

The legal understanding of sustainability underlines an approach that includes considerations of the economic, environmental and social impact of business operations. In particular, the 2030 agenda for sustainable developments identifies and (to some extent) also specifies seventeen goals to be achieved, including basic human needs (such as nutrition and health), environmental protection (with a

specific attention for the pollution problems and a responsible use of natural resources) and an appropriate economic development, intended and promoted as inclusive, fair and equitable.

The legal form by which sustainability's goals emerged at the United Nations level puts a question on the effective binding force of their substance. Indeed, the appropriate legal relevance of the General Assembly resolutions has long been disputed. The 2030 Global Agenda Resolution should not be intended as legally binding like an international treaty under article 38 of the Statute of the International Court of Justice, although in that specific case the language of the resolution qualifies itself as a "contract". Of course, it is quite different to consider that individual States and the European Union are increasingly moving towards integrating the contents of this resolution into bilateral and multilateral free trade and investment agreements, which can be individually classified as international treaties. Furthermore, the United Nations resolution on sustainable development does not show the existence of rules of international customary law. In general terms, that may occur when a resolution of the General Assembly reaffirms the existing customary international law in an *ex post* evaluation. But this is not the case for the 2030 Global Agenda Resolution, since it aims at fostering emerging law and practices, thus both helping to crystallize customary law and contributing to the establishment of further development for the customary law itself.

Specific consideration needs to be given to the argument that considers sustainability a general principle of international law. Indeed, within the international legal system, a general principle has to express a shared approach in dealing with legal issues, which generally exposes a shared view that can be already found in the domestic systems. Yet a general principle may also represent some very basic understanding of international law, to be used as a tool for legal reasoning and treaty's interpretation, and sometimes also as an object of consideration before the domestic courts. However, for the actual development of the international legal system sustainability seems more a concept than a principle, or perhaps a very general one, suitable of different interpretations. Yet it is still worthy of (legal) consideration especially as an integrative tool for the relevant practice of the domestic (legal) systems in this field.

Even without recognizing any binding effect to the 2030 Global Agenda Resolution, it still maintains legal relevance in the international field for its existence, at least through the mechanism of soft law. Many international institutions, including the United Nations, have been using soft law, which has now gained an important role in international lawmaking. Soft law is a very attractive alternative to treaties

and it is of particular relevance when it is needed to spur the essential elements of law, assuming that States and the other international actors will complete the legal process by their practices. This is of great importance in the field of sustainability, where goals have been generally identified by the United Nations, but effective (legal) actions are necessary to find appropriate means and methods to achieve them.

## **2. Sustainability Goals and the Importance of Public Procurement.**

The indication of goals instead of policy means at the international level emphasizes the role of the domestic activities in pursuing sustainability targets. This kind of “elementary evidence” carries with it many consequences, with many practical and theoretical implications.

Many States have elaborated national sustainable development strategies, thus determining by themselves how to plan and implement single or coordinated policies for achieving sustainable development goals. These policies and strategies diverge as countries differ in their institutional, developmental and biophysical conditions. It is thus possible to notice the existence of national sustainable development strategies with substantial differences both in coverage and structure. Some of these plans are more focused on environmental concerns, while others show a deep interest to the economic and social consequences related to sustainability. Still, other plans underpin a comprehensive understanding of the sustainability issues, also considering the transitional costs for public finance.

Sustainability strategies and their related actions and policies have also been promoted by local entities, particularly by municipalities. That kind of process shows a fundamental trend in the legal and political approaches of our era, where (big) cities have been attracting people and money, thus becoming the real center of attention for any kind of discussion on (the future of) economics and politics, and the legal implications as well.

Assuming that sustainability goals are primarily pursued by States’ activities and its local entities, the importance of public procurement law in achieving them has to be underlined. Several arguments may support this consideration, but it is here important to focus on three specific aspects of the issue. The first one concerns the relevance of public spending through public procurement so that directing it toward sustainability has on and by itself important practical effects. The second relates to the consequences that the strengthening of the demand side assumes for spurring sustainability also in the private sector. The third involves the fundamental

connection between sustainability and innovation and considers the prominent role of public procurement in supporting innovation policies.

Public procurement accounts for 12% of gross domestic product and represents 29% of total government expenditures on average across OECD countries. The amount of the economic resources involved expresses all the potential that public procurement has in supporting broader policy objectives, including the fostering of sustainability. It is thus easy to realize that if public authorities seek to achieve an appropriate balance between economic, social and environmental issues while they purchase goods, services and works, they will secure relevant progresses in the obtainment of the (UN) sustainability targets. This is the reason why worldwide many procurement rules and regulations provide appropriate legal frameworks for fostering sustainability, sometimes in a way apt to nudge the use of the discretionary powers by the public administration and other times even in a mandatory form.

Stimulating sustainability from the demand side through public procurement may also have significant effects on the economic strategies of firms or even on their organizational structures. Public demand-side policies stimulate firms to produce goods, do research activities and enter markets they otherwise would not. Indeed, as widely exposed in the economic literature the role of “demand-side policies” has been receiving growing attention, and the strategic use of public procurement is seen as means for achieving government policy goals, including the ones related to the sustainable development (goals). Thus, an adequately oriented use of public procurement to boost sustainability is closely connected to a government’s power to shape and create market conditions for pursuing specific public policies. Besides, firms that operate both in public and private markets and are forced to switch towards sustainability requirements for dealing with the public sector will generally modify the way they operate in an enduring and structural form, for example with regards to the social rights of their employees.

Sustainability is relevantly intertwined with innovation. The latter itself is among the goals of the 2030 Global Agenda Resolution, where it is indeed considered as infrastructure. However, many if not every one of that goals needs innovative solutions, which is of particular evidence for what concerns health, clean water, affordable energy, climate change, recycling of waste and life within the cities. Public procurement plays a crucial role in the development of innovation. As previously stated, public procurement is not anymore just a mean to procure goods and services for the public sector, but it is also used as a strategic tool to support other governmental policy goals. This is of particular importance in the case of innovation since public procurement offers high market volumes and thus may influence the

behavior of firms, attracted by a strong(er) demand. Furthermore, once that an innovative product is developed and created by the stimulus of the public sector it may also emerge in private markets, thus favoring the spur of innovation and the (economical) processes themselves by which it is fed.

Even if a State maintains several means by which supporting sustainability, including command and control policies, tax incentives, State aids, it may be finally affirmed that the strategic use of public procurement is of fundamental relevance in this field, since at the same time it is apt to stimulate, support and develop sustainable goods, services and processes both in the public and the private sphere.

### **3. Fostering Sustainability through Public Procurement: The Impact of Global Regulation and the Practice of States.**

Many countries have procurement laws suitable to promote the obtainment of sustainability goals. This also occurs at the supranational level, where sustainability issues for procurement law emerge in the union of State entities and regional trade agreements.

All these regulations are of fundamental importance since the domestic level of enforcement plays a crucial role in pursuing sustainability goals. Yet it appears appropriate to evaluate how the global regulation on public procurement may facilitate or eventually impair the fulfillment of the sustainability targets. Indeed, it is important to consider the relevance of the global law in its entirety for properly defining the role of the domestic level in shaping the path of sustainability also in its transnational effects.

The regulation of government procurement within international trade is truly complex. Under the WTO framework, the General Procurement Agreement (GPA) has prominent relevance because it specifically deals with the issue. However, while the effectiveness of the GPA is limited in membership, scope and coverage, in the field of procurement there is still room for, albeit (probably) residual, application of the General Agreement on Tariffs in Trade (GATT), the General Agreement Trade in Services (GATS), and the Agreement Subsidies and Countervail Measures (ASCM).

Concentrating the analysis on the coverage of the GPA, which involves 48 parties and it is considered to have opened up to international competition a value of procurement estimated at US\$ 1,7 trillion, the liberalization of government procurement markets (among its signatory parties) by eliminating discrimination against suppliers based on their nationality and by ensuring transparency in tendering procedures emerges as its main object. The revised version of the GPA

entered into force in April 2014 partially diverges from its initial characterization as an essential competition trade agreement. Indeed, the same GPA now expressly includes among its contents the permission of measures that can be justified to protect specific public policy objectives, with a general consideration of the legality of (nondiscriminatory) secondary policy making in the area of government procurement.

Article IV of the GPA sets out the fundamental principles to ensure transparency and competitiveness in the tender process, including the national treatment and most-favored-nation requirements, so that a State party of the agreement has to provide unconditionally to the firms of the other signatory party treatment no less favorable than that accorded to its domestic firms. Yet the GPA also provides general exceptions to the agreement's obligation under article III, where it is affirmed that to the extent they are applied in a manner that does not constitute a means of arbitrary or unjustifiable discrimination between States' party, nothing of the GPA itself should prevent any Party from imposing or enforcing measures necessary to protect sensible interests, human, animal or plant life and health included. Coherently, similar provisions appear with respect to the qualification of suppliers and evaluation criteria, for which article X of the GPA respectively permits the procuring entities to adopt or apply in the tender technical specifications to promote the conservation of natural resources or protect the environment, and to utilize for the awarding process procurement criteria that may include, among the others, quality and environmental characteristics.

Some of the fundamental aspects of the sustainability concept are thus taken into explicit consideration within the GPA, and their protection may represent a valid and effective justification for States to loosen considerations of competition policy. Also, the final provisions of the Agreement, stated in the article XXII, announce further work for the treatment of sustainable procurement, and it is then probable to see an enlargement of the provisions of the GPA in this field in a next future.

In this respect, the actual formulation of the Agreement substantially refers to the environmental aspects of sustainability, and it could be argued if the GPA may be interpreted in a sense apt to give relevance to the social aspects of sustainability as well. The answer to that question should be affirmative for at least three reasons. First of all, nothing in the wording of the GPA contradicts the potential relevance of social interests, which cannot be considered as irrelevant just because they are not mentioned in it. Furthermore, the interpretation which excludes the social interests is at odds with the existence of laws, regulations and even treaties where they acquire important relevance (also) in the field of public procurement, as it is for the case of



the European Union. Besides, the same existence of the 2030 Global Agenda Resolution forces the interpretation of the WTO rules within the current framework of international law, thus compelling the consideration for the social interests when public procurement and sustainability issues come into relevance

Therefore, as long as the practice of States is consistent with the basic principles of the GPA, mainly nondiscrimination and transparency, there is still room to freely pursue sustainability goals, both in their environmental and social aspects. Since the UN resolution does not give any specific indication on how to proceed in doing that, the real problem which emerges is the appropriate identification of what States can practically do without acting in a discriminatory way when they procure goods, services, and works (in an affirmed sustainable way). Indicators and data are one of the most powerful tools for better-performing government secondary interests without compromising the necessity of nondiscriminatory policies, since from collecting and analyzing data standards levels progressively emerge, which are apt to encourage best practices that if not respected may signal incongruences or the presence of inappropriate barriers. The practice of several States may then cause the emergence of global standards so that the interaction between “local” and “global” comes out in a very fresh way.

Conclusively, States are still free to pursue sustainability in the way they prefer, but the convergence on the limits of this freedom may (progressively) reshape the activities of States, local entities and their public administrations. This process is quite interesting since it provides a (theoretical) construction of the public interests related to sustainability in dynamic way, where indeed the proper identification of the discrimination level within the procurement processes is just one aspect of the specific transnational relevance of the choices made by the States or their local entities in the field of procurement law.

#### **4. The Universality of Sustainability and the Transnational Effects of Local Choices.**

Having stated the fundamental relevance of the local choices in fostering sustainability, particularly yet not exclusively in the field of public procurement, a deep reflection on their global effects, which the sustainability issue exposes in a very peculiar perspective, is also needed. The universality of sustainability should suggest reframing part of the legal analysis on the relationship between domestic and global law, with a specific impact on the Administrative Law.

The concept and the extension of International Law have been disputed in the last decades, and has prompted consideration theories apt to promote the relevance of

non-State actors in this field. There are also theories that have developed the concept of Global Law to comprehensively identify the set of international norms of a (newly) recognized global community, then in a way apt to override and include the concept of International Law. In some cases, and with quite a bit of variation the notion of Global Administrative Law, has been used to identify and then regulate any (effective) exercise of power(s) at the global level.

All of these attempts are remarkable since they try to bring fresh theoretical support for new (globally) emerging issues concerning the evolution of the global community. Yet the debate over the achievements of these field of studies is still open, and sometimes it even relates to their consistency, for example - with regard to Global Administrative Law - on the need of a preliminary definition of the idea of Administrative Law on which to build the global one. Truly the former idea of a revised concept of the International Law, capable of orderly identifying the impact of the global regulation upon national law in a policy-oriented perspective, could still result useful for the purpose to grasp how domestic States' actions may positively offer some support for the (solution of) the global issues.

Indeed, despite the theoretical divergences, many of the emerging theories on global law aim to shape types of uniform regulation. Albeit that purpose is often desirable, this is not the unique, and sometimes certainly not the preferable, path by which to face all the global issues. There are cases where diversities in methods and contents may more effectively address problems of global relevance, at the same time expressing a more democratic approach favored by the pluralistic dimension originated by the diverse domestic actions. The (global) sustainability issue exposes that kind of model, and it is then important to describe the main legal consequences which may be inferred from that path.

Sustainability is a question characterized by the universality by its same nature. Indeed, many of the problems related to sustainability, especially the ones connected with environmental issues, can hardly be faced just at the domestic level, since the absence of a global commitment may hamper or even impede the achievement of effective results. Let us think about matters like climate change, clean water, and desertification, which are intertwined among themselves and necessarily require coherent answers worldwide. Yet universality does not mean uniformity, and it is still possible to figure out a global commitment considering effective, although eventually different, autonomous remedies by States, regional entities and local autonomies. This could be very successful faced with problems that still do not find certain solutions, where preserving the democratic shape by the freedom of the

domestic choices may help in finding the more appropriate solutions among different alternatives.

Once described the legal pluralism as one of the possible (and optimal) perspective for the global law, it is needed to state the specific implications that it brings in the field of sustainability, particularly for the Public and the Administrative law.

First of all, it is worth noticing the enlargement of the notion of public interest, which now certainly includes non-exclusively domestic interests, but instead also interests of global relevance. When acting or contracting, States or local entities are still taking into consideration domestic interests, and thus pursuing the desires and needs of their population. Yet sustainability also implies, directly or indirectly, the evaluation of supranational interests for their action to be really effective. All of that may seem obvious, but there are always measures within the evaluation and practical consequences that may eventually favor the obtainment of the sustainability goals but allocate the practical “side effects” away from the territory. Could this eventually affect the legitimate exercise of the discretionary power of the public administration? Could the domestic jurisdiction challenge contracts, action, and acts of the public administration if that occurs? For instance, in the field of public procurement a public administration could procure a quite perfect waste system, and yet as a consequence it could determine negative side effects abroad since some of the waste will be transported there. That kind of decision is probably a “sustainable” one for the domestic level, but it is certainly not if there were a proper understanding of the legal relevance of the sustainability concept, which in the case at hand should instead force the public administration toward a totally recyclable waste systems or toward a system which drastically reduces the production of waste.

Secondly, still in the presence of the domestic actions, the global level may support the same domestic authorities in effectively pursuing sustainability goals. The UN resolution on sustainable development fosters the path of sustainability choices when other choices of different nature are potentially available. In addition, at the global level there are places where support and capacity-building is provided for the goals and their related thematic issues (Division for Sustainable Development Goals [DSDG] in the United Nations Department of Economic and Social Affairs (UNDESA), acquired data (United System SDGs Action Database) and set global indicators to monitor and evaluate the progresses made towards achieving the overall goals and specific objectives (Inter-Agency and Expert Group on SDG Indicators [IAEG-SDGS] established by the UN Statistical Commission). In particular, setting up a way to measure the effectiveness of the policies on sustainability, such as

objectively evaluate the signs of progress made, may further facilitate horizontal accountability between governments by fostering cooperation for addressing the sustainability targets.

While considering how the international legal relevance of the sustainability issue affects all the domestic actions in this field, the final consideration of the last point paves the way for another fundamental consideration, which regards the potentially expansive characteristics that solutions found by States and local entities may gain in fostering sustainability (globally). Although there is no uniformity of the local measures utilized to face sustainability, it may be possibly needed to duplicate what States and/or local entities have done, for example when a particular solution proves to be very successful or promises good results.

Interesting to say, this is what the last of the goals of the 2030 Global Agenda Resolution (17) figures out when it signals the importance to revitalize the global partnership for sustainable development, considering that a successful sustainable development agenda requires a partnership between governments, the private sector and civil society. Indeed, as furtherly specified within the targets, it is envisaged an enhancement of policy coherence for sustainable development and yet there is a fundamental respect for each country's policy and leadership to establish and implement policies for sustainable development.

The sustainability issue then exposes the real and effective substance of the legal pluralism, a more democratic and systemic consistency for better achieving sustainable development on earth.

## **5. Sustainability and States' Legislative and Administrative Decision-making.**

The essential relevance of the domestic level in planning and enforcing sustainability policies is also important for the tools it offers in pursuing sustainability goals.

The same United Nations resolution on sustainable development emphasizes the necessity of providing partnerships between governments, the private sector and civil society for a successful sustainable development agenda. The dialogue between public and private is apt to bring new ideas and resources, and it is in itself a path for downsizing public power in the sustainability field. The necessity of new solutions for stressing problems suggests shared actions, where both the public and the private move in the same direction.

While the exercise of authority is generally marginalized, means as public procurement show all their importance since they tend to research solutions starting with what the market could offer. Procurement is then a useful and comprehensive path by which to foster sustainability.

Yet the issues of the authoritative State and the exercise of power(s) are still relevant and may characterize some of the actions needed to fulfill sustainability goals. Some governments monitor their citizen closely to make sure that individuals will not do anything in contrast to the needs of the highest living and sustainable standards. Let us think, for instance, to limits on car movement to keep under control traffic and its consequences, or even controls on households as those related to excessive consumption of water in connection to a flushed toilet.

Here, of course, laid down cultural options and truly basic political choices need to be considered as conditions that show a bargain between individual freedom and better living conditions.

Indeed, here the model of the States' authority in the realm of sustainability is also at stake, and not every population will give up all or part of their essentially basic freedoms easily.

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