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Institutional Entrepreneurship and the Forgotten Origins of Investment Treaty Arbitration

Taylor St John

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Taylor St John[1]

Postdoctoral Research Fellow, University of Oxford

Abstract

Advance consent clauses are the crux of modern bilateral investment treaties. By giving investors direct access to arbitration against states, they make the substantive promises of the treaties credible. They are responsible for the exponential increase in the number of investor-state arbitrations. Despite the importance of advance consent clauses, fundamental international political economy questions about their origins and development remain unanswered. This paper probes why advance consent clauses were created and how they disseminated.

On the basis of new archival material, I argue institutional entrepreneurship played a vital and underappreciated role in the spread of advance consent. I systematically compare the explanatory power of institutional entrepreneurship with the explanatory power of state leadership, an approach informed by existing rational choice scholarship on these clauses, across three stages in the development and spread of advance consent. Although institutional entrepreneurship and state leadership both have explanatory power, institutional entrepreneurship is dominant: states inserted these advance consent clauses only after an IO drafted and disseminated them aggressively. The organization's top officials acted as institutional entrepreneurs—attempting to shape state preferences, acting as a knowledge-broker, and encouraging convergence—in order to ensure the survival of their organization. Studying the initial spread of advance consent clauses offers powerful insights into the development of the international investment regime and suggests scholars look beyond bilateral bargaining to understand its contours.

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[1] Postdoctoral Research Fellow, Global Economic Governance Programme, University of Oxford.
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Introduction

Over two-thirds of international organizations (IOs) emerge from within existing international organizations (Shanks, Jacobsen, Kaplan 1996; Johnson and Urpelainen 2014). Yet most scholarship on the design and development of IOs focuses on states as the primary actor in their creation (Keohane 1984; Gruber 2000; Koremenos, Lipson, and Snidal 2001; Jupille, Mattli, and Snidal 2013). This leaves the literature with a relatively shallow understanding of existing organizations as actors in the design of new organizations, and particularly little conceptualization of how they might shape less formal international institutions, defined as sets of rules meant to govern international behaviour (Simmons and Martins 2002: 194). How can institutional entrepreneurs—bureaucrats within existing organizations—shape the design and development of international institutions?

Historical institutionalism provides conceptual tools for understanding the ability of entrepreneurs to shape institutions and for understanding gradual institutional development more generally (Schickler 2001; Sheingate 2003; Fioretos, Falleti, and Sheingate forthcoming). I draw on this literature to elaborate three mechanisms through which institutional entrepreneurs can shape outcomes: by shaping state preferences, acting as a knowledge-broker, and encouraging convergence. I suggest conditions under which institutional entrepreneurs are more likely to be successful: as distributional conflict increases, as issues become increasingly technical, and as institutional complexity increases, which makes it more likely that reforms can be “layered” in to existing structures.

The concept of institutional entrepreneurship brings theoretical attention to processes of incremental institutional development and to the agency of international organizations, two issues that are under-theorized in rational choice institutionalism. In this paper, institutional entrepreneurship is applied to an issue that so far has been explained by rational choice approaches: the decision of bilateral investment treaty partners (states) to delegate dispute resolution to an external actor (an IO). Several existing studies argue states chose to delegate dispute resolution in order to overcome commitment and enforcement problems (Guzman 1998; Elkins, Guzman, and Simmons 2006; Buthe and Milner 2008; 2014; Allee and Peinhardt 2010; 2014; Simmons 2014). In these studies, the focus is exclusively on bilateral bargaining between the two states, and the current universe of treaties. However, by taking a longer-term approach and looking at the rise of these provisions historically, the logic of state leadership—that is, states choosing to delegate in order to overcome commitment and enforcement problems—becomes weaker. In fact, these provisions were not even states’ idea; they were created and propelled by an IO.

States inserted these dispute resolution provisions only after an IO drafted and disseminated these provisions aggressively. The organization’s top officials acted as institutional entrepreneurs—attempting to shape state preferences, acting as a knowledge-broker, and encouraging convergence—in order to ensure the survival of their organization. The provisions delegate dispute resolution to the organizations own arbitration services, thereby providing it with a steady stream of arbitration cases. Furthermore, state actions display strong path dependence: once negotiators accepted the idea of provisions delegating dispute resolution, they inserted them widely, even when they were not looking to solve commitment or enforcement problems.

The paper proceeds in five sections. The next section develops the concept of institutional entrepreneurship as it appears in historical institutionalism, and draws out three observable

propositions from it for the investment regime. The second section examines the insights of rational choice institutionalism and how these insights have shaped existing explanations for dispute resolution provisions in investment treaties, concluding with three observable propositions. The third section describes the outcome, delegated dispute resolution provisions, and places this outcome within the literature on legalization. The fourth section addresses issues of case selection and methodology. The fifth section presents the rise of delegated dispute resolution in three stages: creating the framework, drafting the provisions, and integrating the provisions into treaties. In each stage, new archival evidence from the period 1961-1981 is used to adjudicate between the institutional entrepreneurship and state leadership. Institutional entrepreneurship propositions perform strongly in all three stages, yet the explanatory strength of rationalist state leadership propositions is also substantial in one stage and moderate in another. Ultimately it is the interplay of the two that explains the rise of delegated dispute resolution in investment treaties.

I. Institutional Entrepreneurship Within a Context of Gradual Institutional Development

The concept of entrepreneur has existed in political science for many decades (Dahl 1961) but its theoretical development has been splintered across a range of subfields. One strand emphasized bureaucratic or policy entrepreneurship (Kingdon 1984; Schneider and Teske 1992; Stone-Sweet, Fligstein, and Sandholtz 2001; Mintrom and Norman 2009) while another referred to a similar concept as political entrepreneurship (Checkel 1997; Carpenter 2001; Sheingate 2003; 2007; Crowe 2007). Since my focus is the creation and development of institutions, I refer to the concept as institutional entrepreneurs. I follow Sheingate's (2003: 188) definition of entrepreneurs as "creative, resourceful, and opportunistic leaders whose skilful manipulation of politics somehow results in the creation of a new policy or bureaucratic agency, creates a new institution, or transforms an existing one."[2] These actors are strategic, self-interested, and goal-oriented.

In international relations (IR), entrepreneurship has primarily been applied to the effect of individual supranational bureaucrats on the outcomes of multilateral negotiations (Sandholtz and Zysman 1989; Cox 1996). Moravcsik (1999: 270) argues these studies present interesting descriptions, but offer little in the way of testable hypotheses, and finds that once alternatives are posited and tested, entrepreneurship provides no explanatory power for the outcomes of formal multilateral negotiations between European Community states. Yet, as Moravcsik (1999: 300) acknowledges, grand bargains between European Community members "may not be representative of all multilateral negotiations"—these negotiations between high-capacity states with close ties present fewer opportunities for entrepreneurship than global negotiations. Entrepreneurial roles that Moravscik found negligible in the European context may be vital in a global context (Blavoukos and Bourantonis 2011). For instance, supranational entrepreneurs' ability to act as "honest broker" or impartial mediator was not important between European states (Moravcsik 1999), yet might have been crucial in the context examined here, which was characterized by antagonism between investment-exporting and investment-importing states over investment protection.

The role entrepreneurs can play in shaping new IOs or institutions is likely to be particularly important when the new arrangements are created from within existing organizations. Johnson (2013: 183) demonstrates that the involvement of international bureaucrats in the design stage of IOs matters, finding that bureaucrats are often proactive and do not wait for instructions from states. She finds systematic evidence across 180 organizations that the more proactive the design activities of international bureaucrats, the more insulated the resulting institution will be from mechanisms of state control, like veto power. Johnson suggests these bureaucrats are aided by their technical expertise, their high stake in the design of organizations with which they will work, and their willingness to camouflage their design activities. Johnson (2013) and Johnson and Urpelainen (2014) look at these dynamics cross-sectionally; the actual operation of the causal mechanism over time goes

[2] Like many definitions of political or policy entrepreneurship, this one builds on Schumpter's conception of entrepreneurship as the introduction of something new. When applying this conception to complex institutional environments, Kingdon (1984: 191) observed that political innovation is more recombination of old elements than fresh invention, and that entrepreneurs' key innovation was "hook[ing] solutions to problems, proposals to political momentum, and political events to policy problems."

underspecified and unobserved. In the next sub-sections, I specify in detail mechanisms through which entrepreneurs impact institutional outcomes over time.

Shaping State Preferences

As part of their role supplying information and interpretations to states, institutional entrepreneurs may alter the preferences of states (Hall 1986: 233). Historical institutionalist scholars place great importance on theorizing the origins of preferences, arguing that individual preferences are not given and constant but may be endogenous to historical processes that distribute resources and structure power through institutions (Fioretos, Falleti, and Sheingate forthcoming). This attention to preference formation is a core difference between rational choice institutionalism and historical institutionalism (Thelen and Steinmo 1992: 9). In the current case, this argument about preference formation leads to the first Institutional Entrepreneurship proposition:

> *The IO helped construct states' preference for delegated dispute resolution clauses. These preferences are endogenous to the process of designing international institutions for investment.*

Acting as a Knowledge Broker

Institutional entrepreneurs are skilled knowledge brokers. This characteristic has two components: brokering—defined as the ability to construct coalitions or work skilfully around disagreements—and knowledge—defined as technical expertise.

Brokering is central to institutional change across many contexts. Successful entrepreneurs often act as "common carriers" for multiple interests (Schickler 2001). These individuals "advocate their proposals…but they also act as brokers, negotiating among people and making the critical couplings" (Kingdon 1984: 192). They have connections to relevant political actors, which positions them to be effective institutional entrepreneurs (Checkel 1997; Pierson 2004). Brokering was vital for the creation of European supranational agencies (Stone-Sweet, Fligstein, and Sandholtz 2001) and in increasing the autonomy of US government agencies (Carpenter 2001; Sheingate 2003) and judiciary (Crowe 2007). It is often an entrepreneur's ability to marry expertise and political acumen that determines their success (Gutierrez 2010).

Knowledge is an important tool in the arsenal of institutional entrepreneurs. In a concrete sense, constant involvement with specific proposals affords these international officials greater technical knowledge and skill at "inventing institutional options" (Young 1989: 281). Technical expertise can also be used to command deference from other actors. States are more likely to defer to an international organization they perceive as having superior technical resources, and while some states are not in a position to ignore advice from organizations like the World Bank, many others view the organization as a teacher (Finnemore 1993) and are unable to ignore what the World Bank has defined as "best practice" for national economies (Barnett and Finnemore 2004: 7). Furthermore, technical assistance, which is the main programmatic activity for some international organizations, reinforces the conception of the organization as teacher and may raise the profile of certain issues or reinforce particular conceptions of them (Chayes and Chayes 1995: 197). Institutional entrepreneurs within existing IOs are able to couple their expertise to claims of

"neutrality" and a technocratic decision-making style that denies a political motive (Barnett 2005: 113). Expertise gives these individuals a very real power: Johnson and Urpelainen (2014) demonstrate that a positive association exists between states' need for expertise and the depth of bureaucratic discretion in the design process—regardless of whether bureaucrats' design preferences mirror those of states. In the current case, the characterization of entrepreneurs as knowledge brokers leads to the second Institutional Entrepreneurship proposition:

> *The IO acts as a knowledge broker. In the context of delegated dispute resolution, this means undertaking technical drafting and then utilizing connections to disseminate the proposed provisions widely.*

Gradual, Path Dependent Development

Institutional entrepreneurs often work within processes of gradual institutional change. They usually proceed through gradual mechanisms like layering, in which some elements of a given set of institutions are renegotiated while others are left in place (Thelen 2004: 224). Unlike economic entrepreneurs, political entrepreneurs are often constrained by the need to fit existing conventions and work within given structures. Institutional complexity may provide a particularly rich environment for entrepreneurs, who can exploit the ambiguity of institutions through creative action and innovation (Sheingate 2003).

Processes of gradual institutional development are often characterized by path dependence. Institutions are persistent, which means that once a practice, rule, or an organization has been accepted by states, it is likely to stick. Jupille, Mattli, and Snidal (2013: 215) emphasize the power of the institutional status quo, and argue, "institutional choice is not frictionless but protracted; and it is not independent of prior choices but deeply embedded in institutional legacies." This means that actions and decisions taken in earlier stages of institutional development matter more than those taken later; if actors make adaptations and commitments to institutions, then institutional equilibria may deepen over time, or, alternately, the cumulative effect of prolonged periods of gradual change can have transformative effects on institutions (Farrell and Newman 2010; Fioretos, Falleti, and Sheingate forthcoming). The historical institutional literature is criticized for this "inconstant effect of temporality" (Drezner 2010; Jupille, Mattli, Snidal 2013). In this paper, I stake out a clear position, arguing, as Mahoney and Thelen (2010) argue, that the imperfect reproduction of rules and behaviour can yield a continuous process of incremental change. Subtle changes and layering by entrepreneurs can gradually transform an institution.[3] Thelen (2004) points out part of the problem is poorly defined agency during periods of institutional stasis. In the current case, specifying the role of institutional entrepreneurs and their possible contribution to gradual institutional change leads to the third Institutional Entrepreneurship proposition:

> *While the IO encourages delegated dispute resolution universally, recommending states "layer" them into investment treaties. States' adoption of advance consent initially conditional on their negotiators' exposure to the IO Secretariat and subsequently path dependent.*

[3] While outside the temporal scope of this paper, in the decades after 1980, it has become clear that the acceptance of delegated dispute resolution by states radically reshaped the investment regime, consistent with this perspective.

II. State Leadership in a Context of Rationally Designed Dispute Resolution Provisions

Theories of rational choice have long provided insight into the design of international institutions. At the core of these approaches is a focus on the cooperation problem faced by states; the nature of this problem explains institutional design (Koremenos, Lipson, and Snidal 2001). These approaches assume that states will be the primary agents overcoming the cooperation problem—states will figure out the provisions necessary for an efficient solution. When that cooperation problem is absent, states will not use the provisions (Koremenos 2007; Koremenos and Betz 2013).

The inclusion of dispute resolution provisions is an aspect of institutional design that has commanded substantial attention from scholars adopting this approach (McCall Smith 2000; Rosendorff 2005; Koremenos 2007). Delegating any kind of decision-making power, including dispute resolution, comes at a significant sovereignty cost (Abbott and Snidal 2000: 436) and is therefore inherently puzzling. Yet states may have a rational reason for constraining their sovereignty if it helps them to overcome specific cooperation problems (Abbott et al 2000; Goldstein et al 2000; Koremenos 2007).

Exogenous Preferences

Strong exogenous preferences are fundamental to rational institutionalist explanations for investment treaties. Investment-exporting states are assumed to have strong, stable preferences for delegating dispute resolution to an external actor in their investment treaties. Although the best-known article setting out rational institutional design conjectures does not differentiate states based on power (Koremenos, Lipson, and Snidal 2001), most of the investment treaty literature does, recognizing that these treaties result from bilateral negotiations between states with fundamentally different positions and aims.

Material power has a clear manifestation in bilateral investment negotiations: in the period examined here, one state was primarily an investment exporter (often a former colonizer) and the other an investment importer (often a former colony).[4] Early work on bilateral investment treaties, like Guzman (1998) and Elkins, Guzman, and Simmons' (2006) seminal article, focused on capital-importing states, arguing these states initiated negotiations because it could be assumed that treaties delivered investment and that these states were competing against each other for investment. However, even in these accounts, treaty design was still determined by capital-exporting states: "host [investment-importing] countries are 'price-takers' with respect to the terms of these treaties" (Elkins, Guzman, and Simmons 2006: 822).

Investment-exporting states during this period did not consider the possibility that they would be a respondent in a dispute; therefore delegating dispute resolution entailed little sacrifice of sovereignty for them. Delegating dispute resolution could be considered useful because it

[4] It is important to keep in mind that there were a dozen states (at most) that perceived themselves as investment exporters during the 1960s. Then, as now, not all members of the OECD were substantial exporters of investment. The term investment exporters here refers to a handful of states, the same powerful European and American states that Oscar Schacter (1996: 536) had in mind when he observed: "As a historical fact, the great body of customary international law was made by remarkably few states."

helped them overcome an enforcement problem—it would help their investors get redress from recalcitrant investment-importing states. Therefore, it is reasonable to expect that, all else equal, the investment-exporting state will have a stable preference for delegated dispute resolution during the period under study. This is consistent with existing explanations. Exogenous preferences are at the heart of Allee and Peinhardt's explanation of dispute resolution provisions in contemporary investment treaties. They observe:

> "In terms of preferences, all else equal, home-state governments will prefer BITs to include multiple, strong options for enforcing the treaties…The best way to do this is to include in the treaty elements such as preconsent clauses, multiple options for enforcement, and the ability to utilize institutionalized arbitration venues." (Allee and Peinhardt 2014: 62-63)[5]

Applied to the current case, this line of inquiry leads to the first State Leadership Proposition:

> *Investment-exporting states have strong exogenous preferences for advance consent clauses (provisions that delegate dispute resolution to an external arbitration organization).*

Drafting to Overcome Specific Cooperation Problems

Commitment problems and enforcement problems are often considered the central cooperation problems in investment governance. The difference between them is that enforcement problems suggest a current defection would be optimal for one or both states, while commitment problems suggest that sometime in the future defection might become optimal for one or both states (Koremenos and Betz 2013). For investment-importing states negotiating an investment treaty, the primary cooperation problem is commitment.

Many scholars have conceptualized of investment treaties as tools that help investment-importing governments overcome the commitment problem through "hands-tying" (Guzman 1998; Elkins, Simmons, Guzman 2006; Tobin and Rose-Ackerman 2011; Buthe and Milner 2008; 2014; Simmons 2014). Dispute resolution provisions make the hands-tying credible: in this sense, dispute resolution provisions are the most important clause in the treaty. Dispute resolution provisions are useful for overcoming commitment problems when they delegate to a third party. For instance, if a new leader comes to power on a platform of large-scale nationalization, the possible costs imposed by an external arbitration body could be sufficient to change the leader's payoffs in a way that discourages nationalization. We expect states to draft these clauses when commitment problems are especially severe, perhaps after a recent expropriation or breakdown in bilateral relations. Applied to the current case, this argument about cooperation problems leads to the second State Leadership proposition:

> *States draft advance consent clauses in order to overcome cooperation problems – in particular, domestic commitment problems.*

[5] They find real-world evidence of these preferences in the model BITs of OECD countries, which "reveal their preferences and serve as a template for treaty bargaining. These model treaties typically include advanced consent to arbitration and provide for arbitration through permanent arbitration institutions" (Allee and Peinhardt 2014: 63). They argue government preferences for delegated dispute resolution provisions (also known as "advance consent" clauses, since they provide advance consent to external arbitration bodies) are strong and stable.

Problem-Specific Adoption

Rational design approaches often focus on equilibrium outcomes to test conjectures, leading some to argue these approaches neglect the evolutionary processes leading to institutional outcomes (Duffield 2003: 414). However, recent scholarship suggests rational design can provide insight into the design process (Thompson 2010) and that principal-agent models can be used to conceptualize the institutional design process itself, not design outcomes (Johnson and Urpelainen 2014). There is scope for understanding many forms of evolution within the rational design framework, but always with the assumption that "institutional evolution still involves deliberate choices made in response to changing conditions" (Koremenos, Lipson, and Snidal 2001: 767). This is a key insight distinguishing state leadership from institutional entrepreneurship explanation.

The state leadership explanation expects that states will make a deliberate choice to delegate or not delegate in each particular treaty negotiation. Koremenos, summarizing her own earlier work, "argues that the inclusion of dispute settlement procedures in international agreements is a deliberate choice by governments, made to address specific cooperation problems. The implication is that international law is designed efficiently: dispute settlement procedures likely to be incorporated into agreements if, but only if, they are needed to solve specific problems" (Koremenos and Betz 2013: 371). In the current case, this argument about adoption leads to the third State Leadership proposition:

> *States approach each bilateral investment treaty as a new bargain, so we expect states to include clauses when they recognize particularly severe commitment problems—and leave them out when they do not perceive severe problems.*

III. The Outcome: Delegated Dispute Resolution Provision in Investment Treaties

In this paper, delegated dispute resolution is considered part of the process of institutional design. These provisions are the crux of investment treaties, because delegation to an external actor is what makes the substantive treaty commitments credible. Dispute resolution provisions replace diplomatic proceedings with judicial mechanisms, and are common in many areas of global politics (Helfer and Slaughter 1997; Keohane et al 2000; Zangl et al 2011). Institutionalized dispute resolution mechanisms are considered more legitimate and reliable (Zangl 2008), and their importance is underscored by the emphasis that states often put on their design (McCall Smith 2000). Importantly, these provisions should not be equated with compliance or norm internalization—these provisions are just an element in the written treaty. This makes them easy to measure: delegated dispute resolution either appears in treaty text or it does not.

The dynamics of delegation in investment are particularly interesting given the nature of cooperation in the investment regime. Whereas monetary cooperation was characterized by a formal IO and trade cooperation was characterized by repeated rounds of centralized multilateral negotiation, investment cooperation was characterized by uncoordinated, sporadic negotiation of bilateral treaties. In this sense, the post-war investment regime was a forerunner of today's decentralized monetary cooperation or increasingly plurilateral nature of contemporary trade cooperation.

What makes disparate investment treaties hang together is their dispute settlement provisions.[6] The dispute settlement provisions that have been particularly important provide foreign investors with the right to pursue arbitration against states directly—Simmons calls investors' procedural right to bring a case directly against a state "the most revolutionary aspect" of the post-war international investment regime (Simmons 2014: 17). As is to be expected of dispute resolution provisions that are transnational and not interstate (Keohane, Moravscik and Slaughter 2000), these provisions have led to an exponential increase in investor-state arbitration. In 2014, the number of known arbitrations surpassed 600 (UNCTAD 2014) and an individual award exceeded 50 billion dollars (*Yukos v Russia*). The type of dispute resolution provisions examined here provides a state's consent for an investor to bring a case in advance—hence they are sometimes referred to as advance consent clauses. Since the state provides consent in advance and not to the specific dispute, the initiation of arbitration cases can catch state officials by surprise (Poulsen and Aisbett 2013) and provoke outrage in civil society—as Goldstein and Martin (2000) cautioned, legalization may lead to domestic political difficulties.

The right of an investor to bring an arbitration case against a state is controversial and politically salient today—and has long been so. Arbitration between investors and states has old roots, but historically, arbitrations were arranged after a dispute had occurred; treaties and contracts did not contain arrangements for arbitration (Vandevelde 2010: 26; Pauwelyn 2014: 3). During the era of "gunboat diplomacy," gunboats were used to create the conditions in which a state would consent to arbitration. For instance, a home state (the US) might use force so that a host state (Mexico) would agree to set up a mixed claims commission, in

[6] Schill 2009 acknowledges dispute resolution is a crucial centripetal force, and also illustrates other textual similarities and clauses that contribute to the "multilateralization" of these investment rules.

which American investors could bring their claims directly against the Mexican government.[7] The contestation in episodes like these occurred as the capital-exporting state coerced the other state to arbitration.

Contestation would occur because then, as now, the host state government often had little reason to agree to arbitration. In the early 1960s, when the World Bank created a formal IO dedicated to arbitrating disputes between investors and states, the primary obstacle it faced was convincing capital-importing states—many of them former colonies or states with long histories of coercive investment protection—to agree to the idea. To overcome this political obstacle, the framers of the IO came up with a novel solution, the so-called double-consent system. The organization created by the World Bank, called the International Centre for Settlement of Investment Disputes (ICSID), has a founding Convention that requires states to consent in two places before a dispute can be registered against them (Report of the Executive Directors 1965; Schreuer 2009).[8] Ratifying the Convention provides the first consent, but no arbitration can be started without a second expression of consent.

Even if arbitration is not invoked (the vast majority of investment disputes are settled through negotiation), advance consent alters the parties negotiating positions dramatically. When they have direct access to arbitration, investors can use the threat of an arbitration case to induce cooperation or settlement from states.[9]

The IR literature on investment tends to focus on bilateral investment treaties (BITs), but these treaties are only one way in which the second consent can be provided. In practice, three types of instruments providing advance consent have come into force. The table below details how these different instruments delegate dispute resolution to ICSID. The scope of the rules increases as one reads down the table, moving from an individual contract to proposed multilateral agreements.

[7] Mexico and the US did in fact set up mixed claims commissions in 1839, 1848, 1868, and 1923. Brownlie 1979: 521.
[8] The jurisdiction of ICSID is a topic of immense legal scholarship, in part because of its unique double-consent requirement. Schreuer (2009) devotes 340 pages to ICSID's jurisdiction.
[9] Broches believed advance consent also discouraged capital-exporting states from getting involved in disputes, but other observers were less sanguine. O'Keefe (1980: 292) observed that for capital-exporting states, ICSID advance consent becomes "another weapon in the armoury for protection of foreign investment."

Table 1: How Advance Consents Operate in Different Types of Investment Agreements

Type of Investment Governance	How Advance Consent to ICSID Operates	Examples
Individual Investment Contracts	Consent to ICSID is written into individual contracts between investors and host states	Contracts are often private. For public discussions, see SGS v Pakistan, and SGS v Philippines
Domestic Law	Consent to ICSID is written into domestic legal frameworks on foreign investment	Albania's Foreign Investment Law of 1993, or Venezuela's Foreign Investment Law of 1999[10]
BITs	Consent to ICSID is written into bilateral investment agreements, signed between host states and home states	Thousands in force; for example Argentina-France BIT
Bilateral Free Trade Agreements, with Investment Chapters	Consent to ICSID is written into the investment chapter of a trade treaty	US-Chile Free Trade Agreement
Plurilateral Investment Agreements	Consent to ICSID is written into treaties negotiated at a regional level or for a specific issue area	NAFTA, Energy Charter Treaty
Multilateral Investment Agreements	Consent to ICSID is written into multilateral treaties negotiated at the global level	OECD MAI (not in force; negotiations discontinued in 1998)

Despite receiving the vast majority of scholarly attention, BITs have provided the basis for only 63% of ICSID's caseload to date. Domestic laws granting ICSID access have received little attention (Potestà 2011: 156-162), yet in many ways these are the most puzzling type of advance consent clause for IR scholars. Domestic law has provided the basis of consent of 8% of ICSID cases, investment contracts have provided the basis of consent for 19% of cases, and plurilateral agreements for nearly 10% of cases (ICSID 2014-1: 10).

In this paper, the outcome of interest is provisions that delegate dispute resolution to ICSID—regardless of the type of instrument in which they appear. Additionally, while dispute resolution provisions in contemporary investment treaties vary widely (Pohl, Mashigo, and Nohen 2012), the focus here is on provisions written before 1980, which exhibit far less variation.

[10] Potestà (2011: 156-162) provides more examples of domestic laws that provide consent to ICSID jurisdiction.

IV. Research Design

While most IR studies of dispute resolution provisions consider them in the aggregate, taking a sample or examining the entire population to identify and explain patterns, here I start from a different premise. The pattern has already been identified: the vast majority of contemporary investment treaties delegate dispute resolution to ICSID (Pohl, Mashigo, and Nohen 2012). I want to understand what gave rise to this pattern—to theorize and examine empirically the precise steps that led to this institutional arrangement. To grasp how " mechanisms play out over time, or the possibly self-reinforcing effects of institutions over extended periods… requires genuinely historical research. By genuinely historical research I mean work that carefully investigates processes unfolding over time" (Pierson 2004: 130).

Process tracing approaches are the most appropriate, given my outcome and time horizon; as Fioretos, Falleti, and Sheingate (forthcoming) observe, "for good reason, most historical institutional scholarship relies on archival research methods and empirically rich narratives to capture the temporal unfolding of institutional processes." A challenge faced by scholars using this approach to study IOs is equifinality, where multiple causal pathways may lead to the same outcome (Checkel 2014). Checkel argues that it is insufficient to carry out process tracing on one's preferred mechanism, suggesting that "a far better procedure is to outline process-tracing predications of a wide range of alternative explanations of a case in advance, and then to consider the actual evidence for and against each explanation." Here I have concentrated on specifying two explanations with precision: my own and the leading explanation for these provisions.

Table 2a: Comparing Causal Mechanisms

Primary Actor	Causal Mechanism	Outcome
World Bank	Institutional Entrepreneurship	Delegated Dispute Resolution
States	State Leadership	Delegated Dispute Resolution

In order for process tracing approaches to deliver rigorous findings, observable implications must be carefully specified, and a stepwise test of each part of a causal mechanism conducted (Beach and Pedersen 2013: 5). The strength of the method is its ability to identify intervening steps in the causal process (George and Bennett 2005: 206-7); to "peer into the box of causality to locate the intermediate factors" (Gerring 2007: 45). I have separated this process into three steps, which I term stages. In each stage, the two competing explanations provide different observable implications.

Table 2b: Observable Implications

Stage in the Process	Explanation	Observable Implication
Stage One: Creating the Framework	Institutional Entrepreneurship	*Endogenous Preferences.* ICSID helps construct states' preference for advance consent clauses.
	State Leadership	*Exogenous Preferences.* Capital-exporting states have strong exogenous preferences for advance consent clauses.
Stage Two: Drafting the Clauses	Institutional Entrepreneurship	*Acting as a Knowledge Broker.* ICSID undertakes technical drafting and utilizes its connections to disseminate the proposed clauses widely.
	State Leadership	*Independent Drafting to Overcome Specific Cooperation Problems.* States draft advance consent clauses in order to overcome cooperation problems – in particular, domestic commitment problems.
Stage Three: Integrating the Clauses into Treaties	Institutional Entrepreneurship	*Gradual, Path Dependent Development.* ICSID encourages states to layer these clauses into BITs. Initial adoption is conditional on negotiators' exposure to ICSID, subsequent use is path dependent.
	State Leadership	*Problem-Specific Adoption.* States approach each bilateral investment treaty as a new bargain, adding advance consent clauses only where the commitment problem is especially severe.

These observable implications are, to adopt Van Evera's (1997) terminology, unique—they do not overlap. They are also relatively "certain" in that if the evidence does not exist to bear out these expectations, then the explanation fails that stage of the empirical test.

Despite this systematic framing, any process tracing account of institutional change still has inherent limitations. While studies like this one are excellent at "identifying and highlighting particular pathways of institutional change" they are, by their very nature, unable to "tell us much about how common particular kinds of institutional change might be" (Pierson 2004: 140). Large-N work, like that done by Johnson (2013) and Johnson and Urpelainen (2014) demonstrates that entrepreneurial actions from individual international officials may be relatively common. The purpose of this paper is to develop a well-specified account of this process, which improving existing understandings of entrepreneurship and enabling other scholars to identify certain elements of the process that can be measured and aggregated.

Case studies of institutional entrepreneurship also have difficulty identifying features that facilitate, impede, or channel entrepreneurial activity. From a single case study, it is not possible to demonstrate that certain conditions are conducive to institutional entrepreneurship or its effectiveness. That said, I suggest that as distributional conflict, technicality, and institutional complexity increase, the scope for effective entrepreneurship may increase. These suggestions, particularly with regard to distributional conflict, run against the expectations of existing literature, and may open up new avenues for theorizing.

Case Selection and Data

Although dispute resolution provisions exist in many types of treaties, there are strong reasons for selecting those that relate to investment. First, the disaggregated nature of investment institutions mean that within a single case study there are hundreds of different observations—treaties, contracts, or laws which may or may not delegate dispute resolution. This disaggregation also makes investment loosely representative of a direction that governance seems to be travelling: a universe of bilateral or plurilateral treaties that refer disputes to a multilateral organization.

Secondly, the same institutions can be traced back several decades in investment; this relatively long trajectory is excellent for examining the presence (or absence) or mechanisms of gradual institutional development. I focus on the twenty-year period from 1961 to 1981 because the foundations of today's investment regime first appeared then. Institutional entrepreneurship expects the creation of these foundations to be led by IOs, and to be followed by path dependency. If path-setting moments are not led by IOs, then this perspective fails to have any explanatory power.

The dispersed nature of investment governance makes data collection more challenging. Information on pre-1980 ICSID is not readily available in an archive, and the key individuals are deceased. The material below was pieced together from several national archives, the World Bank's oral histories, the *travaux preperatoires* of the ICSID Convention, ICSID Annual Reports, UNCTAD publications, and scholarship or news items from contemporary observers. Taken together, it represents the most comprehensive information about pre-1980 ICSID in existence. This data collection effort unearthed substantial new empirical material, some of which has only recently become available.

V. The Narrative

The narrative below systematically evaluates the explanatory power of institutional entrepreneurship and state leadership on the basis of archival material. Table three summarizes the findings of the narrative. While state leadership matters weakly in the first step and moderately in the final step, institutional entrepreneurship performs strongly in all three steps.

Table 3: Comparing the Overall Explanatory Power

Step in the Process	Explanatory Power of State Leadership	Explanatory Power of Institutional Entrepreneurship
Creating the Framework	Weak	Strong
Drafting the Provisions	None	Strong
Integrating them into BITs	Moderate	Strong

Creating the Framework for Advance Consent

While the state leadership explanation expects capital-exporting states to create an investment institution that provides advance consent, while the institutional entrepreneurship explanation suggests a role for existing IOs in creating the institution and also in shaping state preferences toward advance consent. The following paragraphs show that states did attempt to agree a set of international rules on investment that included advance consent, but every interstate negotiation ended in a stalemate. The World Bank became involved, forged a more technocratic and ultimately more successful path, and made advance consent clauses feasible.

Several proposals for international investment rules were put forward by groups with close ties to the West German government during the 1950s and 1960s. At a 1957 conference held under the auspices of the United Nations (UN), German banker Hermann Abs put forward one such proposal. The draft convention included an international court for handling investment disputes and an international arbitration committee for determining compensation after expropriation (Miller 1959: 372–4). In 1962 a committee at the OECD co-led by Abs produced another draft convention, which, like the 1957 draft, contains an annex outlining machinery for resolving disputes between investors and host states (Schwarzenberger 1969: 123–134). Proposals for international investment rules were controversial, and divisions between states created stalemates at both the UN and the OECD. Expecting the UN and OECD initiatives to fail due to political divisions, the World Bank's General Counsel proposed ICSID—which would provide dispute resolution machinery without any substantive rules attached—in an internal memo to the Bank's Board in 1961. The proposal for ICSID attempted to circumvent the disagreements between states about investment protection. The text explicitly reassures capital-importing states that the double-consent requirement would protect their sovereignty. The proposal's emphasis on consent and sensitivity to sovereignty

concerns distinguished it (the result of intra-IO legal drafting) from the OECD Draft (the result of interstate bargaining).

During the creation of ICSID, a few investment-exporting state representatives made statements revealing a preference for advance consent, but no state took action to make advance consent a reality. In response to the World Bank's proposal, a German official suggested including advance consent in German investment treaties in 1962 ("Memo" SecM 62–68), but German treaties did not actually provide advance consent to ICSID for another 19 years. This is representative of the approach of many investment-exporting states; when the World Bank proposed it, they were in favour of the idea, but did not act in a way that suggests a strong exogenous preference.

Legal officials at the World Bank forged ICSID, and then the ICSID Secretariat[11] (consisting of many of the same individuals) had strong incentives to push for advance consent. ICSID faced a basic challenge during its first two decades: it needed business. No cases were brought to the ICSID Secretariat for nearly a decade after it was created in 1965. The investors and states that were expected to find ICSID useful did not know about the Secretariat's facilities. A 1976 survey of legal counsel in Fortune 1,000 firms—an audience likely to be aware of ICSID—reinforced the "dramatic lack of knowledge" about ICSID: only 15% of respondents were familiar with ICSID's services (Ryans and Baker 1976: 73). To address the lack of cases, the Secretariat began to publish information about itself and introduce its services to governments, issuing pamphlets, adding names to mailing lists, and travelling to advertise the Secretariat's services (First Annual Report [AR]: 4; Second AR: 4; Third AR: 1). Yet the Secretariat struggled to rouse demand for ICSID's services, and the organization's Ninth Annual Report still portrayed staff trying to "stimulate interest" in ICSID (Ninth AR: 3). One staff member recalled that in its first twenty years, ICSID was "begging for cases [but] cases didn't come" (Delaume Oral History [OH] 2004: 13).

Since ICSID did not have cases, it used the number of advance consents as its benchmark for success. It was announced in ICSID's first annual meeting that, "the success of the Centre is not to be judged by the amount of litigation it handles" ("Opening Remarks of George D Woods"). Instead, the Secretariat reported the number of new agreements that included advance consent to ICSID (Third AR: 3; Fourth AR: 5). In its first years, the ICSID Secretariat had an overriding interest in promoting advance consent clauses. Meanwhile states were ambivalent: although US and Germany were signing investment treaties during these years, they did not include advance consent clauses.

[11] The ICSID "Secretariat" is also referred to in this paper as "the Centre" reflecting the organization's own usage.

Table 4: Creating the Framework for Advance Consent: Theoretical Expectations and Reality

	Theoretical Perspective Expects	What Actually Occurred	Explanatory Power
Institutional Entrepreneurship	ICSID helps construct states' preference for advance consent clauses.	World Bank staff led the creation of a dispute settlement organization, with a structure that encourages the organization to promote advance consent.	Strong
State Leadership	Investment-exporting states have strong exogenous preferences for advance consent clauses.	Most states ambivalent. A few capital-exporting state officials make comments that suggest they care about advance consent, but state-led multilateral negotiations for investment rules all end in failure, and no state acts in a manner consistent with a strong preference for advance consent.	Weak

Drafting the Provisions for Advance Consent

While the state leadership explanation expects states to draft advance consent clauses, the institutional entrepreneurship explanation suggests ICSID will promote advance consent using its legal expertise and institutional credibility. The following paragraphs show that states played almost no role in the early advocacy of advance consent. During this step, ICSID led decisively. The ICSID Secretariat did so to ensure its survival as an organization.

ICSID had the technical expertise necessary to draft advance consent clauses and the access to governments necessary disseminate them effectively around the world, despite being tiny in financial and organizational terms. ICSID's first-year operating budget was $32,000 (Parra 2012: 128)[12] and had five staff members during its first twenty years: two lawyers, two administrative assistants, and a research assistant (Parra 2012: 127). The Secretariat's small size and material resources did not limit its influence, however. The World Bank Legal Department "loaned" expert staff to ICSID for free[13] and successive General Counsels viewed the Bank and the Secretariat's resources as interchangeable. The General Counsels themselves were automatically head of the Bank's Legal Department and ICSID's Secretary-General. Throughout the 1960s and 1970s, the Bank's General Counsel worked primarily on ICSID, due to an informal staffing arrangement. Broches, the Dutch-born General Counsel, was quietly sidelined when Robert McNamara became World Bank President. McNamara preferred to rely on Lester Nurick, the Bank's Associate General Counsel, who was an American with experience in the US government, like McNamara (Broches OH May 1984: 40–41; Delaume OH 2004: 12). This arrangement left Broches with

[12] By comparison, the International Development Association (IDA), another recently created arm of the World Bank, had an administrative budget over $3,350,000 in the same year. IDA 1966.
[13] The Bank paid almost all of ICSID's operating expenses during this period. Parra 2012: 128.

time, the Bank's credibility, and the Bank's legal experts at his disposal—technical resources and connections necessary for institutional entrepreneurship.

Without cases, the ICSID Secretariat had to find a purpose. It did so by turning to advisory activities and technical assistance. The Secretary-General repeatedly announced that ICSID "stood ready to act in an advisory capacity" ("Address by Aron Broches to the Sixth AM": 3). Within a year of its creation, ICSID began an ambitious project to categorize all the investment laws of the world ("Address by A. Broches to the Third AM"). This project put ICSID in an advisory role with capital-importing states. By 1981, 13 domestic laws gave advance consent to ICSID.[14]

When advance consent is enshrined in domestic law, it is a unilateral ceding of sovereignty. It is a peculiar decision for a government to take, particularly during the 1970s, a decade of high resource prices and New International Economic Order (NIEO) proposals. None of these states were engaged in negotiations with capital exporters at the time, nor was any overt World Bank loan conditionality used to pressure states. Clauses in domestic law do not solve a commitment problem: domestic law can be rewritten unilaterally or interpreted by local judges. It is only institutional entrepreneurship that can explain this action: capacity-constrained states sought technical assistance to attract investment, and ICSID was positioned to provide it.

ICSID also actively promoted advance consent in contracts and treaties, through the use of model clauses. The Centre released its first set of model clauses in 1968; a 27-page document that showed governments and investors how to consent (Second AR: 4; ICSID/5). The Secretariat suggested providing consent in advance, since arbitrations were more difficult to organize after a dispute had arisen (ICSID/5:3). The model clauses were an additional opportunity for the Centre to act in an advisory capacity. Broches saw advice about model clauses as straightforward technical assistance, well within the tradition of the Bank:

> At times the World Bank group is asked to provide technical advice or assistance to its member governments in preparing suitable legislation for the promotion and protection find investments. In relation to these the expertise of the Secretariat will be readily available to help formulate, if the government so desires, appropriate clauses for settlement of disputes. ("Address by Broches to the Second AR" Emphasis mine.)

This quote illustrates the ease with which Broches switched from being the Bank's General Counsel to being ICSID's Secretary-General. If the Bank were asked for assistance, ICSID would respond, relying on the Bank's legal expertise.

The model clauses were widely adopted in investment contracts. There was no official count, but enough contracts were furnished to the ICSID for Broches to feel the model clause effort had been successful. Building on the success of the first model clause document, in 1969 the ICSID Secretariat released a second model clause document, this time tailored to BITs (ICSID/6). At the time, BITs did not refer disputes to ICSID.[15] The initiative to draft advance consent clauses for BITs came from ICSID itself, not from capital-exporting states.

[14] Afghanistan, Benin, Congo (Brazzaville), Egypt, Ghana, Madagascar, Niger, Senegal, Sudan, Sri Lanka, Tunisia, Upper Volta, Zaire. Annex 4 "Provisions Relating to ICSID in National Investment Laws" Fifteenth AR: 28.

[15] There was one exception to this, the Netherlands-Indonesia BIT, discussed in the next section.

Table 5: Drafting the Provisions for Advance Consent: Theoretical Expectations and Reality

	Theoretical Perspective Expects	What Actually Occurred	Explanatory Power
Institutional Entrepreneurship	ICSID undertakes technical drafting and utilizes its connections to disseminate the proposed clauses widely.	ICSID promotes advance consent in domestic laws of capital-importing countries; ICSID drafts model advance consent clauses and then promotes them heavily.	Strong
State Leadership	States draft advance consent clauses in order to overcome cooperation problems – in particular, domestic commitment problems.	Capital-exporting states do nothing (until after they receive guidance from ICSID)	None

Integrating Advance Consent in BITs

The state leadership explanation expects capital-exporting states to approach each treaty as a new bargain, adding advance consent clauses only where the commitment problem is especially severe. The institutional entrepreneurship explanation expects ICSID to encourage states to layer these clauses into their BITs, and have initial adoption be conditional on negotiators' exposure to ICSID, while subsequent use is path dependent. The following paragraphs show that most states only adopted advance consent after persistent promotion by the ICSID Secretariat. Once adopted, however, negotiating behaviour of capital-exporting states shows strong path-dependency.

The ICSID Secretariat was instrumental in the early BIT movement. McNamara even implied that ICSID was created to facilitate investment treaties, when he argued: "The Centre, through its very existence, is helping to ease and accelerate the process of negotiating investment agreements and is thus already fulfilling the purpose for which it was so recently established" ("Opening Remarks, McNamara, Second AR"). McNamara's comment was echoed by other contemporary observers, like Ryans and Baker (1976), who viewed ICSID as an agent capable of facilitating agreements and influencing BIT provisions.

The ICSID Secretariat was well informed about, and possibly involved in, the first BIT to include advance consent, the Netherlands-Indonesia agreement of 1968. Both governments had close relationships with the Secretariat. Broches had begun his career in the Dutch government and personally reinforced the government's support for ICSID.[16] In 1968, Broches visited Indonesia and in that year the Indonesian government: (a) became one of the participants in ICSID's investment laws project, (b) signed and ratified the ICSID Convention, and (c) signed the BIT with the Netherlands.[17] Broches' institutional

[16] Broches had been a member of the Dutch delegation to Bretton Woods. The Dutch government was one of the few European governments to participate vigorously in the negotiation of the ICSID Convention, even inserting The Hague as a possible seat for proceedings.
[17] Interestingly, (and perhaps tellingly since this treaty was negotiated before the model clauses for BITs were released) the consent to ICSID contained in the Indonesia-Netherlands treaty is confused (Newcombe and Paradell 2009: 44–45).

entrepreneurship was enabled by structural factors. In the late 1960s, Indonesia was attempting to rebuild its reputation after large-scale nationalizations of (mostly Dutch) foreign property. That structural factor, as well as the distrust between the governments of Indonesia (former colony) and The Netherlands (colonizer) created an opportunity for an enterprising international official to promote his institutional innovation.

Other European states began incorporating advance consent, after the ICSID model clause document came out in 1969. In that year, advance consent appeared in the Italy–Chad treaty (Newcombe and Paradell 2009: 45–46; Potesta 2011: 753). In 1970, Belgium and Indonesia negotiated a treaty with a strong variant of an ICSID model clause. The Netherlands updated their practice after the model clause document was released and even added protocols with ICSID clauses to pre-existing treaties, like that with the Cote'd'Ivoire (1965). In 1972, the French representative at the ICSID Annual Meeting announced that his government's BITs now "provided for reference to ICSID—explicit reference to ICSID—in the event of disputes" (Sixth AR: 5). As the table below shows, all subsequent French BITs included access to ICSID.

The table below shows how many BITs negotiated by key capital-exporting states provided advance consent to ICSID in 1981. In that year there were already 67 BITs in force that provided advance consent to ICSID. At that time, ICSID was the only organization in the world monitoring the spread of advance consent clauses in BITs; the ICSID Secretariat provided a yearly list of all treaties that provided advance consent (Thirteenth AR: Annex 4). The data in the first column is drawn from ICSID Annual Reports of the period, while the data in the second column is drawn from UNCTAD. The figures have been corroborated with the original treaty text wherever possible.

Table 6: BITs with Advance Consent to ICSID as at June 30, 1981

Capital-Exporting State	BITs with ICSID Clauses	Total BITs
Belgium	6	8 (BITs with Tunisia and Morocco were negotiated before ICSID was in force)
France	17	20 (Not in treaties with Liberia, Malta, or the Philippines)
Germany	3	51 (In no treaties, except those with Israel, Ivory Coast, and Romania)
Italy	4	5 (Not in the treaty with Romania)
Netherlands	13	16 (Not in the treaties with Tanzania, Thailand, and Sudan)
Sweden	2	10 (In the treaties with Malaysia and Pakistan)
UK	11	14 (Not in the treaties with Thailand, Senegal, and Papua New Guinea)

Note: Switzerland had no BITs that referred to ICSID. The US had no BITs at all.

As European capital-exporting governments drafted their first model BITs during the 1960s and 1970s, they included advance consent to ICSID, in many instances replicating the language of ICSID's model clause documents. The ICSID Secretariat noted that an increasing number of texts reflected "the language of the model clauses" (Fifth AR: 4), but to other observers, the language of the model clauses became so ordinary that was soon forgotten the language had originated within the ICSID Secretariat. This is one reason why contemporary scholarship fails to identify ICSID as the source of the isomorphism in investment dispute resolution clauses.

ICSID's influence went beyond just drafting text: state negotiators sought (and cited) the approval of Broches and other officials when formulating national policy. For instance, the UK government drafted its first model treaty in 1972, which included only one option for dispute settlement: ICSID. Broches encouraged the UK government to include ICSID access, and Poulsen (forthcoming: chapter 3) observes that British negotiators "would occasionally justify their ICSID clauses with the argument that they had been encouraged and cleared by

Broches." States took action by inserting the clauses into their treaties, but the ICSID Secretariat laid the groundwork for their action.

The Secretariat had a better view of the global system of investment protection than any other actor during this period. The ICSID Secretariat, and Broches in particular, recognized the potential impact of these treaties on ICSID's caseload. In 1984, before there had been a single investment treaty case, Broches said:

> There are now about sixty treaties between states, generally industrialized and developing, which provide for access to ICSID in case of disputes about violations of the treaties. And those treaties are investment protection treaties. So, ICSID has an enormous potential clientele (Broches OH May 1984: 44–45).

Contrary to the decentralized picture that emerges from existing accounts of BIT diffusion, advance consent clauses spread outward from a centralized starting point. The ICSID Secretariat was that centralized starting point.

Table 7: Integrating Advance Consent into BITs: Theoretical Expectations and Reality

	Theoretical Perspective Expects	What Actually Occurred	Explanatory Power
Institutional Entrepreneurship	ICSID encourages states to layer these clauses into BITs; states' initial adoption is conditional on exposure to ICSID, subsequent use is path dependent.	ICSID continues to encourage advance consent through specific legal advice to treaty negotiators and monitors the integration of advance consent into BITs closely.	Strong
State Leadership	States approach each negotiation as a new bargain, and only include advance consent when they recognize severe commitment problems.	Capital-exporting states initially ambivalent, but then incorporate advance consent into treaties – some states do so systematically (The Netherlands, France), while others are more haphazard (Sweden) or do so on a very limited basis (Germany).	Moderate

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