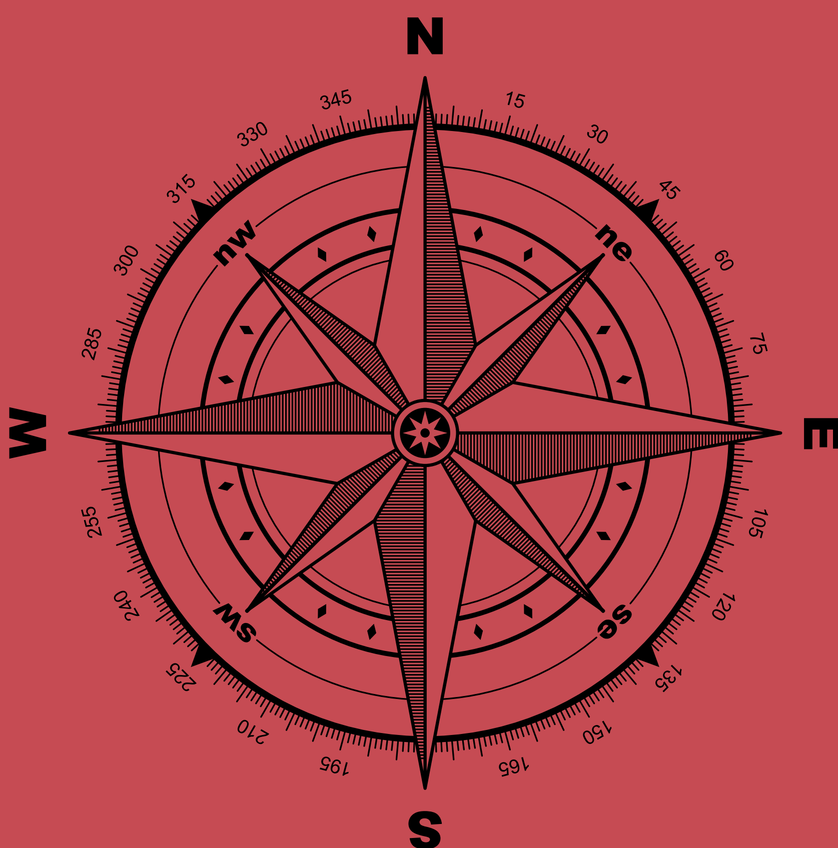
APRIL 2025 MONTHLY NEWSLETTER

Centre for Trade and Investment Law

Investment Law compass



navigating through

GLOBAL INVESTMENT FRAMEWORK

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The Investment Law Compass is CTIL's monthly newsletter on the global investment framework and developments. Our vision is to inform professionals and policy makers on topics related to investment laws and treaty arbitration, thereby fostering informed decision-making.

— **Editor-in-Chief's Note**

BUNDESGERICHTSHOF

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Source: Wikipedia

Intra-EU Investment Arbitration: Revisiting ICSID Jurisdiction in the Wake of the German Court Judgements

Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I), ICSID Case No. ARB/17/34

Background

The German Federal Court of Justice held that intra-EU ICSID arbitrations are inadmissible under German law, even before the constitution of the arbitral tribunal. Citing the ***Achmea*** and ***Komstroy*** judgments, the Court emphasized that such arbitrations violate the autonomy of EU law and are impermissible between EU Member States. It rejected the argument that ICSID's seat-less and self-contained nature exempts it from EU legal constraints. The decision marks a firm stance by Germany in aligning its arbitration policy with EU law, limiting the enforceability of ICSID awards in intra-EU disputes.

The ruling is a significant departure from the recent ICSID award rendered in *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, where the ICSID Tribunal dismissed all objections, emphasizing that the ICSID Convention being a self-contained regime under international law and operates independently of the EU legal order. The Tribunal concluded that both Austria and Croatia, as Contracting States to the ICSID Convention and the BIT, had validly consented to arbitration.

Introduction

The emergence of intra-EU disputes under the ICSID Convention has reignited the debate around the compatibility of international investment agreements with the autonomy of EU law. Since the landmark Achmea judgment, a series of rulings by the Court of Justice of the European Union (CJEU) and national courts, including the Komstroy and PL Holdings decisions, have declared intra-EU investor-state dispute settlement (ISDS) mechanisms incompatible with EU law. Yet, ICSID tribunals have persisted in asserting jurisdiction in such disputes under public international law, as evidenced in Cavalum v. Spain. This article explores the legal and jurisdictional tension surrounding ICSID's role in intra-EU investment disputes, contrasting it with judicial decisions by German and Croatian courts in light of the Vienna Convention on the Law of Treaties (VCLT), the ICSID Convention, and European Union law.

German Federal Court of Justice *(Bundesgerichtshof)*


Source: Canva

In a significant departure from the ICSID's autonomous jurisdictional framework, the German Federal Court of Justice (Bundesgerichtshof) delivered a judgment in July 2023 declaring that intra-EU ICSID arbitrations are inadmissible under German law. The ruling came in the context of enforcement proceedings involving energy investors such as Mainstream and RWE, who had initiated ICSID claims against EU Member States. Germany objected to the admissibility of these proceedings before their constitution, relying on Section 1032(2) of the German Code of Civil Procedure (ZPO) — a provision allowing early judicial review to determine whether arbitration may proceed. The Court upheld Germany's position, emphasizing the supremacy of EU law, especially the principles laid down in Achmea and Komstroy, which prohibit intra-EU arbitration mechanisms on the grounds that they undermine the autonomy of the EU legal order.

The Court ruled that even ICSID arbitrations despite their self-contained, seat-less nature — must be assessed in light of EU law obligations. It reasoned that allowing such claims to proceed would violate Article 344 of the TFEU, which requires EU Member States to resolve disputes concerning EU law only through the mechanisms provided by the Union's legal framework. The Court refused to distinguish between ICSID and non-ICSID arbitrations, holding that ICSID's procedures cannot override the CJEU's jurisprudence on intra-EU dispute resolution.

This decision creates a stark conflict between Germany's domestic enforcement regime - shaped by its EU obligations, and ICSID's international legal order that insulates arbitral proceedings from national courts. The ruling raises profound questions about the enforceability of ICSID awards rendered in intra-EU cases within EU, challenging the efficacy of treaty-based investor protections. Unlike ICSID tribunals, which continue to affirm jurisdiction over intra-EU disputes based on the Vienna Convention and *pacta sunt servanda*, Germany's judiciary has adopted a constitutionalist approach, prioritizing EU law even at the expense of international commitments. The result is a fragmented legal landscape where jurisdiction, admissibility, and enforcement of awards depend heavily on where enforcement is sought.


Source: Canva

Diverging Jurisdictional Outcomes: *Raiffeisen v. Croatia*

In Raiffeisen Bank v. Croatia (UNCITRAL, 2020), the Higher Regional Court of Frankfurt declared arbitration proceedings under the Austria-Croatia BIT inadmissible. The court ruled that the investor-State arbitration clause contravened EU law, emphasizing the autonomy of EU legal order and citing Achmea extensively.

The court adopted a strict view of EU primacy, asserting that the mere possibility that EU law might be applied or interpreted by an arbitral tribunal - without access to the CJEU's preliminary reference mechanism - was enough to invalidate consent to arbitration. In contrast, Claimants argued on the residual conflict rules in Articles 30 and 59 of the VCLT and on the application of the primacy of the EU Treaties to resolve conflicts, but this was dismissed by the court.

Source: DNT Lawyers

ICSID’s Jurisdictional Mandate in Intra-EU Arbitrations

Treaty Basis and the ICSID Framework

The ICSID Convention creates a self-contained arbitration regime that is distinct from domestic legal systems. Article 25(1) of the Convention requires only that the parties be from different Contracting States and that the dispute arise directly out of an investment. In *Cavalum v. Spain (ARB/15/34)*, the dispute arose relating to an investment made by a Portuguese company incorporated in Spain under the Energy Charter Treaty (ECT). Spain challenged jurisdiction, invoking Achmea and Komstroy, but the Tribunal upheld jurisdiction, applying Articles 25(1) ICSID and 26 ECT.

Importantly, ICSID arbitrations do not have a legal seat and therefore escape the procedural law of the host state or any domestic jurisdiction’s oversight, reinforcing the Tribunal’s autonomy to determine its jurisdiction under Article 41 of the ICSID Convention.

Objections: *Achmea* and *Komstroy*

Spain’s objection centered around the ***Achmea judgment***, in which the CJEU invalidated ISDS clauses in intra-EU BITs, citing a violation of the autonomy of EU law. Later, in Komstroy, the CJEU extended this logic to the ECT, asserting that Article 26 ECT is incompatible with EU law insofar as it applies to intra-EU disputes.

However, the Cavalum tribunal found these decisions unpersuasive for ICSID arbitration. It reasoned that EU law is not international law binding upon ICSID tribunals, and the ICSID Convention governs disputes without a connection to domestic legal regimes. The Tribunal also reiterated that no subsequent treaty or binding interpretive rule under the VCLT had altered Spain’s unconditional consent under the ECT.

Admissibility Challenges in National Courts

In July 2023, the German Federal Court of Justice (FCJ) declared intra-EU ICSID arbitrations inadmissible under domestic law in three key cases, including Mainstream v. Germany, RWE v. Netherlands, and Uniper v. Netherlands. Relying on Section 1032(2) of the German Code of Civil Procedure (CCP), which allows pre-constitution objections to arbitration, the Court held that ICSID arbitrations too must yield to EU legal supremacy, despite their “self-contained” character. The FCJ sided with the Higher Regional Court of Cologne, affirming that EU law prevails over treaty obligations where incompatibility is manifest. It emphasized that enforcement in Germany of ICSID awards rendered in intra-EU disputes is implausible and that such awards would be annulled or declared unenforceable.

Achmea Judgment


Source: Canva

In the Achmea B.V. v. Slovak Republic case (C-284/16), the dispute arose from a Dutch investor's claim under the Netherlands-Slovakia bilateral investment treaty (BIT), alleging unfair treatment by Slovakia in the health insurance sector. The arbitration was seated in Germany under the UNCITRAL Rules, and the investor was awarded compensation. Slovakia challenged the validity of the arbitration clause, leading the German Federal Court to seek a preliminary ruling from the Court of Justice of the European Union (CJEU).

In its landmark 2018 judgment, the CJEU held that the investor-State arbitration clause in Article 8 of the BIT was incompatible with EU law. The Court reasoned that such a mechanism allowed disputes concerning the interpretation and application of EU law to be removed from the primacy of EU judicial system. Crucially, arbitration tribunals lacked the authority to make preliminary references to the CJEU under Article 267 TFEU, thereby undermining the autonomy, primacy, and uniformity of EU law.

The CJEU concluded that an international agreement between EU Member States cannot allow a tribunal to decide issues of EU law without the oversight of the EU judiciary. As a result, the arbitration clause was deemed invalid, prompting a sweeping reassessment of intra-EU BITs and ISDS mechanisms within the EU.


Source: Canva

Komstroy Judgment

The Komstroy v. Moldova decision (Case C-741/19) stemmed from a dispute under the Energy Charter Treaty (ECT) involving Moldovan state-owned enterprise Moldtranselectro and Komstroy, a Ukrainian investor. Komstroy initiated arbitration under the ECT, and after procedural challenges, the case reached the Paris Court of Appeal, which sought a preliminary ruling from the CJEU on issues including the definition of "investment" under the ECT.

The CJEU used this opportunity in 2021 to expand upon Achmea, ruling that Article 26(2)(c) of the ECT, which provides for investor-State arbitration, is not applicable in intra-EU disputes. The Court held that when both disputing parties are from EU Member States, such arbitration undermines the autonomy of EU law, because the arbitral tribunal might be required to apply or interpret EU law without access to the CJEU's preliminary ruling mechanism.

The Court emphasized that the Investor-State Dispute Settlement mechanism provided for by the Energy Charter Treaty (ECT) (Article 26(2)c) is not applicable to intra-EU disputes (C-741/19). Therefore, even though the ECT is a multilateral treaty, it cannot override EU law obligations between Member States. The Komstroy judgment thus extended the principles of Achmea to multilateral investment treaties, deepening the EU's rejection of intra-EU ISDS and reshaping the landscape for pending and future claims under the ECT within the Union.

Reconciling Conflicting Legal Regimes

The core conflict lies between:

- The concern regarding the primacy of EU law that all dispute settlements within the EU must respect the autonomy of its legal order, and
- The need to interpret public international law principles under treaties like the ICSID Convention and the ECT in good faith, thereby preserving the object and purpose of the treaties.

In this regard, ICSID tribunals argue that the EU's internal law cannot override their jurisdiction, particularly when both disputing parties are ECT and ICSID members.

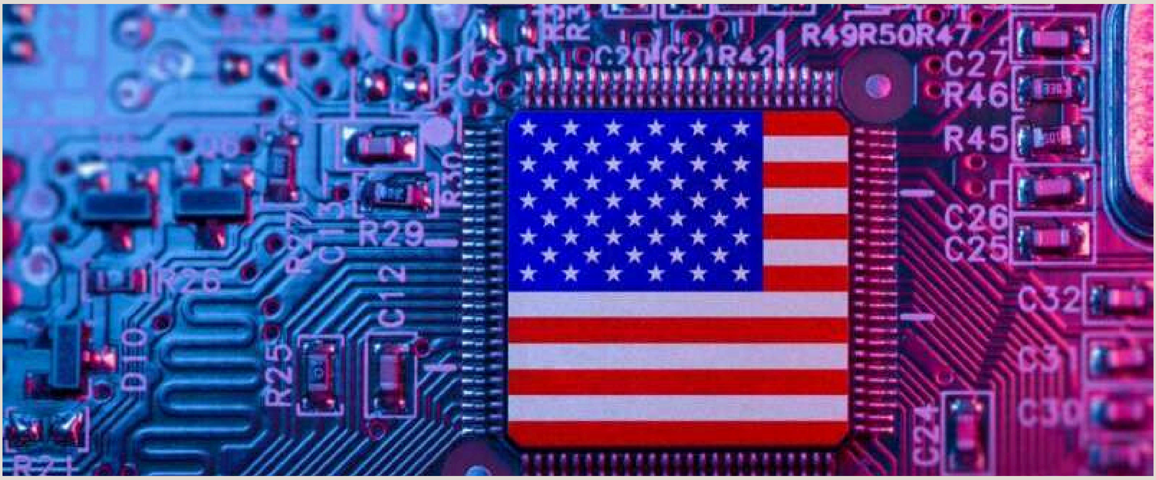
Implications for Enforcement and Future Disputes

While tribunals continue to uphold jurisdiction, enforcement of intra-EU ICSID awards within the EU (e.g., in Germany or Sweden) faces serious hurdles. Outside the EU, these awards may remain enforceable, but with diminishing practical value if EU courts continue to resist recognition.

Conclusion

From an international legal standpoint, ICSID has not exceeded its jurisdiction. It continues to rely on its foundational treaty obligations and the absence of any lawful modification or termination of consent under the VCLT framework.

However, in the evolving reality of supranational legal pluralism, ICSID's resilience in asserting jurisdiction in intra-EU disputes sets the stage for further fragmentation. While it adheres to the rule of law and *pacta sunt servanda*, the systemic disconnect between EU and international investment law regimes remains unresolved.



Source: Canva

US launches an 'Investment Accelerator': More facilitation, Less protection

---- Sujaya Sanjay
Associate, CTIL

While the rest of the world is reeling from the impact of US President Trump's new (and constantly evolving) tariff regime, another slew of executive actions by the US President that went relatively unnoticed was in relation to investment. As covered in the previous edition, the 'America First Investment Policy' (AFIP) **[I]** was announced in late February 2025, which reinforces the US's commitment to maintaining a "strong, open investment environment" to attract foreign capital from US "allies and partners", including from sovereign wealth funds.

Close on the heels of the AFIP, on 31 March 2025, the US also announced the launch of an Investment Accelerator, to manage investments that are greater than $1 billion and more broadly, work with US States to reduce regulatory hurdles for foreign investments. **[II]** The Investment Accelerator will also administer the CHIPS Program Office (set up by the previous administration) to negotiate deals under the CHIPS and Science Act of 2022 within the Department of Commerce.

The US is also actively pursuing restrictions on outbound investments—another policy priority highlighted in the AFIP. On 3 April 2025, the US Treasury and Commerce Departments, together with the United States Trade Representative (USTR), presented a confidential report to the President on various topics relating to the America First Trade Policy. That report, of which a public summary has been made available, **[III]** contains review, findings, and recommendations for the President on issues pertaining to fair and reciprocal trade. Chapter 21 of the report refers to the AFIP and stresses on outbound investment restrictions.

[I] https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/
[II] https://www.whitehouse.gov/presidential-actions/2025/03/establishing-the-united-states-investment-accelerator/
[III] https://www.whitehouse.gov/fact-sheets/2025/04/report-to-the-president-on-the-america-first-trade-policy-executive-summary/

The objective of the restrictions is to promote an 'America First' investment strategy, promoting investments by US companies abroad whilst also ensuring that they do not undermine US national security interests. The summary reveals that the US is considering expanding the scope of restrictions on outbound investments based on technological developments and strategies deployed by "countries of concern", though no further information has been made available. This strategy appears to be in furtherance of the Final Rule published by the US Treasury Department on 2 January 2025 under the Biden administration establishing a US Outbound Investment Security Program (OISP) which requires the US Treasury to be notified for outbound investments in China (mainland), Hong Kong, and Macau in three strategic sectors—semiconductors, artificial intelligence, and quantum technologies.**[IV]**

While the US has pulled levers in favour of promotion and facilitation of foreign investments, it continues to reiterate the importance of balancing these with protection of national security interests. The US has not expressly disavowed investment protection standards or the mechanism of ISDS and is still party to over 40 bilateral investment treaties. Nonetheless, there has been a marked deprioritisation of investment protection—a trend that began with the first Trump administration, which oversaw a complete overhaul of the North American Free Trade Agreement (NAFTA). The US-Mexico-Canada Agreement (USMCA), which replaced the NAFTA, contains limited investment protections vis-à-vis Mexico, while the same does not apply to Canada.

Since then, there has been a visible (though unconfirmed) trend in US policy—not only the executive but also at the Congressional level—to deprioritise investment protections, to limit ISDS, and to accord greater weightage to national security and other such considerations—a trend which appears to have bipartisan support.**[V]** This, in addition to previous derailments of multilateral treaties like the Trans-Pacific Partnership, indicates a diminished appetite overall for traditional investment treaty protections in line with growing global dissatisfaction with ISDS overall. The emphasis on national security in the mandate of the Investment Accelerator, is a further indication of this trend.

Impact on India

In September 2024, India and the US embarked on a partnership aimed at diversifying the global semiconductor ecosystem under the International Technology Security and Innovation (ITSI) Fund, created by the CHIPS and Science Act. President Trump has previously criticized the Act; nonetheless, so far, no actions have been taken to scuttle deals signed by the previous administration.

The CHIPS Program Office's absorption into the Investment Accelerator may well ensure survival of the India-US partnership under the ITSI Fund and might even lead to expedited approvals for proposed projects. However, this does not rule out the possibility of renegotiation of existing deals, including a potential reshuffling of priorities on how ITSI funds will be allocated in future and the terms and conditions that may be attached to their disbursement.

[IV] https://www.whitehouse.gov/presidential-actions/2025/03/establishing-the-united-states-investment-accelerator/
[V] https://www.whitehouse.gov/fact-sheets/2025/04/report-to-the-president-on-the-america-first-trade-policy-executive-summary/

Another Step in the Devas Saga: Judgment of the UK High Court

On 17 April 2025, the High Court of England and Wales (Commercial Court) delivered a significant ruling in CC/Devas (Mauritius) Ltd & Ors v Republic of India [2025] EWHC 964 (Comm), addressing sovereign immunity in the context of enforcing arbitral awards under the New York Convention (NYC). The dispute stemmed from the annulment of a satellite lease agreement (the “Devas Contract”) between Devas Multimedia and Antrix Corporation, an Indian state-owned entity, which had led to an arbitral award exceeding €195 million in favour of Mauritian investors under the Mauritius–India BIT.

The central issue was whether India's ratification of the NYC constituted a “prior written agreement” under Section 2(2) of the UK State Immunity Act 1978 (SIA), thereby amounting to a waiver of sovereign immunity in UK courts. The claimants argued that Article III of the NYC implied consent to adjudicative jurisdiction. However, Justice Sir William Blair rejected this argument, holding that Article III preserves sovereign immunity due to its language requiring enforcement “in accordance with the rules of procedure” of the enforcing state—rules that include immunity laws.

The Court found that India’s ratification of the NYC did not, on its own, constitute a clear, unequivocal, and unmistakable waiver of immunity under the SIA. It distinguished this case from ICSID Convention cases, noting the absence of a comparable provision like Article 54(1) ICSID, and observed that even the travaux préparatoires of the NYC did not intend to preclude immunity-based objections.

This judgment adds to a growing body of jurisprudence showing divergent global approaches to state immunity in investor-State arbitration enforcement, particularly outside ICSID, and poses a potential challenge for investors seeking enforcement against resistant sovereigns within the UK legal framework.

Source: Canva

U.S. Court Upholds Arbitration Award Against Russia in Crimea Expropriation Case

April 17, 2025: In a significant development in investor-state arbitration, the United States District Court for the District of Columbia rejected the Russian Federation's challenge to an arbitral award issued in favor of Ukrainian energy company JSC DTEK Krymenergo. The dispute stems from Russia's annexation of Crimea in 2014 and the subsequent expropriation of DTEK Krymenergo's extensive energy assets in the region.

The arbitral tribunal, constituted under the 1998 Ukraine-Russia Bilateral Investment Treaty (BIT) and the UNCITRAL Rules, found Russia liable for expropriating Krymenergo's property without compensation. Russia refused to participate in the arbitration proceedings and later contested enforcement in U.S. courts, arguing sovereign immunity under the Foreign Sovereign Immunities Act.

However, the Court ruled against Russia's motions to dismiss and stay enforcement, affirming that the expropriation fell within the commercial activity exception to sovereign immunity. The judgment is a notable reaffirmation of arbitral enforcement under the BIT framework, even in highly politicized contexts involving non-participating sovereigns.

This decision reinforces the viability of treaty-based investor protections and underscores U.S. courts' willingness to recognize arbitral awards stemming from Russia's actions in Crimea—a region at the heart of continuing geopolitical tensions.

Source: DNT Lawyers

Proposal for Appeal Mechanism: ICSID Proposes Potential Inter Se Amendment of ICSID Convention

April 1, 2025: In a potential breakthrough for investment arbitration reform, a new note released on April 1, 2025, explores an “inter se” modification of the ICSID Convention that would allow for appeals of ICSID awards - a major departure from the current system that prohibits such review.

Under the proposal, states agreeing to the modification (referred to as “Participating ICSID States”) could enable ICSID awards to be appealed to a new, standing Appeals Tribunal. This idea is being discussed in the context of UNCITRAL Working Group III’s Draft Statute for a Standing Mechanism for the Resolution of International Investment Disputes.

Key potential amendments under the inter se modification include:

- **Replacement of Annulment with Appeal:** Participating states would substitute the existing annulment mechanism with a full appeal process.
- **Remand Powers:** The Appeals Tribunal would be able to remand disputes back to the original tribunal, absent in the current ICSID framework.
- **Recognition and Enforcement:** Awards modified through the proposed appeal mechanism established under the ***“inter se”*** modification of the ICSID Convention would still enjoy the enforcement guarantees of the ICSID Convention, but only between Participating States.
- **Selective Participation:** The modification would not bind all ICSID members - only those who agree to the new framework, avoiding the need for unanimous consent under Article 66.

Though the ICSID Secretariat does not endorse the modification, the proposal reflects growing momentum toward more robust checks and balance mechanisms within investor-State dispute settlement. If adopted, it would represent a significant transformation in the architecture of the ICSID.

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Submission Guidelines:

- Contributions should focus on investment law, arbitration, policy analysis, or related areas.
- Articles should be between 500-800 words.
- Submissions must be original, well-researched, and properly cited.
- All submissions will undergo editorial review to ensure quality and relevance.

How to Submit: Send your articles to [***ctiloffice@iift.edu***] with the subject line "Newsletter Contribution." Please include a brief bio in your email.

Let's navigate the intricate world of investment law together. We look forward to your insightful contributions.

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