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# LegalTAPS

Special IPBA 2016 Edition

## IMPACTS OF TPPA ON THE LABOUR SECTOR

(PART I)

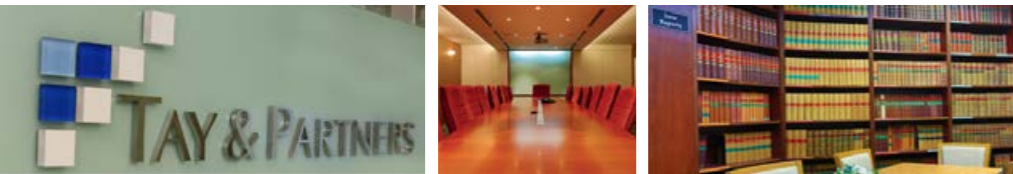


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SHARING OBJECT  
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PERFECTLY FINE



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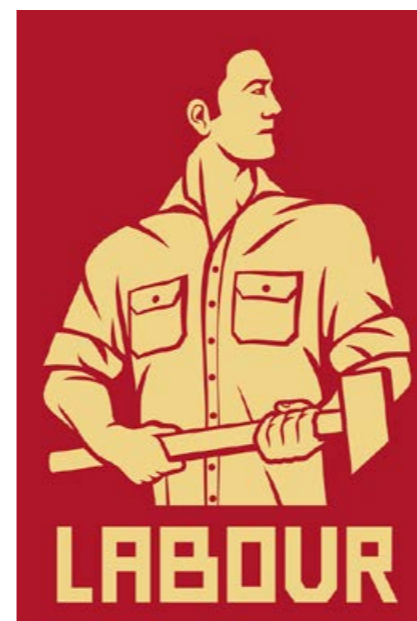
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# IMPACTS OF TPPA ON THE LABOUR SECTOR (PART I)

by Leonard Yeoh

**“This article discusses the significance of the Trans-Pacific Partnership Agreement (TPPA) and the impacts it could potentially bring to the labour sector in Malaysia. In Part I of this article, we will examine the potential changes to the laws governing trade unions, collective bargaining and strikes.”**



Malaysia signed the Trans-Pacific Partnership Agreement (TPPA) on 4 February 2016, along with 11 other countries, namely Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. It is anticipated that entry into the TPPA will promote economic growth, support the creation and retention of jobs, enhance innovation, productivity and competitiveness, raise living standards and promote good governance, enhance labour and environmental protections.

In respect of the labour sector, the Malaysian government and the United States further entered into a bilateral instrument in accordance with the Labour Chapter (i.e. Chapter 19) of the TPPA, namely the Malaysia-United

States Labour Consistency Plan, in which both parties commit under the Chapter to obligations concerning its labour law and practice.

### MITI and the Ministry of Human Resource as Principal Negotiators

The Ministry of International Trade and Industry (MITI) was given the mandate to lead and coordinate Malaysia's participation in the TPPA, while other ministries and agencies were tasked with working groups for areas under their purview. Predictably, the Ministry of Human Resource was made responsible for the labour sector, which is widely regarded as one of the most affected sectors with the introduction of the TPPA.

By virtue of Chapter 19 and the Labour Consistency Plan, the TPPA is expected to bring upon substantial changes to the labour sector, particularly in the areas concerning union organisation and collective bargaining, elimination of forced labour, abolition of child labour, elimination of discrimination in employment, minimum wages, working hours, and occupational safety and health.

### Union Organisation Judicial Review of Ministerial Orders

Under the existing regime, an Order by the Minister pursuant to section 18(7) of the Trade Unions Act 1959 to suspend a trade union shall be final and conclusive. Such is the same for decisions dealing

with appeals to the Minister.

However, with the advent of the TPPA, ministerial decisions will now be subject to judicial review. Further, a decision to suspend, withdraw or cancel a trade union registration will automatically be stayed pending the outcome of the judicial review.

### Registration of Trade Unions

The TPPA is also seen to have the effect of narrowing down the wide discretion currently vested in the Director General of Trade Union (DGTU). Instances of such include the removal of discretion to deny registration of a trade union if there exists another union representing the same group of workmen which the proposed union also seeks to represent.

Similarly, the DGTU will no longer have the discretion to refuse to register a trade union on the basis that it is likely to be used for unlawful purpose or for purposes inconsistent with its objects and rules. The term 'unlawful' has also been further clarified to only refer to serious breaches of law.

In addition, the DGTU's discretion to withhold registration due to the proposed union's name being undesirable will also be limited to only exceptional circumstances, such as that the name will pose a threat to public order or inflame sensitivities with respect to race or religion.

**Cancelling/Withdrawing the Certificate of Registration of Trade Union**

The TPPA further takes away the DGTU's discretion to cancel the registration of a trade union, which is still exercisable under the existing regime. Effectively, cancellation of registration will be limited only to circumstances where there has been a serious breach of law.

The power to cancel registration where two or more unions exist in the same industry will also be removed, and will instead be replaced with a process for determining representation of workers for the purposes of collective bargaining in a particular establishment, trade, occupation or industry.

**Membership Rights**

The current restriction on persons not employed or engaged in the industry for which the trade union is registered to remain as union members will be removed. This indicates that dismissed, suspended or retired employees will soon be allowed to participate as members of the union.

**Leadership of Trade Unions**

Non-Malaysians can now run for elections for the union office provided they have worked legally in Malaysia for at least three years. The TPPA further provides for removal of the prohibition for employees or officers of a political party to act as a trade union executive. The basis for disqualification of a person otherwise eligible for union executive will also, under the TPPA, be limited to only offences relating to the integrity required to exercise his duty, such as breach of fiduciary duty.

**Amalgamation of Trade Unions**

The existing requirement that trade unions must be comprised of employees in similar trade or industry will be removed to give way to greater freedom in merging different unions. Similarly, the formation of a union federation pursuant to sections 72 and 74 of the Trade Unions Act 1959 will not necessitate that the members of the unions be employed in similar trade, occupation or industry.

**Affiliation with International Unions**

DGTU will no longer have the discretion to forbid local trade unions from being affiliated with international bodies. The TPPA further provides that such decision may be carried out internally through a secret ballot vote of its members with a quorum in accordance with the union's constitution or by-laws.

**Collective Bargaining**

The wide restrictions imposed by section 13(3) of the Industrial Relations Act 1967 in respect to proposals for collective agreements will now be dispensed with. Accordingly, proposals by trade unions can now include matters relating to promotion of workmen from a lower grade or category to a higher grade or category, transfer of workmen within the organisation, employment of any person in the event of vacancy, termination by reason of redundancy or reorganisation, dismissal and reinstatement of workmen and assignment or allocation of duties or specific tasks.

**Strikes**

The existing consent requirement to call for a strike under the Trade Unions Act 1959 is the consent of at least two-thirds of the total number of members entitled

to vote. The TPPA is set to reduce this requirement to a quorum requirement of two-thirds of the members and the consent of 50 percent plus one of the member votes cast. Should the law be amended to accommodate the new TPPA terms, it will then be less of an uphill task for trade unions to call for strikes in the future.

The limitations placed by the Trade Unions Act 1959 on the range of issues entitling the workmen to strike will also be removed with the TPPA. Further, workmen will also be relieved from penal sanctions for calling for or participating in peaceful strikes, regardless of whether such strikes are inconsistent with the provisions of the Industrial Relations Act 1967.

## Conclusion

Since the day the news of Malaysia's entry into the TPPA came to light, doubts have been raised and questions have been asked in relation to how the changes brought by the TPPA will necessarily achieve the objects for which the TPPA came into existence. With the signing of the agreement and its eventual implementation, we may soon find out the answers to the uncertainties surrounding the elusive free trade agreement.



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# Q & A ON TPPA

by Lim Bee Yi

**Q1: What is the TPPA (Trans-Pacific Partnership Agreement)?**

A: The TPPA is a regional free trade deal between 12 countries in the Asia-Pacific region.

**Q2: What are the objectives of The TPPA?**

A: The TPPA aims to promote economic integration to liberalise trade and investment and to promote closer links across a range of economic and regulatory issues.

**Q3: Which countries have signed?**

A: New Zealand, Australia, Chile, Mexico, Japan, Peru, Canada, Vietnam, USA, Singapore, Brunei and Malaysia.

**Q4: When did Malaysia sign the TPPA?**

A: 4 February 2016.

**Q5: What are the key changes to trade mark laws in Malaysia?**

A: i) Expansion in scope for registerable trade marks to include sound and scent marks;  
ii) No necessity for trade marks to be registered in the country of origin or in another jurisdiction, included on a list of well-known trade marks, or given prior recognition as a well-known trade mark in order for a trade-mark to be determined as a well-known trade mark;  
iii) Trade Mark licenses are not required to be recorded in order to establish the validity; and  
iv) Geographical indications are to be given the same protection under the trade mark system.

**Q6: What are the key changes to patents law in Malaysia?**

A: Patented medicine will benefit from potentially longer protection.

**Q7: What are the key changes to copyright law in Malaysia?**

A: i) Extension of term of copyright protection to 70 years after the death of the author; and

ii) Criminal penalties for offences relating to rights management information and circumventing technological protection measures.

**Q8: How will these key changes affect enforcement of intellectual property rights in Malaysia?**

A: i) There will be criminal penalties for anyone who wilfully circumvents technological protection measures for the purpose of commercial advantage or financial gain;  
ii) There will also be criminal penalties for cases of wilful trade mark counterfeiting or copyright piracy on a commercial scale;  
iii) Higher damages will be awarded to copyright holders; and  
iv) There will be criminal penalties for disclosure of trade secrets.

**Q9: Under the TPPA, are internet service providers liable for infringement committed by their customers using their networks?**

A: No, but Internet service providers will be required to reveal the identity of copyright infringers.

**Q10: What are the main concerns regarding the IP provisions in the TPPA?**

A: i) The extension of the protection period for copyright to life of the author plus 70 years would result in the stifling of innovation as creators may be hindered from innovating from existing works;  
ii) the overall purview of the provisions appear to benefit multinational corporations rather than individuals;  
iii) the extended patent lengths to compensate for regulatory compliance review would have the effect of preventing generic drugs from entering the market and patented medicine to remain costly; and  
iv) by granting market exclusivity for new clinical information of a previously approved pharmaceutical product supporting a new "indication", "formulation" or "method of administration"; drugs prices are kept high as pharmaceutical companies may be inclined to make slight improvements to the drugs in order to ensure that they have a monopoly on the profits. This arguably reduces genuine innovation.

**Q11: When will the TPPA come into effect?**

A: The TPPA will come into effect once it is ratified and Malaysia has been given a timeline of two years from the signing date to ratify it.



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# CAT overturned MyCC's market sharing object decision

by Nicole Leong

The first decision by the Malaysian Competition Appeal Tribunal since its inception more than 4 years ago caught the media and public attention. Tay & Partners represented AirAsia, one of the successful appellants, the other party being MAS whom MyCC alleged colluded with AirAsia to share the market.

## Brief facts

The case involves the country's 2 major carriers, MAS and AirAsia, who entered into a Collaboration Agreement together with AirAsia X Bhd in conjunction with a short lived share swap deal involving their major shareholders, Khazanah Nasional Bhd and Tune Air in 2011. The share swap was later unwound in 2012. On 31 March 2014, Malaysia Competition Commission ("MyCC") ruled that MAS and AirAsia had violated the prohibition against market-sharing agreement by virtue of the Collaboration Agreement under section 4(2)(b) of the Competition Act 2010 ("CA 2010") and imposed financial penalties of RM10 million each. On 4 February 2016, the 5 members of the Competition Appeal Tribunal ("CAT"), unanimously decided that the MyCC misinterpreted the Collaboration Agreement and failed to show that there was a market sharing object.

## Grounds of decision

The CAT summarised and discussed 7 grounds of appeal in its grounds of decision, some of which will be discussed in this article.

- **The Malaysian Competition Commission ( MyCC ) misinterpreted the Collaboration Agreement**

MyCC's case of market sharing was built largely around the Collaboration Agreement between MAS and AirAsia. The CAT however agreed with AirAsia and MAS that the Collaboration Agreement is a framework conditional agreement subject to detailed anti-trust analysis and subsequent approval. A plain reading of the terms of the Collaboration Agreement did not warrant a finding of restriction by object within the meaning of section 4(2)(b) of the CA 2010. Furthermore, the MyCC did not give any reason or analysis for its decision that the purported object of the Collaboration Agreement was one of market sharing.

- **MyCC cannot rely totally on the deeming provision**

Section 4(2)(b) reads -

*"Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to share market or sources of supply is deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods or services".*

MyCC contended that section 4(2)(b) can be triggered by the mere entry into the Collaboration Agreement. This was rejected by the CAT. Instead, the CAT held that MyCC is required to establish

the object of the Collaboration Agreement was to share market in order to succeed under the aforesaid provision. MyCC's attempt to rely totally on the deeming provision does not absolve itself from the duty to prove restriction by object under section 4(2)(b).

- **No ceding of routes by MAS**

MyCC also relied on the withdrawal of Firefly from East Malaysian routes arguing that this ceded those routes to AirAsia. The CAT agreed with the Appellants that the route withdrawals were made by MAS as parent company of Firefly independently and outside the scope of the Collaboration Agreement. MyCC failed to establish the causal link between the Collaboration Agreement and the route withdrawal.

It also observed there was never any ceding of the East Malaysian routes to AirAsia as the Appellants have also argued that those routes were taken back by MAS from Firefly.

## Significance of the landmark decision

The decision is significant on a number of levels -

- **Deeming provision is not a short cut**
- The CAT's decision will force the competition authority to address the

cardinal issue whether there is an object to share market before attempting to rely on section 4(2)'s deeming provision. In

other words, MyCC must establish an agreement which restricts competition by object before it invokes the deeming

provision. This is in line with AirAsia's counsel's submission on the 2 limbs approach under section 4(2) -

### Limb 1:

"(2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to -  
...  
(b) share market or source of supply;  
..."

### Limb 2:

"... is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services."

A careful reading of section 4(2) (b) [read together with section 4(1)] would clearly show that the

deeming proviso is only applicable to the 2nd Limb. In other words, it is only when the object to share market in the 1st limb has been proven by the MyCC that the agreement could be deemed to significantly prevent, restrict or distort competition.

- **Restriction by object test**

The CAT appears to have laid down the test in deciding whether an agreement is restricted by object - "...in order to decide whether an agreement is restricted by object - "[r]egard must be had *inter alia* to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part". Based on the aforementioned test, MyCC has the onus to prove an alleged anti-competitive object based on interpretation of the agreement in question. Words and expressions used by the parties will be construed and given effect accordingly in order to ascertain the intention of the parties. We however note that the CAT did not take the opportunity to discuss the meaning of "economic and legal context" as submitted by AirAsia's counsel.

- **Definition of relevant market**

With regards to market sharing, the CAT pointed out that the MyCC did not or failed to define the relevant market. The CAT observed that definition of relevant market is integral in any competition inquiry. This observation of the CAT puts us in line with the approach taken by other jurisdictions which also recognise definition of the relevant market is the key aspect of any competition inquiry. It is only after having defined the relevant market that the MyCC can assess whether a particular conduct is anti-competitive in nature. *Objective analysis on airline collaboration and merger.*

The CAT also cautioned that a simplistic use of the deeming provision of section 4(2) of the CA 2010 on airlines business may not be proper. This decision

acknowledges that alliances between airlines could enhance efficiency and service quality, and it would be wrong to assume that collaboration between 2 airliners is *per se* illegal.

This will provide some guidance to Malaysian Aviation Commission which was recently established by the Malaysian Aviation Commission Act 2015. This new Commission has taken over regulation of the competition and economic issues relating to the aviation industry. It is also noteworthy that the new Act introduced merger control over aviation service markets in Malaysia.

## Closing observation

This landmark decision of the CAT has provided some much sought after clarity on the interpretation of section 4(2) of the CA 2010 and is a welcome decision.



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# REGULATING THE USE OF UNMANNED AERIAL VEHICLES IN MALAYSIA

by Choy Wan Ching

**T**he use of drones (also known as unmanned aerial vehicles (“UAV”)) has become popular in Malaysia recently. During the major floods on the East Coast in late-2014, drones were used in humanitarian relief to monitor the level of flooding and the extent of damage. Drones were also used to deliver supplies to areas which were cut-off by the flooding. A wide range of drones can be easily purchased online or from certain dealers, with prices as low as RM200 -- possibly explaining the widespread use of drones by the public. It is common to see photographers taking aerial photographs using cameras mounted on drones and hobbyists flying drones instead of kites.



In Malaysia, the use of UAVs are primarily regulated by the Aeronautical Information Circular 4/2008 (“AIC”) published in February 2008 by the Malaysian Department of Civil Aviation (“DCA”) pursuant to the power conferred by section 24[O] of the Civil Aviation Act 1969. Under the AIC, most of the regulatory matters for UAVs, including registration and airworthiness certification requirements, are prescribed by the Civil Aviation Regulations 1996 (“CAR”).

Generally, all UAVs are governed by the AIC unless they are exempted as small aircraft. A small aircraft is defined as an unmanned aircraft weighing not more than 20 kg, and which

is subject to further restrictions on its use. Small aircrafts are prohibited from being flown in controlled airspaces, crowded spaces or within aerodrome traffic zones (unless the prior permission of the air traffic control unit has been obtained). Small aircrafts are also subject to a flying height restriction of 400 feet above ground and may not be flown for the purposes of aerial work. These rules for small aircraft are principally to regulate the flying of recreational model aircraft.

All UAVs weighing more than 20 kg are required to be registered with the DCA and to undergo an airworthiness certification process to obtain a certificate of airworthiness

or a permit to fly. There are two categories of UAV operators in the AIC, namely, the UAV commander (“Commander”) and the UAV pilot (“Pilot”). A Pilot is the person who actively exercises remote control of the non-autonomous UAV flight or monitors an autonomous UAV flight. A Commander will be in direct control of the UAV by remote controls, co-located with the Pilot, or by monitoring the state and progress of the UAV at the flight deck location in the ground control station. The Commander assumes the same operational and safety responsibilities as those of a captain or pilot-in-command of a piloted aircraft performing a similar mission in similar airspace. Both the Commander and Pilot must have a valid private pilot’s license.

UAV operators must ensure that the UAVs they operate comply with all the applicable rules and procedures which apply to a manned aircraft. UAV operators are also required to maintain adequate levels of insurance to meet their liabilities in the event of an accident.

Recreational UAVs are usually light-weight at below 20kg and some are as light as 1kg. As discussed earlier, there are no specific regulations governing UAVs below 20kg other than the rules concerning the use of small aircrafts.

In early 2015, photographs of aircraft approaching the Kuala Lumpur International Airport purportedly taken by an aerial drone were being widely circulated on social media. These photographs have raised concerns regarding the poor implementation of the regulations and flight prohibitions on recreational UAVs. The lack of public awareness on the safety issues of drone operation, especially amongst the recreational UAV operators, is also troubling. Flying light-weight UAVs near the vicinity of an airport is highly dangerous as the light-weight UAV may easily be sucked into the engine of a jet airliner and cause its engine to malfunction. It may also collide with and damage such aircraft.



Following the outrage sparked by the photographs, the DCA has issued a warning prohibiting the flying of unauthorised UAVs in the vicinity of airports. The DCA is currently preparing more detailed regulations governing the operation of UAVs, especially recreational UAVs, to replace the current AIC. It is not known when the new regulations will be gazetted and enforced. In view of the growing number of recreational UAV operators, high hopes are vested on the soonest implementation of the updated regulations by the DCA. There should also be more emphasis on public education on the dangers of improper UAV operation.



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# Assignee's Power of Sale: Imperfection is perfectly fine

by Wong Weng Yew

Until recently, it has always been difficult for legal practitioners to advise their assignee clients, who hold immovable property as security, the 'correct' method of enforcing their right of sale where the document of title has been issued. To appreciate this legal dilemma, one may have to take a step back to look at the development of the law in this area over the years.

The Federal Court in *Phileo Allied Bank (M) Bhd v Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 has long established that security in the form of an absolute assignment creates an equitable mortgage. Hence, in the case of immovable property, the application to the Court for judicial sale is not required to realise the security. However, *Bupinder's* case stopped short of addressing whether an assignee, upon issuance of the individual title, is obliged to ensure the execution of a legal charge before it could proceed with recovery action against the assignor. More importantly, it does not address the question whether the assignee could still resort to non-judicial sale under such circumstances. The High Court, as opposed to making

a succinct determination on the issue, has inadvertently contributed to the uncertainty.

In the pre-2005 decisions of *Ooi Chin Nee v Citibank Bhd* [2003] 1 CLJ 548 and *Jashin Scaffolding (M) Sdn Bhd v Chew Ai Eng Sdn Bhd; OCBC Bank (Malaysia) Bhd (Applicant)* [2004] 6 CLJ 509, the High Court found that the terms of the contract, i.e. the assignment itself, required the assignor to take the transfer of the immovable property by executing a statutory charge upon issuance of the registered document of title. Therefore, upon issuance of the document of title, a statutory charge must be created. Once this is done, Order 83 of the Rules of the High Court 1980 becomes operative and any sale of the immovable property by the assignee can only take place by way of foreclosure proceedings pursuant to the National Land Code 1965 - to wit, a judicial sale.

After 2005, the High Court took a different view from *Ooi Chin Nee* and *Jashin*. In *Hong Leong Bank Berhad v Goh Sin Khai* [2005] 3 CLJ 25, the High Court interpreted the terms of the assignment as merely imposing a contractual obligation on the assignor to

take transfer of the immovable property upon issuance of the document of title. In the absence of any statutory provision, rule of common law or express agreement, the Court could not extend such obligation on the assignee to ensure that the title is indeed transferred and a legal charge is registered. The failure by the assignor to transfer the title and register a legal charge simply enables the assignee to sue the assignor in equity for a decree of specific performance or breach of contract like any other terms in the assignment. It does not extinguish the absolute assignment or the assignee's right to transfer the chose in action under it.

Due to these conflicting High Court decisions, coupled with the lethargic

development of the law in the area over the past 10 years, the assignee of an immovable property would have had to elect on informed basis whether to risk realising the security by way of private sale; or in the abundance of caution, first see to the proper transfer of the property and registration of the legal

charge before applying for judicial sale under the National Land Code 1965.

Hence, the decision in *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 C.J.L. 1 that finally put an end to this decade-long predicament is most welcoming and important especially to the banking

and financial sectors. The Federal Court has the opportunity to examine the law propounded in the previous 3 High Court cases and ultimately, fully agreed with the judgment in *Goh Sin Khai* and disagreed with the decisions of *Ooi Chin Nee* and *Jashin*. In essence, the Federal Court inter alia affirmed and held that:

"(6) The bank was not obliged to ensure the execution of the charge and thereafter to obtain an order for judicial sale before it could proceed to exercise its rights under the LACA upon the appellant's default under the loan;

(7) The creation of a charge was not a pre-requisite for the bank before it could proceed with the recovery action against the appellant under the LACA despite its issuance of the document of title."

From the commercial point of view, the *Damai Freight* case makes it much easier and quicker for assignees to realise the security without resorting to Court proceedings. However, it does not necessarily mean that assignees should view the creation of the legal charge with no urgency. Under the Torrens system, a legal charge offers greater security interest to the lender compared to assignment. In competing interest and priorities, the statutory protection offered to the chargee's registered interest under National Land Code 1965 is far superior to an assignee's equitable contracted rights.



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