

International Ship and Port Facility Security (ISPS) Code and Crew Welfare

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Seafaring is a profession and seafarers are like ordinary workers in any other work force. Therefore, seafarers should enjoy the same rights as accorded to workers ashore. These rights include the right to life, right to payment of wages, and right to healthy, safe and decent working conditions. People working ashore have access to a variety of medical services; if they fall sick, hospitals and clinics are at their disposal 24 hours a day. A seafarer, however, has to depend solely on her/his ship's first-aid kit. Therefore, it is very important for seafarers to be allowed to visit clinics or other medical facilities ashore while at port. Due to the nature of ship operations, seafarers often work 14-16 hours a day. Even with the adoption of regulations and recommendations by the International Labour Organisation's Seafarer's Hours of Work and the Manning of Ships Convention, 1996, conditions of excessive working hours still exist. Thus, there is an urgent need for relevant states and international organisations to adopt a new approach to draft legislations while consenting to the ergonomics and other needs of seafarers.

Introduction

In November 2001, the International Maritime Organisation's (IMO) Maritime Safety Committee (MSC) and Maritime Security Working Group (MSWG) adopted Resolution A.924 (22) on "review of measures and procedures to prevent acts of terrorism, which threaten the security of passengers, crews and the safety of ships." The

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Conference of Contracting Governments to the International Convention for the Safety of Life at Sea (SOLAS), 1974 was convened in London during December 9-13, 2002. On December 12, 2002 a resolution now known as the International Ship and Port Facility Security (ISPS) Code was adopted along with a resolution to amend Chapters V and XI of SOLAS by which compliance with the ISPS Code became mandatory as of July 1, 2004. Chapter XI was later amended to Chapters XI-1 and XI-2 to adopt the special measures to enhance maritime security.

The ISPS Code aims to establish an international framework involving cooperation between Contracting Governments, Government agencies, local administrations, shipping industry and port authorities to detect and assess security threats and to take preventive measures against security incidents affecting ships or port facilities used for international trade. The ISPS Code requires the designation of appropriate officers or personnel onboard each ship as the Ship Security Officer (SSO), at each port facility and in each shipping company to prepare and to put into effect the security plans that will be approved for each ship and port facility.

The Human Element

Seafaring is a profession and seafarers are like ordinary workers in any other work force. Hence, seafarers should enjoy the same rights – to life, to payment of wages, and to healthy, safe and decent working conditions – as accorded to workers ashore. People working ashore have access to a variety of medical services; if they fall sick, hospitals and clinics are at their disposal 24 hours a day. A seafarer, however, has to depend solely on her/his ship's first-aid kit. Therefore, it is very important for seafarers to be allowed to visit clinics or other medical facilities ashore while at port.

Due to the nature of ship operations, seafarers often work 14-16 hours a day. Contrary to standards set in the International Labour Organisation's (ILO) Seafarer's Hours of Work and the Manning of Ships Convention, 1996, conditions such as excessive work hours still exist. Even after staying and working onboard for weeks and, at times, even months, especially in the case of large tankers discharging in single buoy mooring (SBM), seafarer's still do not enjoy the freedom of going on shore leave. Article 3.19 of the Convention on the Facilitation of Maritime Traffic 1965 states:

"Foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of

the ship have been fulfilled and the public authorities have no reason to refuse permission to some shore for reasons of public health, public safety or public order.”

Even Alexander Justice, in his commentary on Article XX of the Code of Oleron, has explained:

“The reason for Article XX was to keep the seaman in health and vigour. For by encouraging them to go ashore, two at a time, when their attendance was not necessary onboard, the Master gave them an opportunity to refresh themselves on land, which is the best remedy in the world for the Scurvy, contracted a ship board by living on salt meats and dry biscuits and being crowded up in close place for a considerable time. Their eating fresh provisions and breathing the free air at land makes them strong and better able to go through their business.”

Maritime Labour Convention

An urgent need was felt to revise the Safe Manning Certificate to take into consideration the workload of seafarers and this issue was highlighted at the SOLAS Conference in December 2002 under Resolution 3, in particular Part 1(e), requesting a review of Resolution A.890 (21) on “Principles of Safe Manning” in light of the new security related responsibilities. With the advent of the ISPS code, the International Confederation of Free Trade Unions (ICFTU), the industry, labour supplying countries and the World Maritime Trade Union have expressed concerns on fatigue and under-manning issues. The ICFTU has submitted a document to the MSC, asking for a review of these principles on safe manning.

Article IV of the Maritime Labour Convention 2006,¹ which is yet to be adopted, mentions the need for standards as seafarer’s employment and social rights. Standard A1.4 (Recruitment and Placement) elaborates on the importance of public seafarer recruitment and placement services to provide services in an orderly manner that protects and promotes seafarer’s employment rights as provided in the Convention.

Regulation 2.1 (Seafarer’s Employment Agreements) emphasises the importance of contracts, indicating that the same should be clearly written, legally enforceable and consistent with the Standards in the ISPS Code. The regulation also allows a seafarer to review and seek advice on the terms and conditions in the agreements and to sign without any undue influence. Regulation 2.7 (Manning Levels) suggests seafarers to

work onboard ships that have sufficient personnel for the safe and efficient operation of the ship. Consideration is made towards continuous safe operation, high level of security on board taking into account concerns on seafarer's fatigue and the particular nature and conditions of the voyage. When determining, approving or revising manning levels, the competent authority shall take into account the need to avoid or minimise excessive hours of work to ensure sufficient rest and to limit fatigue.

Article 111 of the Convention on Fundamental Rights and Principles, underscored the provisions of its law and regulations with respect to the fundamental rights of:

- (a) Freedom of association and the effective recognition of the right to collective bargaining;
- (b) Elimination of all forms of forced or compulsory labour;
- (c) Effective abolition of child labour; and
- (d) Elimination of discrimination in respect of employment and occupation.

While observing (b) and (d) above, one can assume that without ergonomically designing or amending the ISPS Code (implementation criteria) it would not be possible to comply with these rights and principles. Basically, ship personnel are being forced to contribute towards compliance of the ISPS Code without prior studies being carried out on the aspects of fatigue and stress. Without considering these amendments to the safe manning standard on board ships, the level of uncertainty on the application of the ISPS Code would be imminent. Undoubtedly, the ISPS Code works ergonomically in an attempt to regulate the behaviour of seafarers and port authorities through elaborate regulatory procedures as preventive measures in relation to combating criminal offences that pose a threat to maritime security.

The ISPS Code

Looking at the macro-ergonomics that combine the organisational as well as social environment in which the human-machine functions, one observes that a top-down approach is adopted where participation from all levels is required for the successful implementation of the Code. However, a look at the top of the 'pyramid', which comprises of entities like MSC and MSWG that developed the Code, makes it apparent that they have failed in their obligation to identify the seafarer's role on board ships. In fact, seafarers are the actual implementation tool of the Code. If IMO

designed the Code according to the socio-technical system where human-machine inter-relation is considered, then a framework of responsibility would need to be adopted to identify who should be responsible to implement Article 7 of Part A of the ISPS Code pertaining to ship security? This Article requires that, at Security Level 1, all ships take preventive measures against security incidents through appropriate measures such as:²

- (a) Ensuring the performance of all ship security duties;
- (b) Controlling access to the ship;
- (c) Controlling the embarkation of persons and their efforts;
- (d) Monitoring of deck areas and areas surrounding the ship;
- (e) Supervising the handling of cargo and ship's stores; and
- (f) Ensuring that security communication is readily available.

In addition, the SSO is required to carry out the security assessment of the ship on-scene, which includes the following elements:

- (a) Identification of existing security measures, procedures and operations;
- (b) Identification and evaluation of key shipboard operations, which are important to protect;
- (c) Identification of possible threats to key shipboard operations and the likelihood of the occurrence, in order to establish and prioritise security measures; and
- (d) Identification of weaknesses, including human factors, in the infrastructure, policies and procedures.

The security assessment should be documented, reviewed, accepted and retained by the shipping company. The security plan and manual should identify the required preventive measures. As per Article 12, the SSO's duties and responsibilities include, but are not limited to:

- (a) Undertaking regular security inspections of the ship to ensure that appropriate security measures are maintained;
- (b) Maintaining and supervising the implementation of the ship security plan, including any amendments to the plan;
- (c) Coordinating the security aspects of the handling of cargo and ship's stores with other shipboard personnel and with the relevant port facility security officers;

- (d) Proposing modifications to the ship security plan;
- (e) Reporting to the company security any deficiencies and non-conformities identified via internal audits, periodic reviews, security inspections and verifications of compliance and implementing any corrective actions;
- (f) Enhancing security awareness and vigilance on board;
- (g) Ensuring that adequate training has been provided to shipboard personnel, as appropriate;
- (h) Reporting all security incidents;
- (i) Coordinating implementation of the ship security plan with the company security officer and the relevant port facility security officer; and
- (j) Ensuring that security equipment, if any, is properly operated, tested, calibrated and maintained.

It is a tremendous effort for a single person or a ship with reduced manning to cope with all the responsibility and duties stated above. Consideration of the proposed security duties and responsibilities should be equally distributed with consideration of the stipulated working hours among competent ship personnel specially trained in implementing maritime security on ships, so that the duties and responsibilities can be performed with success.

Chapter V of SOLAS, Regulation 14 has made it mandatory that the contracting government to the Convention shall undertake necessary actions for its national ships to maintain or, if necessary, adopt measures for the purpose of ensuring that, from the point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned, with reference to Resolution A.890 (21) on “Principle of Safe Manning” as amended by Resolution A.955 (23). Chapter V refers to only the “Safety of Navigation”, but Article 4.28³ of Part B of the ISPS Code requests administrations to take into account any additional workload that may result from the implementation of the ISPS Code and ensure that ships are sufficiently and effectively manned.

The ISPS Code and Shore Leave

In 2005, the International Transport Federation (ITF) carried out a survey by sending out questionnaires to about 230 seafarers’ union affiliates representing approximately 700,000 members and to 127 ITF inspectors to gauge the effectiveness of the ISPS Code and the implications of its implementation to seafarers. A vast majority of the

respondents (seafarers) said they were adversely affected by the implementation, either by the excessive workload or denial of access to shore. Of the total respondents, 86 per cent maintained that the ISPS Code had resulted in extra work with an adverse impact on crew performance and well-being, while only 4 per cent reported increase in manning levels to cope with the additional workload. In the context of human rights violation, of primary concern is the issue of shore leave and the restrictions placed on seafarers wanting to leave a vessel.⁴ Of the total reported cases of shore leave denial, 58 per cent were at United States (US) ports. The Associated Marine Officers and Seamen's Union of the Philippines (AMOSUP) carried out its own survey, which showed 70 per cent cases of shore leave denial at US ports.

Being confined to living in ships with small numbers of crew of different cultural backgrounds limits the inter-crew communication and when forced to work under additional limitation of communication with loved ones at home, it creates mental and physical illness. A report submitted by Stefan Mueller Dombois, an ITF officer at Long Beach, USA stated:⁵

"In December 2005 the MV Sunny Globe arrived at Long Beach to off-load cement and take on scrap metal, a task that would take about seven days. On 14 December an immigration officer came on board the vessel to question the seafarers. One of those questioned was a Filipino ordinary seaman (OS) who had not long been at sea. When asked about his previous career he replied that he had been a mechanic. This prompted a follow-up question on the uses of brake and engine oil – the official seemed set on testing the seafarer's technical knowledge. The OS was shy and had limited English language skills. He could not answer the question. The Master of the vessel offered to vouch for his crew member, saying that he had sailed on two previous contracts with him and confirming that he was of reliable character. The reference was not deemed acceptable. Instead the immigration officer issued a "notice to detain the alien on board," requiring that the seafarer be "detained on board under safeguard at all time while in the US." His stated reason for the detention was given as 'malafide.' The rest of the crew were allowed ashore."

Security restrictions and feelings of being neither trusted nor valued are undermining seafarers' faith in themselves. The morale of those who work at sea has reached an all-

time low and the effect on recruitment is evident. Anyone who has been to sea would say that there is no worse place to be if one is feeling low or depressed. Onboard suicides are at an all-time high; morale is at an all time low. What is sapping the seafarers' morale and what is the effect on recruitment?⁶ It is now believed that the high-value shipping industry needs a serious makeover if it wishes to attract the high-value recruits that it deserves.

The US ratification of ILO's Convention on a standard biometric seafarer identification (ID) card remains mired in uncertainty. Visa requirements for non-US seafarers will continue to scupper shore leave on a large scale in the near future.⁷ Australia has expressed interest to issue visa for foreign crews landing on any of its ports.⁸ What has happened to all the freedom of the sea? The ILO's Convention on ID cards for seafarers brings to light the international application of human rights to seafarers. A timely background search would be carried out for each seafarer before issuance of the ID card. With its universal application, this system could ease the process of visa application at every port of call.

Seafarers have human rights, too! There is a lot to be said about putting oneself in another person's shoes. For instance, how does the Master of a container ship calling into Singapore feel when he requests the agent for an appointment to visit the doctor, only to be told that because he is a Pakistani citizen and does not have a visa he would not be permitted to leave the ship and thus, the much needed medical attention would be withheld?⁹ How would one feel in a similar situation? This question needs to be asked more often of officials guilty of a slavish adherence to regulation, unleavened by common sense. In a case in the US Supreme Court in 1943,¹⁰ it was decided that:

"The assumption is hardly sound that the normal uses and purposes of shore leave are exclusively personal and have no relation to the vessel's business. Men cannot live for long cooped up aboard a ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landman, therefore, the superfluous is the necessary... to make life livable and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."

Seafarer's ID

On the US initiative, ILO adopted the Seafarer's Identity Documents Convention (Revised ILO-85) on June 20, 2003. This Convention enhances maritime security by setting international standards for the seafarer's identity document (SID) – machine readable, tamper proof, digital photograph and biometric – to provide reliable, positively verifiable and internationally acceptable identification. This Convention allows or gives the right to shore leave and requires member states to accept SID as a document replacing visa. Member states would have to maintain an electronic database containing all the information of their own seafarers to be accessible by authorities from all ILO member states.

The SID will act as a waiver for the need of visa D1 and D2 (US crew member visas D1 and D2) but the cost of implementation and maintaining of the database would have to be borne by the member states. Seafarers will not receive any incentive to obtain the SID unless specified by their particular state. Since the standard being set for the approval of SID is high, to satisfy the technical requirements of the US Enhanced Border Security and Visa Reform Entry Act of 2002, it raises the cost for the processing of and obtaining this card. At the same time, SID offers the best possible solution between legitimate port security requirements and the need for crews to attend to their physical, emotional, and spiritual needs on shore leave, provided that the Convention is broadly ratified and implemented.

However, there is still uncertainty about the reliability and safety of biometric procedures, and the use of biometric 'smart-cards' can provoke certain misapprehensions concerning user privacy. Some critics say that biometric technology is far from foolproof and that while it can improve security in some situations, its cost frequently far outweigh its benefits. Critics assert that a widespread system of biometric seafarer IDs would not necessarily unmask terrorists who have managed to obtain and carry them.¹¹

Even the most advanced systems falsely reject a small proportion of legitimate users and falsely accept illegitimate users. There are also issues relating to the issuance of cards to the wrong person. The ILO has placed great emphasis on Flag States to maintain a proper database available for international consultation by authorised officials and to observe adequate procedures for the issuance of identity documents. Although the new proposed standard is based on the principle of keeping cost as low as possible, some ILO members have expressed concerns that such sophisticated identity documents would cost more than the existing seafarers' cards.

The Impact to the Society as a Whole

A ship intending to enter a foreign port may be required to provide the following information to the Port State:

- International Ship Security Certificate;
- Ship security level;
- Security level at last 10 ports; and
- Special or additional security measures at the last 10 ports.

In essence, it is the responsibility of the crew to protect the perimeter of the ship from unauthorised access and the responsibility of the port facility to protect that area of the port which interfaces with the ship. There are some anticipated problems with initiating the new procedures. For example, a very large crude carrier (VLCC) trading between the Middle East and a Louisiana offshore oil platform has a 45-day turnaround period. Let us assume that the Master of the ship has taken charge only two or three months ago. Thus, he would not be in a position to accumulate the above mentioned information unless proper documentation is being maintained. The new system being implemented would make his task very difficult. The rules require the ship to have proof of security status at her last 10 ports of visit. As enforcement commences in the US, the US Coast Guard (USCG) would have to be aware that this ship will take over a year to accumulate the requisite 10 security declarations. Another problematic area will be the approved status of foreign ports. Assessments will have to be made concerning hundreds of ports worldwide. This cannot be done overnight. The USCG will, therefore, have to exercise some flexibility, at least initially. Such complications have forced many Masters to leave their jobs and look for a shore job or simply retire.

Port State Controls

If there are clear grounds for believing that a ship is not in compliance with the ISPS Code, the Port State control officers should attempt to establish communication with the ship and its administration in order to rectify the situation. Should this fail, they may take appropriate steps such as the following:

A Requirement to Rectify the Non-compliance

A requirement that the ship proceed to a location specified in a country's territorial

seas, or internal waters. For example, on September 10, 2002 USCG personnel were conducting a routine examination of the container ship *Palermo Senator* when their radiation detectors were activated. A security zone was immediately established around the vessel, which had recently arrived in Port Elizabeth, New Jersey from Valencia, Spain. The vessel was escorted to anchorage near the Ambrose light tower where it was fully examined by personnel from the USCG, Customs, Federal Bureau of Investigation, Department of Energy and US Navy Seals. It was eventually determined that the radiation was being emitted by a container carrying clay tiles from Italy. Apparently, low level radiation is sometimes found in clay deposits. Reportedly, the vessel operator incurred demurrage costs exceeding US\$ 50,000 while the vessel was being examined.

Greek Special Forces detained the cargo ship *Baltic Sky* on January 22, 2003 after acting on a tip-off that the ship was carrying illegal explosives. On December 21, 2001 the *Nisha* which was intercepted in the English Channel and detained by New Scotland Yard as part of an operation based on intelligence gathered in an anti-terrorist operation. On October 30, 2003 the *Athena* was boarded at Kunsan, South Korea on the suspicion of Al Qaeda operatives being present on board. These ships were denied entry into the ports.

Thus, it can be seen that the consequences of non-compliance can be very serious. Ships may be considered to constitute an immediate threat to security and denied entry to port or ports can be omitted from the "white list" of compliant ports and terminals.

Delay

The ISPS Code (Part A Paragraph 14.1) envisages delay for ships calling at ports and provides that security measures and procedures at a port facility will be applied in such a manner so as to cause minimum interference.

Compliance with the ISPS code may well affect the time and cost of ships' calls at ports. This is anticipated because of the extra security measures both on board and ashore leading to an extension of the time taken to load and discharge cargo. In addition, the extra security required for personnel moving through ports will inevitably lead to delays in getting contractors, surveyors and super cargo on board. The extra checks to be carried out by Port State control are also likely to take time. Therefore, when fixing ships on time charter, the allocation of these costs should be considered. Otherwise, delays caused by complying with the Code or not, as the case may be, could give rise to questions about who should bear the increased costs.

The Baltic and International Maritime Council's (BIMCO) US security clause for time charters provides that all costs and expenses arising out of the US security regulations should be for the charterer's account as a consequence of their employment of the vessel unless such costs are incurred solely as a result of the owner's negligence.

Charterparty Clauses

Arrived Ship

If a port closes its waiting anchorage, undoubtedly, it would lead to arguments as to when a ship is deemed as having 'arrived'. Hence, it would be wise to amend charterparty definitions to deal with this eventuality. In the case of *Johanna Oldendorff* the English High Court held that where a vessel has been refused permission to enter a port and has been ordered to wait outside the port by the port authority, she is not an "arrived ship."¹²

Unsafe Ports

The threat of terrorism is quite capable of branding a port as 'unsafe', prospectively, physically and politically. However, it is anticipated that the classic definition of "unsafe port" is likely to be wide enough to include the operation of the ISPS Code as seen in the case of *Eastern City*.¹³

Under a time charter if shipowners decide, having considered all circumstances, that a port is unsafe, then the time charterers will generally be obliged to nominate an alternative port. However, under a voyage charter if the voyage charterer has nominated a safe port in the charter and, subsequently, that port becomes unsafe, the voyage charterer is not obliged to make an alternative nomination. Unless there is express provision in the charterparty dealing with such a situation, the vessel would either have to proceed to the nominated port in spite of it being 'unsafe' or wait until the port is considered to be safe once more. In such circumstances, the delay could conceivably be excessive enough to frustrate the voyage charter. It would, therefore, be sensible to consider inserting clauses into the voyage charter dealing with remedies in case this type of situation arises, for example, obliging charterers to make an alternative nomination. In the absence of such an alternative nomination shipowners could be permitted to sail to an alternative safe port of their choosing.

Conclusion

In the event of a terrorist incident occurring on board a vessel or at a terminal, the duties of care required by most legal courts are likely to be with reference to the ISPS Code. Therefore, failure by a vessel or a port to adopt these measures when required by law could result in the port or vessel being blacklisted leading to financial loss and liability on the part of the vessel's owner/operator for breaching contractual obligations to provide a seaworthy vessel. If a vessel or its cargo is detained for SOLAS security breaches where the carrier or the port fails to provide a secure vessel or port, she may be liable for the consequential damage.

It is inevitable that there will be a period of uncertainty and that there may be problems due to the lack of uniformity in the Code's implementation in different ports by different Flag States. In the meantime, existing and future contractual relationships should be checked to ensure that the expected implications of the Code are analysed and dealt with as far as possible.

Security measures undertaken by authorities must be in harmony with human element issues, with consideration of the seafarer's rights as human beings and other rights enjoyed by them by virtue of their profession. Although laws do not oblige shipowners to provide seafarers with safe ships, it is important to ensure such provisions are addressed and made important in line with other provisions such as those for the protection of property and the environment, addressed in other maritime conventions. It is of great importance that suitable maritime laws are made for protection of seafarers and their human rights.

In order to address the issues mentioned in this paper, the foremost approach that shipowners could take is to create and implement a new mechanism to ascertain the number of crew required on different kinds of ships. This new mechanism would then assist the respective Marine Officers in the Marine department to certify ships and, eventually, render the management with a safe manning certificate, which would comply with requirements needed for effective implementation of codes and regulations for a safe and secured ship.

Shipowners would need to identify and record the performance and time required for each of the major tasks carried out onboard and/or to be performed in the future. A full comprehensive shipboard duty would include tasks such as the following:

1. Cargo work;
2. Ballast operations;
3. Navigation;
4. Engine operations;
5. Auxiliary equipment operations;
6. Radio operations;
7. Deck operations, pilot boarding etc.;
8. General operations, maintenance etc.;
9. General administration;
10. Food and cleanliness;
11. Emergency operations.

To determine the manning requirement, the ship voyage profile and operating conditions would have to be specified. For each shipboard function, the average time required has to be recorded and multiplied by its frequency of occurrence per voyage. Then this data has to be multiplied by the number of persons of a given skill needed to perform that function. In this way, the total amount of time required by a person of a given skill to perform a specific function during the voyage can be determined. Dividing this figure by the total days of voyage would give the average time per day required for that function. Further dividing this number by the average number of true working hours per day per person (10 hours, as per Standards of Training, Certification and Watchkeeping (STCW)) in that skill would give the number of persons required per day to run the ship. This would eventually give the number of personnel – deck officers, deck ratings, engineer officers, engine rating and catering staff – required for the ship to operate safely. The simplified formula is illustrated below:

1. Average time for shipboard duties x frequency of occurrence per voyage = A
2. An X number of personnel required to perform this duty = Total time required to perform that duty during the voyage = B
3. $B/\text{Total number of voyage days} = \text{Average time per day to perform that duty} = C$
4. $C/10 \text{ hours} = \text{Number of personnel required per day} = D$
5. For every duty mentioned above the same calculation would need to be done and the sum of all D 's will give in the number of personnel required to man the vessel safely.

Adoption of this formula would standardise the calculations for minimum safe manning onboard ships and it would be successful if proper data and record is collected. This formula would enhance the quality of seafarer's onboard all type of ships and, thus, would comply as an ergonomically designed legislation towards a safe and secured trading environment.

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