

The European Commission (EC) is currently challenging Brazil's ban on the importation of retreaded tires at the World Trade Organization (WTO). The EC complains that Brazil's ban is disguised protectionism that violates several GATT disciplines. A WTO Panel was established on 20 January 2006 to examine the case.¹

Brazil justifies its import restrictions on the basis of environmental and human health concerns.² Brazil argues that tires contain highly combustible and polluting materials, and that tire incineration releases toxic gases and contaminates Brazil's soil, water, and air. The accumulation of tires in its territory also results in mosquito propagation because mosquitoes use tires for their breeding ground, which in turn increases the transmission of serious diseases such as dengue, yellow fever, and malaria.³ Because Brazil already has a large amount of tire waste in its territory and considerable difficulties dealing with this waste, additional tire waste resulting from the import of retreaded tires would aggravate the environmental and public health risks associated to tire disposal.

Tire Waste & Retreaded Tires

Tire waste and its disposal is a worldwide problem. Tires are not biodegradable; hence the time required for their decomposition is undetermined. Due to their chemical composition, tires, when burnt, release organic and inorganic pollutants to the air and soil, including hydrocarbons, dioxins, and other toxic substances. Tire disposal requires special and expensive technology, and ultimately the elimination of waste tires is not guaranteed. Developing countries face additional problems dealing with tire waste, including lack of technical capacity. Additionally, due to their shape and impermeability, disposed waste tires (including retreaded tires) can hold water for long periods, providing sites for mosquito larvae development. Thus, given that tires in developing countries are often disposed of in landfills and illegal dumps, tires become vectors for diseases such as elow fever, malaria, and dengue.

Used tires and tire material can often be recycled, for instance by tire retreading. Tire retreading, like other forms of tire recycling, postpones the eventual disposal of a tire. Tire retreading contributes to a reduction in the total amount of tires used and disposed of over time, because retreading

extends the life of the original tire by about 30%-100%. Given that most countries are faced with the need to dispose of ever-increasing numbers of tires, prolonging the life of a tire through retreading can be a way to minimize the number of waste tires.

While retreading is an environmentally friendly way of recycling a used product, trade in retreaded tires can increase the environmental and public health impacts of tire waste. The possibility of retreading an already retreaded tire is significantly reduced. This was an issue of fact before an Arbitral Tribunal of the Mercosur (addressed in further detail below), which concluded that a car tire generally can be retreaded only once.⁴ Moreover, compared to a new tire, the life of a retreaded tire is generally shorter. Thus, the import of a shorter-life retreaded tire ultimately leads to a higher number of waste tires in an importing country than would the import of longer-life new tires. For these reasons, a number of developing countries, including Albania, Algeria, Argentina, Bangladesh, Bahrain, Cambodia, Colombia, Ecuador, The Philippines, Jordan, Macedonia, Morocco, Mexico, Nigeria, New Zealand, Pakistan, Peru, Thailand, Sri Lanka, Uganda and Venezuela, ban or restrict the imports of used or retreaded tires.

The EU & Brazil's Measures to Control Environmental and Health Problems Linked to Tire Disposal

Countries are increasingly addressing the problem of tire disposal in their environmental and health policies. In Brazil, for instance, stockpiles of waste tires have accumulated in its territory. Lacking the capacity to deal with a large volume of tire waste, Brazil has adopted regulations to avoid the generation of unnecessary tire waste. For example, since 1991, Brazil prohibits the import of *used tires* to be employed to manufacture retreaded tires domestically,⁵ including the import of retreaded tires (except from Mercosur). Brazil has also adopted a series of other measures to address the problems resulting from the increasing generation of waste tires in its territory, including measures: (a) to prohibit landfilling and burning of used tires; (b) to attach responsibility to producers and importers of tires for the collection and disposal of these products when they reach the end of their life cycle; (c) to define and monitor the environmentally sound options for disposal of waste tires; (d) to require compulsory environmental licensing for companies dedicated to the disposal of

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waste tires; (e) to discipline the use of waste tires co-processing technologies in cement production; and (f) to control emissions in industrial plants co-processing waste tires.⁶

The European Union is also dealing with the environmental risks associated with waste tires disposed of in landfills. In order to deal with its waste tire stream, the EC adopted three Directives:

(1) the *Landfill Directive* (1993/31/EC), which restricts and ultimately prohibits the disposal of used tires in EC landfills—as of 2006, whole, cut or shredded tires are completely banned from landfills within the European Community, leading to an important increase of tires to be disposed of in another manner;

(2) the *End of Life Vehicle Directive* (2000/53/EC), which establishes percentages and sets deadlines for EC Member States to reuse or recover tire waste—more specifically, this Directive requires Members States to ensure that the reuse or recovery rate for waste tires rises to 85% by January 2006, and further increases to at least 95% by January 2015; and

(3) the *Waste Incineration Directive* (2000/76/EC), which establishes emission limit standards for plants incinerating tire waste within the Community. As a result of its desire to avoid disposal expenses that would be higher because of its stricter environmental regulations, the EU is looking to find alternative ways of dealing with the millions of used tires that it produces and uses annually.⁷

In the pending WTO dispute, Brazil has raised the concern that the EC intends to dispose of its used and retreaded tires by exporting them abroad. In its statement to the WTO's Committee on Trade and Environment on 6 July 2005, Brazil noted:

Another obvious consequence of the implementation of the mentioned Community Directives will be an increasing pressure for new markets for the EC's used and retreaded tires. Consumers all over the world have a very strong perception that used tires are trash and that retreaded tires are low quality products. European consumers clearly prefer new tires to shorter lifespan products (retreaded tires) or wastes (used tires). Therefore, the EC will need to search for consumers of these products outside its borders.

By exporting retreaded tires to Brazil, the EC would eliminate used tires from its territory, and also transfer the

responsibility for the end use of waste tires to the receiving country (in this case, Brazil). If Brazil is unable to manage its tire waste in an environmentally sound and sustainable manner that would avoid contamination with hazardous pollutants and proliferation of diseases in its territory, then Brazil arguably has the right to ban the importation of recycled tires that would compound these problems on environmental and health grounds. In that vein, whether retreaded tires aggravate the environmental and public health impacts of tire waste in Brazil may call for careful analysis of several issues of fact, such as, *inter alia*: tire disposal requirements and capacity in Brazil and life-span of domestic tires.

Some of the issues involved in trade in used tires and tire waste are addressed by the Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), examined next.

Transboundary Movement of Waste as a Problem Recognized in the Basel Convention

The Basel Convention was adopted in 1989 as a response to increased exports of hazardous waste from industrialized countries to developing countries and Eastern Europe. Ratified currently by 167 countries, the key objectives of the Basel Convention are: to minimize the generation of hazardous wastes in terms of quantity and hazardousness; to dispose of hazardous waste in an environmentally sound manner; to ensure national self-sufficiency in hazardous waste management, and to reduce the transboundary movement of hazardous wastes.

To achieve these objectives, the Basel Convention has established several rights and obligations. Among these is the sovereign right of any country to first declare a waste as hazardous and subject to control.⁸ Parties exercising their right to prohibit the import of hazardous or other wastes (defined as wastes collected from households and incinerator ash) must inform the other Parties. Parties are then obliged to not permit the export of hazardous wastes or other wastes to the Parties that have prohibited the import of such waste.⁹ Further the Convention forbids the export of waste to countries lacking the ability to manage such waste in an environmentally sound manner.¹⁰ The Convention also calls for every party to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous and other wastes, that shall be located to the extent possible in the state where the waste was generated.¹¹

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In addition, in 1995, the Third Conference of the Parties adopted an amendment to the Convention, banning the export of hazardous wastes from Liechtenstein, OECD and EU Member States to other countries for final disposal and recycling. According to this amendment, which is expected to enter into force upon receipt of one more instrument of ratification, exports from developed to developing countries will be prohibited, regardless of local environmental conditions and disposal capacity. Though not binding on countries that have not ratified the ban, the EU has already implemented it under EU law.¹²

Waste tires and used tires can fall under the scope of the Basel Convention in certain circumstances. First, if waste tires are exported for disposal, then they are a controlled hazardous waste and subject to the Basel Convention. Second, used tires exported for recycling may also fall under the Basel Convention if they contain an Annex I hazardous constituent that exhibits an Annex III hazardous characteristic.¹³ Third, if Brazil notifies the Parties in accordance with the Basel Convention that it considers waste or used tires to be a hazardous waste, then such tires fall within the controls of the Convention and their export to Brazil will be prohibited.¹⁴ Other countries, such as Thailand, have adopted such listing and notification measure thereby benefiting from the protection of the Basel Convention.

In contrast to waste or used tires, retreaded tires have undergone a recycling process, usually in accordance with strict safety standards, that allows for their characterization as products and that differentiates them from waste. Even if retreaded tires do not qualify strictly as waste as defined in the Basel Convention, however, it is important to note that the spirit of the Convention specifically covers situations where developed countries are 'exporting a waste problem' to a developing country. In that light, the Basel Convention's preference for disposal at source is relevant to approaching the public health and environmental issues associated with trade in retreaded tires.

Finally, Mercosur countries and associated countries could create a Mercosur waste trade agreement, which under the Basel Convention would constitute a legitimate regional arrangement trade in waste, provided that it was compatible with the Basel Convention.¹⁵ In that vein, capacities of scale enabled by such a regional arrangement would in turn allow for a regional recycling center, thus ultimately benefiting the environment and human health. Steps in this direction appear at an early stage with the creation by Mercosur Environment Ministers of an *ad hoc* group, under the

Environmental Working Group, tasked with analyzing legal asymmetries relating to the environmental management of tires and making recommendations. More generally, as examined below, the regional integration and market considerations played a role in the reasoning of the Mercosur Arbitral Tribunals, although they did not address the Basel Convention dimension.

Selected Legal Aspects of the Brazil-Retreaded Tires Case

The *Brazil-Retreaded Tires* case raises a number of interesting and complex questions of fact and law. This section provides a cursory overview of three central issues: the claims and defense, the "necessity" test, and the Mercosur Arbitrations.

The Claims and Defense

The EC is challenging several of Brazil's measures relating to retreaded tires, including among others: Brazil's prohibition of the issuance of import licenses for retreaded tires;¹⁶ Brazil's exemption from the ban of retreaded tires from Mercosur countries; and Brazil's penalties on the importation, as well as the marketing, transportation, storage, keeping or keeping in deposit or warehouses of imported, retreaded tires.¹⁷

The EC alleges that Brazil has acted inconsistently with several provisions of the GATT, including:¹⁸

- Article XI:1 by instituting and maintaining a prohibition and restriction other than a duty, tax or other charge on the importation of a product of the territory of another Member, made effective through import licenses and other measures.
- Article XI:1 and/or Article III:4 of GATT 1994 by instituting and maintaining a restriction other than a duty, tax or other charge on the importation of a product of the territory of another Member, made effective through a fine imposed on the importation of retreaded tires;
- Article III:4 and/or Article XI:1 of GATT 1994 by maintaining prohibitions of the commercialization of imported retreaded tires at the level of States and by imposing a fine for imported retreaded tires that are sold, transported, stored, kept or kept in deposit or warehouses and therefore according, to products from the EC treatment

less favorable than that accorded to like products of national origin.

- Article I:1 of GATT 1994 by eliminating the import ban and financial penalties for retreaded tires imported from other Mercosur countries, while maintaining those measures for other imports, including from the EC.
- Article XIII:1 of GATT 1994, by applying a prohibition and restriction on the importation of a product of the territory of another Member, although the importation of the like product of all third countries is not similarly prohibited or restricted.

Brazil, in response, argues that the exceptions in Article XX of the GATT justify measures otherwise inconsistent with GATT disciplines on MFN, national treatment, or quantitative restrictions (such as those at issue in the case) that are adopted to protect health and the environment. In a statement to the WTO's Committee on Trade and Environment on 6 July 2005, Brazil argued:

Brazil is . . . of the view that any country lacking capacity to deal adequately with the environmental and health consequences of this kind of undesirable commerce shall have fully recognized their rights to impede it. In fact, Article XX of GATT 1994 already shelters WTO Members from certain trade practices which represent a menace to human, animal or plant life or health. Based on the exception provided for by Article XX of GATT 1994, many WTO Members – especially developing countries – have adopted restrictive measures as a way to prevent imports of shorter lifespan products, thus avoiding premature generation of wastes in their territories.

The General Exceptions clause in GATT Article XX allows WTO Members to derogate from other GATT disciplines if measures are necessary to protect human, animal or plant life or health (paragraph b) or if they relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (paragraph g). These exceptions are “subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade” (headnote to Article XX).

Emerging WTO jurisprudence on Article XX has interpreted this introductory phrase as a safeguard against abusive application of health and environment exceptions. The Appellate Body has particularly focused on, *inter alia*, whether exceptions have been applied reasonably, and

whether exceptions have been applied in an open and transparent way. Also, the Appellate Body has explicitly referred to the notion of sustainable development in trade policy, as contained in the Preamble to the WTO Agreement, and its impact on the introductory clause of Article XX.

The “Necessity” Test

When adjudicating whether or not an otherwise GATT-inconsistent measure can be saved under the Article XX (b) exception, panels must determine whether or not the measure is “necessary” to fulfill the legitimate objectives listed under that paragraph. In *Korea – Beef*, the WTO Appellate Body first stated that for a measure to be necessary, the measure does not need to be “indispensable” or “inevitable.”¹⁹ The Appellate Body created a three factor balancing test for deciding whether or not a measure is necessary when it is not per se indispensable. The three factors to be considered are: (i) the contribution made by the (non-indispensable) measure to the legitimate objective; (ii) the importance of the common interests or values protected; and (iii) the impact of the measure on trade.

The Appellate Body indicated that these elements of the weighing and balancing process were part of the determination whether an alternative GATT-consistent or less inconsistent measure was reasonably available. That is a key question that may determine the success of a defense based on Article XX(b): whether Brazil could achieve the same level of environmental and health protection by using other reasonably available measures that would be less restrictive to trade. In approaching this question, WTO jurisprudence has noted the importance of looking at, *inter alia*, the importance of the values protected.²⁰ In that respect, the Appellate Body in *EC-Asbestos* noted that the preservation of human life and health was both vital and important in the highest degree, thus making it easier to meet the necessity requirements of Article XX(b). Additionally, WTO Jurisprudence on “necessity” has also considered the costs associated with alternative measures and the difficulties in the implementation of an alternative measure. For example, in *U.S. – Gambling* (which involved the GATS), the Appellate Body found that an alternative measure that is merely theoretical in nature may not be considered reasonably available.²¹ This would include situations where the responding Member is not capable of taking an alternative measure or situations where the measure imposes an undue burden on that Member (e.g., prohibitive cost or substantial technical difficulties).

The Mercosur Tires Arbitral Decisions

As mentioned above, the EC also challenged Brazil's exemption of Mercosur countries, from the import restrictions on retreaded tires. Brazil's exemption is the result of a decision of a Mercosur Ad Hoc Arbitral Tribunal in a case brought by Uruguay against Brazil challenging its ban on imported retreaded tires. The Tribunal ordered Brazil to change its laws and to allow retreaded tires from Uruguay access to the Brazilian market.

In the ambit of Mercosur, Uruguay has challenged both Brazil and Argentina for prohibiting the entry into their territories of retreaded tires. While similar, these cases have significant differences that may have impacted on the outcome of the cases. Unlike Argentina, Brazil did not raise public health and environment issues as a defense to its measures. Instead, Brazil presented a more narrow legal argument: that its measures only clarified the legal status of reformed tires under the relevant tariff line; that the tariff line and the ban applied to both used and reformed tires; and that Mercosur norms allow its Members to restrict trade in used goods, such as reformed tires. While the arbitral tribunal noted that the Brazilian classification of retreaded tires was not necessarily arbitrary from a technical perspective, it nevertheless found that Brazilian authorities had distinguished used tires from reformed tires for a number of years before the change in policy, which was thus an impermissible obstacle to free trade under Mercosur. In reaching its 2002 decision, the Mercosur (Uruguay v. Brazil) Arbitral Tribunal placed great emphasis on the importance of the law of integration in the efforts of Mercosur countries to create a common regional market.

A second difference of significance between the arbitrations is the fact that the *Argentina-Tires Award* was reviewed and reversed by Mercosur's Permanent Review Court. The arbitral tribunal had detailed the differences between new, used, and reformed tires, and found that the import of reformed tires, on account of their shorter life-span when compared to new tires, increased the environmental impacts on the importing country.²² On that basis, the Tribunal concluded that Argentina's measures were justified according to the health and environmental exceptions of Mercosur's legal framework.²³

Mercosur's Review Court, however, concluded that the measures could not be justified under the public health and environment exceptions. The Court elaborated jurisprudential criteria relevant to the application of the exceptions, such

as necessity and proportionality, noting that Mercosur lacked a legal authority establishing clear criteria for the invocation of the exceptions.²⁴ On the basis of such criteria, the Court found that Argentina's Parliament had supported the measure as a means of protecting domestic industry, and thus it was incompatible with the Mercosur integration objectives.²⁵

The Mercosur Review Court's attempt to contribute jurisprudential criteria to the application of exceptions falls short of what is expected and needed from an international appeals mechanism. Its handling of EC and WTO jurisprudence is surprisingly thin. Also surprising is the Court's superficial consideration of the complexity involved in trade and environment issues. In that context, the "smoking-gun" approach that gives paramount weight to evidence of protectionist intent in governmental statements, which the Court appeared to find conclusive, is incapable of addressing the more difficult cases of mixed intent. In such cases of mixed intent, where public health and environment issues are enmeshed with competitiveness issues, an approach that ignores either of the elements in question is incapable of appropriately reconciling the tensions that may arise between trade and legitimate non-trade objectives. Any such approach is doomed to fail in the longer-term, as non-trade values, such as public health and the environment, are essential welfare goals of society — indeed, the environment is the true infrastructure of society — and should not be subordinated to trade considerations.

The EC challenge to Brazil's measures relating to retreaded tires will likely raise a host of questions with respect to the relationship between rules under the WTO and regional trade agreements. This is an area of growing complexity, where cases involving NAFTA and Mercosur have troubled the WTO.²⁶ While the WTO Dispute Settlement Body may prefer to avoid scrutinizing the legality of Mercosur under Article XXIV of the GATT, the Panel may nevertheless consider the Mercosur arbitrations. In that context, could Brazil find justification for its measures under GATT health and environment exceptions when similar measures adopted by Argentina were found inconsistent with similar exceptions in Mercosur? Or would a Panel pause when confronted with the potential for apparently contradictory decisions in the regional and the multilateral forums? Further, would the numbers of imported tires and the capacity to deal with them make a difference, noting that the the millions of tires that the EC needs to dispose of would dwarf the 130,000 tires estimated trade between Uruguay and Brazil? More generally, in approaching the issues, the Panel may take into account the particular goals of a regional economic and political integration proj-

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ect, and ask how such arrangements impact on the application of the GATT.

Conclusions

The *Brazil-Retreaded tires* case raises a number of highly relevant environmental and health issues. The WTO panels will likely have to determine how WTO rules allow trade restrictions based on the lifespan of products. Moreover, panels may also have to address the question of whether restrictions are permitted with respect to recycled or second-hand products that are particularly difficult and dangerous to dispose of, and which in some cases may be exported to avoid the (expensive) disposal in the exporting country.

These environmental and human health considerations will most likely be examined under GATT Article XX(b) and /or (g). In the GATT context, issues associated with reasonably available alternatives to Brazil's ban may receive particular attention from the Panel and the Appellate Body. In addition, the requirements of Article XX's introductory clause may lead to inquiry on the implications of sustainable development of Brazil's measures.

The Mercosur dimension of the case will also raise novel issues for the Dispute Settlement Body. The Mercosur arbitral decisions on reformed tires are likely to be considered by the Panel in its approach to the issues involved in the EC challenge to Brazil's measures. In this ambit, the *Brazil-Retreaded Tires* case may recharge the general debate over Article XXIV of the GATT on regional trade agreements.

Tire waste and disposal is a worldwide health and environment problem, and both the EU and Brazil are trying to minimize the impact of tire waste on their environment and the health of their people. Recycling tires through retreading, and consequently extending their use, is a way, albeit limited, of diminishing the tire disposal problem. Trade in retreaded tires, however, generally increases the health and environment tire disposal problem in the importing State, as retreaded tires cannot be retreaded again and usually have a shorter life-span than new tires. Given the serious implications of tire waste on the propagation of mosquitoes and associated diseases like malaria and dengue, and given the difficulties of adequate disposal of the hazardous and persistent chemicals in tires, countries should retain the ability of banning entry of short-life retreaded tires that amplify the threats to their environment and the health of their people.

Endnotes

¹ Argentina, Australia, Japan, South Korea and the United States have reserve their third-party rights.

² Brazil – Measures Affecting Imports of Retreaded Tires (DS 332) – Second Request by the EC for the Establishment of a WTO Panel.

³ The WHO has noted that dengue is the most important emerging tropical viral disease in the world. WHO, Guidelines for Treatment of Dengue Fever/Dengue Hemorrhagic Fever in Small Hospitals, New Delhi, 1999. Dengue can be lethal and requires large budgetary resources to combat.

⁴ Tire MERCOSUR Award, Uruguay v. Argentina, para. 79.

⁵ Portaria SECEX nº 08, of 14th May 1991, Portaria SECEX nº 14, of 17th November 2004, Portaria SECEX nº 8, of 25th September 2004

⁶ See Submission of Brazil to the CTE, WT/CTE/W/241, 12 July 2005.

⁷ Estimates place the figure of waste tires produced annually in the European Union in the order of 100 million.

⁸ Basel Convention, Article 1.1.b.

⁹ Basel Convention, Article 4.1.

¹⁰ Basel Convention, Article 4.2.e & g.

¹¹ Basel Convention Article 4.2.b.

¹² Council Regulation (EC) No 120/97 of 20 January 1997 amending Regulation (EC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, *Official Journal L 022*, 24/01/1997 P. 0014 – 0015.

¹³ Basel Convention, Article 1.1.a.

¹⁴ Basel Convention, Article 1.1.b.

¹⁵ Basel Convention, Article 11.

¹⁶ Portaria No. 14 of 17 November 2004 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce.

¹⁷ Presidential Decree No. 3919 of 14 September 2001.

¹⁸ Request for the Establishment of a Panel by the European Communities, WT/DS332/4, (18 November 2005); See also, European Commission, Report to the Trade Barriers Regulation Committee, Examination Procedure concerning an Obstacle to Trade, Within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Trade Practices Maintained by Brazil Affecting Trade in Retreaded Tyres, (September 13, 2004).

¹⁹ *Korea – Beef* AB report, para. 161. This case addressed “necessity” in the context of Article XX(d).

²⁰ NATHALIE BERNASCONI-OSTERWALDER, DANIEL MAGRAW, MARÍA JULIA OLIVA, MARCOS ORELLANA & ELIZABETH TUERK, ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE, pgs. 148-202 (Earthscan 2006).

²¹ *U.S. – Gambling* AB report, para. 308.

²² Award, *Uruguay v. Argentina*, *Prohibición de Importación de*

Neumáticos Remoldeados, 25 October 2005, paras. 101-2 & 112.

²³ The Treaty of Asuncion of 1991 (the basic Mercosur treaty) references the Treaty of Montevideo of 1980 (the Latin American Integration Association (ALADI) basic treaty) and incorporates its health and environment exceptions.

²⁴ Tribunal Permanente de Revisión, Award, *Prohibición de Importación de Neumáticos Remoldeados Procedentes del Uruguay*, 20 December 2005, para. 10 & 14-7.

²⁵ *Id.*, para. 16 & Footnote 6.

²⁶ See, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report, WT/DS308/AB/R, (6 March 2006); *Argentina—Poultry Anti-Dumping Duties*, Panel Report, WT/DS241/R, (22 April 2003).

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