

Climate change and maritime boundaries: Pacific responses and implications for Australia

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REGIONAL OUTLOOK Climate Action

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Regional Outlook

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Introduction

Maritime boundaries are important for Pacific island states, for which resource-rich maritime areas are a vital source of revenue and central to their identity as ‘large ocean states’¹ in the ‘Blue Pacific’.² In this working paper we consider how climate change, and particularly rising sea levels, challenges the maritime entitlements of Pacific island states. We then consider how the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS), already under pressure from states contesting (or ignoring) its provisions, appears incapable of resolving these challenges without substantial amendment. We then analyse how Pacific island states are responding to these challenges, led by regional responses and maritime boundary diplomacy. We conclude by identifying the implications of these challenges for Australia and its responsibilities as a member of the ‘Pacific family’.

1. Climate change challenges to the Pacific islands' maritime boundaries

Pacific island states view the seas as central to the scope and exercise of state sovereignty. Their rights to resources in the seabed and water column, such as oil, gas, minerals and fish, derive from the zoning regime established in UNCLOS. This convention has been central to setting the maritime boundaries of Pacific island states. It is estimated to have given them rights over 30,569,000 km² of maritime area,³ in contrast to their combined landmass of 552 789 km² (84 per cent of which is Papua New Guinea).⁴ This constitutes about 28 percent of exclusive economic zone (EEZ) claims worldwide.⁵ UNCLOS delivers particularly significant benefits for Pacific island states that have small land masses. For example, although Tuvalu has only 26 km² of land, it has a maritime territory covering more than 900,000 km². Cook Islands has 600 km² of land, but a maritime territory of approximately 2 million km².

Maritime zones are important, as many Pacific island states depend on fisheries resources. These provide revenue from licences and access agreements, an important source of food and income, and a source of employment.⁶ The region's tuna fisheries, for instance, were valued at around US\$6 billion in 2018, and for smaller states it is one of the few non-aid sources of foreign income.⁷ Seabed mining presents another potential future source of revenue as technology for locating and extracting these minerals improves, particularly as many of the minerals critical to supporting renewable energy technology are found in the seabed.⁸ Maritime boundaries are also strategically significant, as they influence navigation rights.⁹

UNCLOS provides the international legal regime for recognising states' maritime boundaries. Article 3 provides that each state has sovereign rights over their territorial seas up to 12 nautical miles off their coastline. Within this area, states are in principle free to enforce any law, regulate any use, and exploit any resource. Beyond the territorial sea, UNCLOS sets out different maritime zones that provide state with particular sovereign rights, including the exclusive economic zone (EEZ) and continental shelf. The EEZ recognizes the right of coastal states to jurisdiction over the resources in an area extending 200 nautical miles from their shores.¹⁰ Coastal states have the right to exploit, develop, manage, and conserve all resources found in the waters, including fish. In contrast, the continental shelf provides rights to non-living resources of seabed and subsoil, including hydrocarbons and minerals.¹¹ In many cases, maritime boundaries perform dual functions as they delimit both the EEZ and continental shelf of coastal states, however this is not always the case.¹² In some cases, states claim an extended continental shelf of 350 nautical miles from their baselines, beyond the 200nm limit of the EEZ set out in UNCLOS.

Through rising sea levels and altering coastlines, climate change is likely to affect Pacific island states' maritime entitlements under UNCLOS. Under article 5, coastal states usually have 'normal' baselines that are coincident with the 'low-water line along the coast as marked on large-scale charts officially recognised by the coastal State'.¹³ These baselines are what maritime boundaries are measured against. Baselines are generally thought to be ambulatory under international law. Natural coastlines are 'impermanent features'¹⁴, and as coastlines change, baselines also move.¹⁵ The key legal issue for low-lying states, including many in the Pacific, is that several of their normal baselines are vulnerable to inundation as sea levels rise. This raises the question of whether these

states should be able to fix these baselines (and consequently their maritime boundaries) under UNCLOS before they erode or are inundated due to climate change. Sea level rise may also lead to the reclassification of land features, with potential implications for claims under UNCLOS. Different categories of land features generate different maritime entitlements. An atoll must have naturally formed islands that are above high tide in order to support a maritime claim.¹⁶ An island, 'a naturally formed area of land, surrounded by water, which is above water at high tide,' can generate the full suite of maritime entitlements, including up to a 200 nautical mile EEZ and continental shelf.¹⁷ In contrast, rocks are features incapable of sustaining 'human habitation or economic life of their own', and are only entitled to a 12 nautical mile territorial zone, but no EEZ or continental shelf.¹⁸ Low-lying elevations, that is, 'a feature exposed at low tide but submerged at high tide',¹⁹ are not entitled to a territorial sea, EEZ, or continental shelf, and can only generate a 500-metre safety zone. In practical terms, this means if an 'island' is reclassified as a rock or low-lying elevation due to coastal erosion or inundation, it is no longer capable of generating EEZ and continental shelf claims. In the Pacific, Marshall Islands, Tokelau, Tuvalu and Kiribati which are wholly, or almost entirely, made-up of low-elevation atolls and reef features, could consequently see their maritime territory disappear.²⁰

UNCLOS does not provide that the declared maritime jurisdictions of states will continue to be respected once they begin to be altered by climate change. This has left scholars and practitioners examining legal options, particularly as there is recognition of 'the inequity of a situation where small island states that have contributed the least to the greenhouse gas emissions that are causing anthropogenic climate change, might, under the current rules of international law, suffer the first and most serious impacts of sea level rise'.²¹ Both the International Law Association and the International Law Commission have established groups to study the issue. One option is the emergence of a new principle of customary international law fixing baselines at their current positions. This has found favour with some international law experts, who argue that if the purpose of UNCLOS was 'to create and maintain stability, certainty, and fairness in the governance of oceans, then a freezing of the baselines or the outer limits of maritime zones would be a consistent—and most just—means to preserve endangered states' rights to their marine resources.²² However, this view faces the challenge that, even if Pacific island states can demonstrate sufficient state practice in support, it may be difficult for them to secure sufficient acceptance of it by other states to constitute *opinio juris*. Other alternatives face similar political challenges, such as the possibility of securing agreement to a protocol to the 1994 *United Nations Framework Convention on Climate Change*, an amendment to UNCLOS, a decision of the meeting of the state parties to UNCLOS, a resolution of the UN General Assembly, or an advisory opinion from the International Tribunal on the Law of the Sea in favour of fixing baselines. Alternatively, it has been proposed that small island states could be permitted to include artificial islands as defined territory,²³ allowing them to use preservation methods to maintain their land territory and consequently maritime jurisdiction. This relies on the fact that states are permitted to physically protect their baselines through techniques such as seawalls, moles (including piers, breakwaters or causeways) and harbours.²⁴ This solution may have consequences for other maritime disputes, such as in relation to the South China Sea where artificial island build-up is affecting both the strategic situation and the capacities of smaller Southeast Asian powers to access their maritime entitlements under international law.

The Westphalian ideal of a territorialised nation-state is coming under challenge through climate change, not just due to sea level rise but other developments that make the land uninhabitable, such as soil salinisation and compromised freshwater sources. The loss of habitation may affect the maritime boundaries of Pacific island states as this is crucial to distinguishing between an 'island' and 'rock', with implications for EEZ and continental shelf claims. Although binding only on the parties to the dispute, the decision of the Arbitral Tribunal in the *South China Sea Arbitration* between the Philippines and

the People's Republic of China set a stringent threshold for islands to generate maritime jurisdiction, most notably in its criteria for what constitutes habitation and economic activity.²⁵ If such criteria were more widely applied, this could have implications for the maritime zoning around land features that are no longer habitable due to the effects of climate change. In confronting the loss of physical territory, there has already been consideration of possible relocation of citizens of low-lying atoll states and their sense of nationhood and sovereignty.²⁶ Some have proposed a new legal category for a post-climate international order for de-territorialised or landless nation-states, or the 'nation ex-situ'.²⁷ Yet, the issue of maritime zoning provokes different questions about how a de-territorialised state might continue to be 'quasi-territorial' through the maritime jurisdiction nations may continue to assert if maritime boundaries are fixed.

2. Pacific island states' responses

Pacific island states have responded to the challenges of climate change to their maritime boundaries with a high level of regional solidarity and international activism under the auspices of the Pacific Islands Forum (PIF), reflecting a broader process of international assertiveness described as the 'new Pacific Diplomacy'.²⁸ This reflects an increasing emphasis on a 'partnership approach' and 'collective outcomes and impact' by PIF leaders.²⁹ Since 1974 Pacific island states have been working together to redraw and publicly declare their maritime baselines and boundaries to pre-empt arguments that climate change-induced sea level rise will change their baselines and maritime jurisdictions. Consequently, there is a determined 'regional move to secure the present spatial scope of its maritime jurisdiction against the threat of future sea level rise'.³⁰

These efforts have accelerated over the last 20 years. Notably, in 2010 the PIF developed a *Framework for a Pacific Oceanscape*, which provided that the Pacific island states should, 'in their national interest,' deposit with the UN coordinates and charts delineating their maritime jurisdictions.³¹ Indeed, Action item 1B of that Framework is titled 'Regional Effort to Fix Baselines and Maritime Boundaries to Ensure the Impact of Climate Change and Sea Level Rise Does Not Result in Reduced Jurisdiction of PICTS'. This explicitly states that: 'This could be a united regional effort that establishes baselines and maritime zones so that areas could not be challenged and reduced due to climate change and sea level rise'.³² These commitments have been echoed in subsequent regional declarations. In the 2014 *Palau Declaration* PIF leaders called for 'strengthened regional efforts to fix baselines and maritime boundaries to ensure that the impact of climate change and sea-level rise does not result in reduced jurisdiction'.³³ In 2015 Polynesian leaders called for the states parties to the UNFCCC to acknowledge the importance of EEZs for island states and to 'permanently establish the baselines... without taking account of sea-level rise'.³⁴ In 2018 the Parties to the Nauru Agreement signed the *Delap Commitment on Securing Our Common Wealth of Oceans* in which state signatories commit to 'pursue legal recognition of the defined baselines established under the *United Nations Convention on the Law of the Sea* to remain in perpetuity irrespective of the impacts of sea level rise'.³⁵

This commitment was restated at the 2019 PIF leaders' meeting; their communique identified 'a collective effort to develop international law with the aim of ensuring that once a PIF Member's maritime zones are delineated in accordance with UNCLOS, that Member's maritime zones cannot be challenged or reduced as a result of sea-level rise and climate change'.³⁶ To this end, in September 2020 the PIF convened a regional conference on 'Securing the Limits of the Blue Pacific: Legal Options and Institutional Responses to the Impacts of Sea Level Rise on Maritime Zones'. Dame Meg Taylor, then-PIF Secretary General, opened the conference by emphasising the importance of a regional response, noting that 'our identity and advocacy as a collective is absolutely vital'.³⁷ The conference concluded with a commitment to 'secure maritime zones against sea level rise', to 'ensure that maritime laws recognize maritime boundaries as secure' and to work 'to develop regional norms for sea level rise and maritime zones'.³⁸ At the October 2020 PIF Foreign Ministers meeting, leaders agreed to develop a 'regional normative declaration for Leaders' consideration in 2021' and endorsed, in principle, the idea of establishing a Forum Officials Committee Specialist Sub-Committee on Sea-Level Rise in Relation to International Law.³⁹

Individual states have also been active. For example, Tuvalu has expressed its intent to require all states that form relations with it to 'recognise the statehood of the nation as permanent and its existing maritime boundaries as set regardless of the impact of sea-level rise'.⁴⁰ The Tuvaluan government has urged other Pacific states to 'take unilateral action to enact policies and legislation that support the legal proposition put forward by Forum Leaders in their meeting in Tuvalu in 2019', with a particular focus on establishing state

practice in order to develop customary international law.⁴¹ Other Pacific states have followed this approach by adopting legislation that purports to fix their maritime jurisdictions. This approach is also favoured by the International Law Association Committee on Sea Level Rise and International Law, which in 2018 endorsed a recommendation that established baselines, maritime zones or both be fixed and that there be no requirement to recalculate them based on sea level rise.⁴²

In order for Pacific island states to declare fixed baselines under UNCLOS they first have to be mapped and maritime boundary disputes resolved. To achieve this, since the early 2000s the Pacific Islands Regional Maritime Boundaries Project has provided assistance to Pacific states to clarify the extent of their maritime jurisdictions, including: depositing information about their maritime boundaries with the Secretary-General of the UN, as required by UNCLOS; preparing continental shelf submission for the UN Commission on the Limits of the Continental Shelf; updating maritime zones legislation; and delineating the limits of their maritime zones, including drafting and negotiating maritime boundaries treaties.⁴³ The Project has involved a partnership between the Pacific Community and the Australian government, with the support of the Forum Fisheries Agency (FFA), Global Resource Information Data Network, the Commonwealth Secretariat and the University of Sydney, and a range of relevant Australian government agencies. Although the FFA had been working since the 1990s to establish territorial sea baselines, when the Project began, many maps and charts being used by Pacific states were outdated and had often been produced by third countries; for example, Fiji and Papua New Guinea relied on British Admiralty Charts.⁴⁴

The Project has assisted Pacific states to use geographic information systems to declare their maritime zones using geographic coordinates, rather than distance from the baseline. This is significant, because it 'has the potential to establish a body of regional state practice which may have a more wide-ranging impact on the law of the sea. This is because this practice 'fixes' the outer limits rather than leaving them as 'ambulatory'.⁴⁵ In the Pacific, the distance from the baseline is 'being determined at a particular point in time, and then declared using coordinates. Consequently, the distance from the baseline is no longer the determining factor in locating the outer limits. What is determinative is the legal instrument declaring the limits'⁴⁶.

The Project has also provided a forum for Pacific states to negotiate the delimitation of the estimated 49 maritime boundaries between them.⁴⁷ This has seen the number of maritime boundary agreements in the region double in recent years; almost three quarters have been negotiated and thirteen remain outstanding.⁴⁸ These agreements 'have all been based on principles of equidistance'.⁴⁹ In their 2018 communique, PIF leaders 'committed to progressing the resolution of outstanding maritime boundary claims'.⁵⁰ They reaffirmed this commitment in their 2019 communique.⁵¹ Tuvalu and Kiribati have also passed domestic legislation replacing low tide line as the baseline with 'a system of fixed geographic coordinates'.⁵²

As at October 2020, Cook Islands, Fiji, Federated States of Micronesia, Papua New Guinea, Solomon Islands, Palau, Tonga, Tuvalu, Tokelau and Kiribati, as well as Australia, New Zealand and France (on behalf of its territories) have lodged continental shelf submissions with the UN Commission on the Limits of the Continental Shelf.⁵³ Several of these submissions overlap. France and Vanuatu also dispute sovereignty over Matthew and Hunter Islands.⁵⁴ As described above, continental shelves are important because coastal states exercise sovereign control over them for the purpose of exploration and exploitation of natural resources, particularly oil and gas.⁵⁵ Significantly, according to UNCLOS, continental shelf submissions have the effect of '*permanently* describing the outer limits of its continental shelf',⁵⁶ suggesting that—once declared and submitted—Pacific states' continental shelves would not change despite the effects of rising sea levels.⁵⁷ However, this is relevant only to the continental shelf and not the EEZ, which is relevant to fishing rights and responsibilities beyond the twelve nautical mile territorial sea.

3. Implications for Australia

The impact of climate change on the maritime boundaries of Pacific island states will have consequences for Australia. First, Australia shares – although to a less significant degree – the challenge that rising sea levels pose to maritime boundaries. Australia has the third largest EEZ in the world, partly because of its large land mass, but also due to its islands and atolls. Australia's islands and atolls in the Coral Sea and the Cocos Keeling Atoll islands in the Indian Ocean face the same vulnerabilities to climate change as do Pacific island states, which will have consequences for Australia's maritime boundaries. This might explain why Australia endorsed the 2014 Palau Declaration, which called for 'strengthened regional efforts to fix baselines and maritime boundaries to ensure that the impact of climate change and sea level rise does not result in reduced jurisdiction'.

Yet the second challenge is that, despite sharing these challenges, Australia has not taken serious policy action to address climate change and has been accused of being disingenuous about its claims to be meeting its Paris Agreement targets.⁵⁸ Australia is also said to have stymied stronger commitments to address climate change within the PIF.⁵⁹ At the 2019 PIF leaders' meeting, Australia reportedly refused to support the *Tuvalu Declaration* made by small island Pacific states calling for the use of coal in electricity generation to end.⁶⁰ However, Prime Minister Scott Morrison did announce a \$500 million 'Stepping up Climate Resilience in the Pacific' package.⁶¹ Rather than representing new funding, this package drew \$500 million from existing aid funds. The Australian government's emphasis on spending, rather than domestic action, to address climate change has disappointed Pacific island leaders.⁶²

Australia has identified improving its relationships in the Pacific islands is a policy priority, which reflects that the government has long identified that a secure Pacific islands region sits only behind a secure Australia in the hierarchy of its strategic interests.⁶³ As other powers increase their presence in the Pacific islands, the government has begun to demonstrate strategic anxiety about the 'crowded and complex' geopolitics of the region⁶⁴ and its declining influence there.⁶⁵ Yet Australia's foot-dragging on climate change—which PIF leaders (including Australia) have identified as 'single greatest threat' to the region⁶⁶—risks encouraging Pacific island states to seek closer relations with powers that have interests potentially inimical to Australia, particularly China. After the 2019 PIF leaders' meeting former Kiribati President Anote Tong commented that: 'If someone [Australia] is determined to take you down, you don't stick with them you go and look for someone else'.⁶⁷ Fijian Prime Minister Frank Bainimarama similarly commented that: 'After what we went through with Morrison, nothing can be worse than him. China never insults the Pacific. You say it as if there's a competition between Australia and China. There's no competition, except to say the Chinese don't insult us'.⁶⁸

With the Biden Administration determined to take strong action on climate change—exemplified by President Joe Biden convening a 'Leaders' Summit on Climate' in April 2021—Australia may find itself unable to resist changing its approach. Indeed, Australia is increasingly the 'odd one out' on climate action, with G7 leaders committing to tackling climate change at their 2021 summit, to which Australia was invited as an observer. Given that Australia faces similar challenges to its maritime boundaries as Pacific island states from climate change, as well as similar challenges of increased natural disasters, water shortages and other environmental changes, it is frustrating that perceived domestic political imperatives are permitted to trump vital environmental and international interests.

Third, it is significant that Australia has begun to emphasise the ‘resilience’ of Pacific islands peoples and states when discussing the impact of climate change in the region;⁶⁹ its regional response to COVID-19 similarly emphasises the importance of resilience.⁷⁰ This could be interpreted as reflecting a recognition that Pacific peoples and states have long responded and adapted to environmental, societal, environmental, geopolitical and other shocks. Such an interpretation provides a welcome counterpoint to the concepts of ‘vulnerability’, ‘fragility’ or ‘weakness’ which have long dominated Australian discourse about the region, and which imply passivity, victimhood and helplessness. But Australia’s emphasis on resilience could also be interpreted as an attempt to gloss over the structural factors—including Australia’s role—that have rendered Pacific island states and peoples vulnerable to climate change, or have contributed to the uneven nature of economic development (including the influence of globalised neoliberalism), the under-developed nature of public services (including the legacy of colonialism) and frequently unequal gender relations. On this reading, the language of resilience leaves climate change as something for Pacific people and states to cope with, rather than addressing structural factors or the need for Australia and other polluters to take more active steps to prevent climate change.⁷¹

Fourth, this emphasis on resilience may be partly in anticipation of the fact that, as sea level rise inundates or renders uninhabitable islands and atolls in the Pacific islands, Australia will likely have to respond to calls for climate mobility. How this occurs will be challenging. If measures are implemented under international law to allow inundated Pacific island states to continue to possess sovereignty in a de-territorialised form,⁷² their populations may still be regarded as citizens of that state and entitled to its protection. However, as that state would not necessarily have a defined territory (unless it is able to carve one out within another state), it is unclear where these people would have the right to move to. Alternatively, if inundated states cease to exist, then their populations may become stateless. At present the *Stateless Persons Convention* defines a ‘stateless person’ as someone ‘who is not considered as a national by any State under the operation of its law’.⁷³ Neither the *Refugee Convention* nor the *United Nations Framework Convention on Climate Change* provide guidance concerning climate-induced migration.⁷⁴ In these situations it will likely fall to neighbouring states to offer refugee status to displaced Pacific island populations. New Zealand declared its intention in 2017 to create a humanitarian visa category for people displaced by climate change, but in 2018 abandoned that policy after Pacific peoples expressed their desire that New Zealand instead work towards helping them continue to live in their own countries.⁷⁵

In the maritime domain, an important area of consideration is how de-territorialised states might cope with the challenges of monitoring, controlling and enforcing their maritime jurisdiction from afar. This may require bilateral assistance from states such as Australia, which already provides patrol boats and support under its long-standing Pacific Maritime Security Programme. It may also involve the development and use of sophisticated surveillance technologies and regional cooperation, building on what Australia and other partners provide to the Forum Fisheries Agency and other maritime surveillance mechanisms in the region.⁷⁶ In this regard, regional states such as Australia could also play a contributing role to ensuring that de-territorialised Pacific island states will reap the benefits of fishing licences in their maritime zones. The other issue is how de-territorialised states could contribute to their conservation and sustainability responsibilities under UNCLOS when they are no longer proximal to maritime areas. Managing and protecting maritime zones generated from distant islands is not unusual, and Australia has experience in this, for example in the EEZ and continental shelves around Heard Island and MacDonal Island.

Australia has remained silent on the issue of Pacific islands climate mobility, despite Australian leaders consistently referring to the importance of its ‘Pacific family’.⁷⁷ This highlights the challenges of different understandings of what obligations the concept of ‘family’ imposes. As Pasifika academics Tarcisius Kabutaulaka and Katerina Teaiwa point

out, 'kinship comes with important expectations, values and responsibilities. In the Pacific, relatives can make serious requests of each other, and it's a major cultural faux pas to say no'.⁷⁸ This raises the question of what constitutes Pacific 'family values', as well as how Australia will negotiate the obligations that family membership is generally understood to involve in the Pacific islands in the context of climate mobility. Although Australia's Seasonal Worker Scheme and Pacific Labour Scheme have facilitated some Pacific labour mobility to Australia, it remains difficult for most Pacific people to obtain an Australian visa,⁷⁹ and it is unclear whether there is either political or public will to offer sanctuary to substantial numbers of Pacific climate migrants.

Finally, the challenges that climate change poses to the capacity of smaller Pacific island states to access their maritime resources under international law will exacerbate existing human security challenges, though, for example, the developmental impacts of lost revenues and increased food insecurity. The Pacific is already highly susceptible to Illegal, Unregulated and Unreported (IUU) Fishing: it is estimated that 20 per cent of wild-caught fish is illegally caught.⁸⁰ If the legitimacy of EEZ boundaries is questionable, this will exacerbate the risks of extra-regional actors treating the area as 'high seas' rather than within the maritime jurisdiction of Pacific island states. As the region's largest aid donor and self-identified security guarantor (particularly in the Melanesian and Polynesian sub-regions), Australia will likely bear increased costs of responding to these challenges. Australia will also likely bear much of the cost of responding to the increased occurrence of natural disasters and other climatic events caused by climate changes.

Conclusion

While UNCLOS provides a valuable framework for establishing maritime order among the world's states, there remain important gaps around how to deal with the problem of rising sea levels generated by climate change. At the moment, the international community generally accepts that as territory moves, so too do baselines and the boundaries of maritime zones. Yet as the oceans threaten to engulf the low-lying land features and atolls of Pacific island states, such a view of the relationship between land and sea in international law will strip these states of their maritime resources and jurisdiction. Rising sea levels therefore pose a challenge to the maritime boundaries of climate-vulnerable states, in particular their continuing access to the maritime resources that support their economic independence.

Pacific island states are responding to these challenges through regional maritime boundary diplomacy focused on advocating for regional customary norms to fix baselines, and developing narratives that emphasise the importance of maintaining their maritime zones irrespective of territorial erosion. The effects of climate change on the Pacific will also have implications for neighbouring states, such as Australia, which claims responsibilities to its 'Pacific family'. It raises important questions about what the loss of maritime territory means for Australia as an aid partner to the Pacific, the extent to which Australia will join in the calls for a customary regional norm around fixing baselines, and the role Australia can play in ensuring the maritime security of de-territorialised states. Perhaps more importantly, the challenges posed by climate change in the Pacific islands will continue to cast a light on Australia's domestic policies and its failure to meet its climate obligations within the international community.

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