

(k) Written Statement of the People's Republic of China**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
(CASE NO.17)****RESPONSIBILITIES AND OBLIGATIONS OF STATES
SPONSORING PERSONS AND ENTITIES WITH RESPECT
TO ACTIVITIES IN THE INTERNATIONAL SEABED AREA****(REQUEST FOR ADVISORY OPINION SUBMITTED TO
THE SEABED DISPUTES CHAMBER)****WRITTEN STATEMENT OF
THE PEOPLE'S REPUBLIC OF CHINA****18 AUGUST 2010**

I. Introduction

1. On 6 May 2010, the Council of the International Seabed Authority (hereinafter "Authority") adopted decision ISBA/16/C/13, whereby it decided to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereinafter "Seabed Disputes Chamber" or "Chamber") to render an advisory opinion on the following questions:

- “1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?”

2. By Order 2010/3 dated 18 May 2010, the President of the Seabed Disputes Chamber invited the States Parties to the United Nations Convention on the Law of the Sea (hereinafter "Convention"), the Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority to present written statements on the questions submitted to the Chamber for an advisory opinion. By Order 2010/4 dated 28 July 2010, the President of the Chamber fixed 19 August 2010 as the time-limit within which written statements might be presented to it on these questions.

3. China hereby presents its observations as follows.

II. Jurisdiction

4. The jurisdiction of the Seabed Disputes Chamber to give advisory opinions is set out in article 191 of the Convention, which reads:

“The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council [of the Authority] on legal questions arising within the scope of their activities.”

5. The Council of the Authority adopted the decision to request an advisory opinion without objection.¹ The decision was taken by consensus,² which accords with the decision-making rules of the Council set out in the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter “1994 Agreement”) adopted in 1994.³ Therefore the said request of the Council has been validly made.

6. Three questions referred to in the Council’s decision address the content of the legal responsibilities and obligations of a sponsoring State, the extent of liability of a sponsoring State and the measures a sponsoring State must take to fulfill its responsibility under the Convention respectively. All these questions fall within the category of legal matters.

7. The Authority is the organization through which States Parties of the Convention organize and control activities in the Area.⁴ The Council is the executive organ of the Authority,⁵ and exercises extensive functions with respect to organizing and controlling activities in the Area.⁶ The three questions referred to in the decision of

¹ See Press Release SB/16/19 of the Authority.

² Article 161, paragraph 8 (e), of the Convention provides: “[...] ‘consensus’ means the absence of any formal objection.”

³ Annex, Section 3, paragraph 2, of the 1994 Agreement provides: “As a general rule, decision-making in the organs of the Authority should be by consensus.”

⁴ See article 157, paragraph 1, of the Convention.

⁵ See the first sentence of article 162, paragraph 1, of the Convention.

⁶ The general powers and functions of the Council are set out in article 162 of the Convention, which include, “establish[ing] [...] the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.” (paragraph 1), and “supervis[ing] and co-ordinat[ing] the implementation of the provisions of this Part on all questions and matters within the competence of the Authority [...]” (paragraph 2(a)).

the Council are all relevant to activities in the Area sponsored by States Parties, and thus constitute questions arising within the scope of the Council's activities.

8. In light of the foregoing, China is of the view that the Seabed Disputes Chamber has jurisdiction to render an advisory opinion on the said questions.

III. General Comments

9. The Convention and the 1994 Agreement establish the regime of Area and constitute the main source of law in respect of the responsibilities and obligations of the sponsoring States with respect to activities in the Area.

10. According to the Convention, the Area and its resources are the common heritage of mankind.⁷ Activities in the Area shall be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States.⁸ The Authority shall act on behalf of mankind to exercise all rights in the resources of the Area.⁹ Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole in accordance with the Convention and the relevant provisions of other instruments.¹⁰ Sponsored by States Parties concerned, state enterprises, natural or juridical persons may carry out activities in the Area in association with the Authority.¹¹

11. Regarding activities in the Area, the goal of safeguarding the benefit of mankind is mainly reflected in two aspects: first, the conduct of activities in the Area pursuant to the Convention and the relevant provisions of other instruments should be encouraged so as to promote the general welfare of mankind through exploration and exploitation of the resources in the Area and allow the States to share any benefits derived therefrom; and, second, activities in the Area shall be carried out in an orderly manner so as to prevent, mitigate and control any harm that may arise therefrom.

⁷ See article 136 of the Convention.

⁸ See article 140, paragraph 1, of the Convention.

⁹ See article 137, paragraph 2, of the Convention.

¹⁰ See article 153, paragraph 1, of the Convention.

¹¹ See article 153, paragraph 2, of the Convention. See also regulation 11, paragraph 1, of the Regulations for Prospecting and Exploration of Polymetallic Nodules and regulation 11, paragraph 1, of the Regulations for Prospecting and Exploration of Polymetallic Sulphides.

12. At present, activities in the Area are generally at a preliminary stage. The prospects for commercial mining of the resources of the Area remain unclear. Activities in the Area have not been conducted on a large scale. Effective participation of developing States in activities in the Area is rather limited. Current activities in the Area have not resulted in any damage caused by the wrongful acts of a contractor;¹² nor has any sponsoring State been held liable for damage caused by its failure to fulfill its obligations under the Convention.

13. In light of the foregoing, to properly address the issue of a sponsoring State's responsibilities and obligations in relation to sponsored activities in the Area, the relevant actors shall strictly observe and apply the Convention and the 1994 Agreement, take full account of the current status of activities in the Area, observe the need to safeguard the benefit of mankind as a whole, and pay due regard to the interests and needs of developing States for their effective participation in activities in the Area.

IV. Comments on Question 1

14. Question 1 asks: "What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?"

15. The responsibilities and obligations of States Parties that sponsor activities in the Area are stipulated in article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention. In the certificate of sponsorship issued by a sponsoring State for a state enterprise or other entity,¹³ the sponsoring State shall

¹² The term "contractor" refers to any of the entities entitled to conduct activities in the Area under Article 153, paragraph 2, of the Convention and its plan of work has been approved by the Authority. In cases where States Parties sponsor activities in the Area, contractors may be state enterprises, natural or juridical persons which possess the nationality of States Parties or effectively controlled by them or their nationals.

¹³ Both regulation 11, paragraph 1, of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and regulation 11, paragraph 1, of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area provide that each application

declare that it assumes responsibility in accordance with the said provisions of the Convention.¹⁴

16. In accordance with the said provisions of the Convention, a sponsoring State shall have the responsibility to ensure that the entity sponsored by it shall carry out activities in the Area in compliance with the Convention and the relevant provisions of other instruments (hereinafter "responsibility to ensure compliance"). This is an international obligation assumed by the sponsoring State under the Convention. Where the sponsoring State fails to discharge this responsibility to ensure compliance, it shall be liable for the resultant damage. This is a legal consequence of the sponsoring State's breach of its international obligation.

A. The Responsibility to Ensure Compliance

17. Three provisions in the Convention are relevant to a sponsoring State's responsibility to ensure compliance.

18. Article 139, paragraph 1, of the Convention provides that States Parties shall have the responsibility to ensure that activities in the Area shall be carried out in conformity with Part XI of the Convention.¹⁵ Article 153, paragraph 4, of the Convention provides that States Parties shall assist the Authority in securing compliance with the relevant provisions of the Convention, the rules, regulations and procedures of the Authority, as well as the plan of work approved by the Authority.¹⁶

by a State enterprise or one of the entities referred to in subparagraph (b) of regulation 9 shall be accompanied by a certificate of sponsorship issued by the State. The entities referred to in above-mentioned subparagraph (b) of regulation 9 of both Regulations include natural or juridical persons which possess the nationality of States or are effectively controlled by them or their nationals.

¹⁴ Both regulation 11, paragraph 3, of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and regulation 11, paragraph 3, of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area provide: "Each certificate of sponsorship shall be duly signed on behalf of the State by which it is submitted and shall contain [...] (f) a declaration that the sponsoring State assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention".

¹⁵ Article 139, paragraph 1, of the Convention provides: "States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part [...]".

¹⁶ Article 153, paragraph 4, of the Convention provides: "The Authority shall exercise such

Application of the two above-mentioned provisions is not subject to any special limitation, and the responsibility to ensure compliance applies to the States Parties which act as sponsoring States.

19. Specifically addressing sponsoring States, Annex III, article 4, paragraph 4, of the Convention provides that the sponsoring State or States, pursuant to article 139, shall have the responsibility to ensure, within their legal systems, that a sponsored contractor shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention.¹⁷

20. To summarize, the responsibility to ensure compliance can be construed as the responsibility of a sponsoring State to ensure, within its legal system, that a contractor that it sponsors shall carry out activities in the Area in conformity with the relevant rules, including the contract between the contractor and the Authority, the rules, regulations and procedures of the Authority and the relevant provisions of the Convention.

21. The Convention does not elaborate explicitly on the term “ensure”. China is of the following views with respect to a sponsoring States’ responsibility to ensure compliance:

(a) The responsibility to ensure compliance aims to prevent a contractor from violating the contract, the Convention and other relevant rules, regulations and procedures of the Authority, when carrying out activities in the Area. To this end, a sponsoring State shall, within its legal system, exercise supervision over the activities conducted by a contractor.

(b) A sponsoring State shall fulfill in good faith its responsibility to ensure

control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139¹⁷.

¹⁷ Annex III, article 4, paragraph 4 of the Convention provides: “The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention [...]”.

compliance. Faithful performance of treaty obligations is a fundamental principle in international law.¹⁸ Article 300 and article 157, paragraph 4, of the Convention also expressly stipulate that States Parties shall fulfill in good faith their obligations under the Convention.¹⁹

(c) The responsibility to ensure compliance is not an obligation on a sponsoring State to guarantee a result that a contractor shall absolutely not violate the contract, the Convention or other relevant rules, regulations and procedures under any circumstance whatsoever. Although the sponsoring State has the responsibility to supervise the contractor, it cannot conduct the activities in the Area in place of the contractor. Whatsoever supervisory measures taken by the sponsoring State, the possibility cannot be completely ruled out that activities conducted by the contractor may breach some relevant rules. In other words, the fact that the contractor breaches some relevant rules does not necessarily mean that the sponsoring State has not fulfilled responsibility to ensure compliance.

(d) As long as a sponsoring State has taken all necessary and appropriate measures under the Convention, including supervisory measures, it can be deemed to have fulfilled its responsibility to ensure compliance. The Convention, in article 139, paragraph 2, stipulates that a State Party shall not be liable for damage caused by any failure of a contractor it sponsors to comply with the Convention if the State Party has taken all necessary and appropriate measures to secure the contractor's effective compliance.²⁰ Accordingly, whether it has taken necessary and appropriate measures within the meaning of the Convention can be regarded as the criterion for determining

¹⁸ Many important international instruments acknowledged that States Parties shall fulfill the obligations in good faith, for example, article 26 of the Vienna Convention on the Law of Treaty provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

¹⁹ Article 300 of the Convention provides: "States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right". Article 157, paragraph 4, of the Convention provides: "All members of the Authority shall fulfill in good faith the obligation assumed by them in accordance with this Part in order to ensure to all of them the rights and benefits resulting from membership".

²⁰ Article 139, paragraph 2, of the Convention provides that "[...]A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2 (b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4".

whether a sponsoring State has fulfilled its responsibility to ensure compliance.

B. Liability for Damage

22. Article 139, paragraph 2, of the Convention provides that “[w]ithout prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party [...] to carry out its responsibilities under this Part shall entail liability [...]”. Without any special limitation to its application, the said provision applies to the State Party acting as a sponsoring State.

23. In accordance with the above provision, a sponsoring State shall not incur any liability unless the following conditions are all met: first, the sponsoring State has failed to carry out its responsibilities under Part XI of the Convention; second, damage has occurred; and, third, there is some causal link between the failure of the sponsoring State to fulfill its responsibilities under the Convention and the damage.

24. With regard to a sponsoring State’s liability for damage, China is of the opinion that:

(a) The said liability arises from a sponsoring State’s failure to fulfill its responsibility to ensure compliance. Although a sponsoring State sponsors contractor’s activities in the Area, it shall be liable only for its own failure to discharge its responsibility under the Convention, not for the wrongful acts of the sponsored contractor. As far as sponsoring activities in the Area are concerned, the sponsoring State’s responsibility under the Convention is just the responsibility to ensure compliance.

(b) Damage giving rise to the said liability is that directly caused by wrongful acts of a contractor. In the case where a State Party sponsors activities in the Area, damage giving rise to the liability of the sponsoring State must occur in the course of activities in the Area. A contractor is the person who conducts activities in the Area and it is the wrongful acts of the contractor that directly cause damage in the Area. To the extent that the sponsoring State fails to fulfill its responsibility to ensure compliance, its

failure may have some influence on the contractor's conduct. However, the sponsoring State's role is limited to sponsoring, not directly carrying out, the activities in the Area. As a result, its failure to ensure compliance with the obligations under the Convention cannot directly cause any damage. Rather, the damage is caused only indirectly by such failure of the sponsoring State through its impact on conduct of the contractor.

(c) A sponsoring State's liability, if any, for damage is without prejudice to the liability of a contractor and/or other parties. As indicated above, without prejudice to Annex III, article 22, of the Convention, the sponsoring State shall be liable for damage pursuant to relevant provisions of the Convention.²¹ In accordance with Annex III, article 22, of the Convention, the contractor and the Authority shall be liable for any damage arising out of their respective wrongful acts, account being taken of contributory acts or omissions by the other party.²² In respect of damage arising out of wrongful acts by the contractor, the contractor shall be liable; in cases where the wrongful acts by the Authority contribute to the damage, the Authority shall have corresponding liability for the damage. In such a situation, if the sponsoring State is also liable for the damage, the assessment of its liability shall be conducted in a way so that account is taken of the liability of the contractor and the Authority.

V. Comments on Question 2

25. Question 2 asks: "What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom the State Party has sponsored under Article 153, paragraph 2 (b), of the Convention?"

²¹ See also article 139, paragraph 2, of the Convention in which it provides: "Without prejudice to [...] Annex III, article 22, damage caused by the failure of a State Party [...] to carry out its responsibilities under this Part shall entail liability[...]".

²² Annex III, article 22, of the Convention provides: "The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, accounts being taken of contributory acts or omissions by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor[...]".

26. When an entity sponsored by a State Party fails to comply with the Convention or the relevant provisions of other instrument, the sponsoring State does not necessarily incur liability. If no damage is caused by the contractor's failure to comply with the Convention or the relevant rules of other instruments, no liability for damage arises. Even if damage is caused by such failure, the sponsoring State shall not be liable, if it has taken all necessary and appropriate measures to fulfill its responsibility to ensure compliance under the Convention.²³

27. If a sponsoring State fails to fulfill its responsibility to ensure compliance under the Convention, it shall be liable for the damage caused by such failure. Having taken into account the above analysis with respect to the sponsoring State's liability for damage, China has the following observations on the extent of the said liability:

(a) The liability of a sponsoring State shall be proportional to the gravity of the failure to carry out its responsibilities under the Convention and the strength of the causal link between the said failure and the damage. The liability resulting from a complete failure to fulfill its responsibility under the Convention should be greater than that resulting from a partial failure. In addition, the stronger the above-mentioned causal link, the greater the sponsoring State's liability.

(b) None of the Convention, the rules and regulations of the Authority and the contract between the contractor and the Authority stipulates that the sponsoring State and the contractor shall bear joint and several liabilities, or that the sponsoring State's liability is residual to that of the contractor. In determining liabilities for damage, there is no sufficient legal basis to support the imposition on the sponsoring State of such joint and several liability or residual liability for damage arising out of wrongful acts of the contractor.

(c) Compared with the liability of the contractor whose activities directly cause damage, the liability of the sponsoring State is secondary.

(d) In the case where the Authority is liable for damage arising out of wrongful acts

²³ *Supra* note 20.

of the contractor, the sponsoring State shall not bear the part of the liability incurred by the Authority in accordance with the Convention.

VI. Comments on Question 3

28. Question 3 asks: “What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?”

29. As indicated above, a sponsoring State assumes the responsibility to ensure compliance under the Convention. However, the Convention does not spell out what constitute the necessary and appropriate measures that a sponsoring State *must* take in order to fulfill its responsibility to ensure compliance.

30. Article 139, paragraph 2, of the Convention refers to “necessary and appropriate measures” for the purpose of describing circumstances under which a sponsoring State is not liable for damage under the Convention.²⁴ Whereas the failure by a sponsoring State to fulfill its responsibility under the Convention is one of the prerequisites for incurring liability and whereas its adoption of “all necessary and appropriate measures”, as stated in article 139, paragraph 2, of the Convention, shall absolve it of any liability, a sponsoring State can be deemed to have fulfilled its responsibility to ensure compliance under the Convention if it has taken “all necessary and appropriate measures” within the meaning of article 139, paragraph 2, of the Convention. For this reason, the “necessary and appropriate measures”, as stated in article 139, paragraph 2, of the Convention provides valuable guidance on determining the measures the sponsoring State *must* take in order to fulfill its responsibility under the Convention.

31. Article 139, paragraph 2, of the Convention does not explicitly concretize “necessary and appropriate measures”. However, a more meaningful elaboration can be found in Annex III, article 4, paragraph 4, of the Convention, which also provides the circumstances under which a sponsoring State can absolve it of any liability, that

²⁴ *Supra* note 20.

is, "if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction".²⁵ In view of the fact that the measures prescribed in the said provision have the same effect as the "necessary and appropriate measures" within the meaning of article 139, paragraph 2, of the Convention, the said provision can be regarded as an clarification of the latter.

32. Based on the above analysis, China is of the following views with regard to the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention:

(a) A sponsoring State shall adopt relevant laws and regulations and take administrative measures, including supervisory measures, in order to fulfill its responsibility under the Convention.

(b) The measures taken by a sponsoring State shall ensure that the contractor's obligations, assumed under the Convention and the rules, regulations and procedures of the Authority, and the contract between the contractor and the Authority, can be recognized and enforced under the domestic law of the sponsoring State.

(c) The measures that a sponsoring State must take shall be determined by the sponsoring State itself within the framework of its legal system. In deciding whether certain measures taken by a sponsoring State are sufficient to meet its responsibility to ensure compliance, account shall be taken of the particular characteristics of the legal system of the sponsoring State.

(d) The effectiveness of the measures taken by a sponsoring State shall not be below the international standard that has been established for regulating the activities in the Area.²⁶

²⁵ Annex III, article 4, paragraph 4, of the Convention provides: "[...] A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction".

²⁶ For instance, in accordance with article 209 of the Convention, States shall adopt laws and

VII. Conclusion

33. With respect to its sponsorship of activities in the Area, a sponsoring State has the responsibility to ensure compliance; it shall ensure that a contractor it sponsors shall carry out activities in the Area in compliance with the contract between the contractor and the Authority, the rules, regulations and procedures of the Authority and the relevant provisions of the Convention.

34. In order to carry out its responsibility to ensure compliance, a sponsoring State shall take necessary and appropriate measures, including adopting relevant laws and regulations as well as taking administrative measures, such as supervisory measures. Such measures shall be determined by the sponsoring State itself within the framework of its legal system. In deciding whether certain measures taken by a sponsoring State are sufficient to meet its responsibility to ensure compliance, account shall be taken of the particular characteristics of the legal system of the sponsoring State.

35. If a sponsoring State has taken necessary and appropriate measures pursuant to the Convention to fulfill its responsibility to ensure compliance, it shall not be liable for any damage arising out of wrongful acts of a contractor it sponsors in conducting activities in the Area.

36. If a sponsoring State fails to fulfill its responsibility to ensure compliance, it shall incur corresponding liability for damage thus caused.

37. With regard to the extent of liability for damage incurred by a sponsoring State, it shall be determined in accordance with relevant factors, including the gravity of the failure to fulfill its responsibility under the Convention and the strength of causal link between the said failure and the damage.

regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, and the requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures established in accordance with Part XI of the Convention.

38. Compared with the liability of a contractor whose activities directly cause damage, the liability of a sponsoring State is secondary.

39. In short, the responsibilities and obligations of a sponsoring State under the Convention and the 1994 Agreement shall be reasonable and appropriate, which are sufficient to enable the sponsoring State to exercise supervision over the contractor, while at the same time, prevent the creation of undue burdens on the sponsoring State.



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