

China and the South China Sea

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Introduction

The dispute over delimitation of maritime zones in the South China Sea is perhaps the most complex international legal dispute in the world today. The South China Sea is a *semi-enclosed sea* that is surrounded by no less than nine independent states—and, in addition, Taiwan. They all have overlapping claims to continental shelves and Exclusive Economic Zones. The dispute is further complicated by rival claims between China and Vietnam to sovereignty over *the Paracel islands*, and between the Philippines, Malaysia, Vietnam, China (and Taiwan) to the many islets and reefs in the huge Spratly area (the *Nansha* in Chinese). The South China Sea disputes will be extremely difficult to resolve. They therefore represent an enormous challenge to the political leaders, diplomats, legal experts, marine scientists, fishing authorities, naval officers, oil and gas companies, and environmental experts of the region.

The political leaders ^{since the 1990s the ASEAN countries have tried to agree with China on} ~~have been under pressure to agree on~~ a formal code-of-conduct that can prevent further militarisation of the dispute, while facilitating a process of conflict management and resolution. The urgency of the need to adopt a code-of-conduct, and get on with conflict resolution, is due to ^{a number of factors:} environmental dangers (notably the destruction of coral reefs), ~~to~~ the risk that fish stocks may be depleted, ^{desires} ~~to the need~~ to get on with drilling for oil and gas, ~~to~~ fears of war, and ~~to~~ a general desire to ensure regional stability.

So far the People's Republic of China has played a passive, reactive role in the attempts which have been made to foster regional dialogue. For a long time Beijing insisted that the disputes could only be discussed bilaterally. Beijing only reluctantly accepted to participate in informal and semi-official regional dialogues. China remains strongly opposed to involving countries outside the region in any kind of diplomatic discussions. The only positive Chinese initiative has been a proposal to shelve the disputes and jointly develop resources. Although this proposal was put forward by former Prime Minister Li Peng as early as 1990,¹ China has never specified the areas that should be developed jointly, and the proposal has not elicited ~~any~~ ^{any} positive response ^s from other countries in the region.

While playing a passive diplomatic role, China has pushed its positions forward both militarily and legally. It has modernised its South China Sea fleet, built an airbase on Woody Island in the Paracels group (which has been entirely occupied by China since 1974), encouraged the fishermen of Hainan and Guangdong to fish in the Spratly area, while establishing a naval presence there, with exercises, patrols and the construction of permanently manned shelters on several underwater reefs.

¹ Lee Lai To: *China and the South China Sea Dialogues*: 18.

Virtually all of the above-water islands in the Spratly area had been occupied by Taiwan, Vietnam, the Philippines and Malaysia before the PRC Navy entered the area in 1987–88. In March 1988, more than 70 Vietnamese sailors died in an unsuccessful attempt to prevent China from occupying reefs. Since then there have been many episodes, but no real military confrontation.

Legally China has pushed its position forward by adopting new national laws (1992, 1998) that establish most of the South China Sea as Chinese "maritime territory",² and by drawing a radical baseline system in 1996, as point of departure for claiming vast Economic Zones. The most contested part of the baseline system is an "archipelagic baseline" around the whole of the Paracels.³ China has not, however, made known the precise extent of its claim to continental shelves and economic zones.

When asked by a journalist in November 1999 if Chinese expansionism is a threat to Southeast Asia, Singapore's Senior Minister Lee Kuan Yew replied:

What do you mean by Chinese expansionism? I don't envisage their coming down to Southeast Asia to capture us. I see them wanting to reunify Taiwan, and later start drilling for oil and gas in the Spratlys. But they will not go into the Philippines, Thailand or Vietnam. They've said they would abide by the Law of the Sea, so these problems should not be insurmountable.⁴

The present author tends to agree with Lee Kuan Yew. To take the South China Sea area by force is neither a feasible nor desirable option for Beijing. China has ratified the United Nations Convention on the Law of the Sea (UNCLOS) along with the other states around the South China Sea.⁵ Thus they are committed to abiding by its rules. The problems in the South China Sea are not insurmountable, but they will be extremely difficult to resolve. No solution can be found unless there is an enlightened leadership in Beijing with a clear diplomatic strategy, a basic understanding of international law, and the necessary courage to reach out for a compromise.

This paper will first try to explain why China's diplomacy in the South China Sea has been so passive, and then try to outline a possible Chinese strategy for assuming a constructive role and resolving the disputes over the next couple of decades.

Beijing's Difficulties

China's present attempts to gradually push its military and legal positions forward, while maintaining a passive approach to regional diplomacy, reflect a number of unresolved difficulties, inconsistencies or dilemmas. Before Beijing can adopt a more coherent and active political strategy towards the disputes in the South China Sea it needs to address these difficulties. Seven of them will be analysed here:

The first is *military*. Occupation of islets in the Spratly area has taken on enormous symbolic value. It would not be very hard for the Chinese Navy to evict the Philippine, Malaysian and

² Law on the Territorial Sea and the Contiguous Zone (1992). Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (1998).

³ Greg Austin: *China's Ocean Frontier*: 181ff.

⁴ *Far Eastern Economic Review*, 11 Nov 1999: 28.

Vietnamese troops from their reefs and islets in this area, but it would be extremely difficult to hold such positions afterwards if a hostile force were to launch a counter-attack. The small and exposed islets in the Spratly area are difficult to defend. Only a country enjoying naval supremacy as well as command of the air could defend the Spratly islets, and such a country would have little need for them. The strongest naval power in the region, the United States, has shown scant interest in the Spratlys, no doubt because they are of questionable military value. It may be useful to have electronic listening posts in the Spratly area, but modern satellite technology can make even this redundant. The islets are primarily of symbolic value. Beijing must therefore weigh the symbolic importance of occupying reefs in the Spratly area against the costs involved in building a capability to defend them. The other occupants (Vietnam, Malaysia, the Philippines and Taiwan) feel this same dilemma. Taiwan recently admitted that it could not defend its island (Itu Aba or Taiping), and that coast guards would replace its troops there.

The second difficulty is *legal*. Chinese legal experts cannot find support for China (and Taiwan's) vast claims in the United Nations Convention on the Law of the Sea (UNCLOS), which was signed in 1982 and entered into force in 1994. China has, as mentioned, both signed and ratified the convention, as have the other countries involved in the dispute (except of course Taiwan, which is not a UN member). The states around the South China Sea have therefore committed themselves to abide by the law of the sea. There are few Chinese, however, who know what this means, while everyone knows the map of their country with the famous nine dots encompassing all of the South China Sea. This map, which was first published by Chiang Kai-shek's government in 1947 or 1948, treats the sea as if it were land, subsuming virtually all of it as Chinese "maritime territory". The Law of the Sea, however, does not allow any state to subsume such sea areas as anything called "maritime territory". For this to be possible, the sea must be defined as a nation's "historic bay". The South China Sea does not satisfy the conditions for being anyone's "historic bay". Some Chinese legal scholars have realised this problem. They claim that the nine dots should be understood as just indicating a claim to sovereignty to all islands within the line. The problem with this position is not only that most of the islands in the Spratly area are occupied by other countries, but also that these islands are probably too small to generate any right to continental shelves or maritime zones. Not only their military value is limited. Their economic value may also be minimal since none of them, if UNCLOS is to be followed, is likely to have a right to more than 12 nautical mile territorial waters. To be an island at all, an insular feature needs to be above the water at high tide (UNCLOS 121 (1)). To generate a right to a continental shelf and a 200 n.m. Exclusive Economic Zone (EEZ), an island must in addition be able to sustain human habitation and economic life of its own (UNCLOS 121 (3));⁶ none of the islets in the Spratly area have ever sustained any permanent habitation, except by troops (and the staff of a recently established Malaysian hotel).

⁵ The PRC's "Standing Committee of the National People's Congress" ratified UNCLOS on 15 May 1996 and announced the ratification in *China Ocean News*, No. 507, 17 May 1996, p. 1.

⁶ "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." UNCLOS 121 (3). The full text of UNCLOS can be found at: <http://www.tufts.edu/departments/fletcher/multi/sea.html>.

The third difficulty has to do with China's need for *oil and gas*. One of the motives for China's vast continental shelf claims is the expectation of finding huge reservoirs of oil and gas under the seabed. Chinese publications, notably the military ones, have often stated as if it were a fact that there *are* huge quantities of oil and gas in the Spratly area. The truth is that no one knows. Seismic exploration has revealed geologic structures that *may* contain vast quantities of oil and gas, but to prove that the oil and gas is there, and that the geological structures are not too complex to allow profitable exploitation, it will be necessary to drill a number of holes. Serious oil companies are unlikely to drill for oil until they know on whose continental shelf they are drilling. China and Vietnam's attempts to induce US companies to drill for oil in the western part of the Spratly area have so far proved unsuccessful. A Joint Development Zone, where many states split taxes between them, and laws and regulations are negotiated multilaterally, would also probably be less attractive to the oil companies than a classic solution where the seabed is divided between the countries concerned, following the principles of delimitation established in UNCLOS. Thus China, in order to realise its aims of exploring for oil and gas, will probably first have to negotiate a classic treaty of delimitation on the basis of UNCLOS.

The fourth difficulty also results from China's increased *consumption of energy*. China can no longer satisfy its energy needs through domestic production, neither onshore nor offshore. Since 1993, China has been a net importer of oil. (In the 3rd quarter of 1999 it was the world's ninth largest importer of oil with more than one million barrels per day). In the beginning of 2000 Beijing also authorised a project to import liquefied natural gas (LPG) to Guangdong province in the south. The big Chinese oil companies have responded to the changing situation by investing in oil exploration in many parts of the world, including the Middle East. This means that China now shares the traditional concern of countries such as Japan, the United Kingdom, the USA and South Korea for the safety of the world's sea-lanes. China can respond to this in two ways. The first is to build a strong blue-water navy that can protect vital sea-lanes, escort convoys of tankers if need be, and deter attacks on Chinese ships. Throughout the 1990s the People's Liberation Army Navy (PLA-Navy) has told the country's leaders that this is what they should do. The Beijing leaders are acutely aware, however, that to build a large, modern navy is an extremely long term project. The other solution is to join up with the world's maritime nations in a principled multilateral defence for the freedom of navigation. This is a solution based on international co-operation and integration. It is certainly more attractive, but only if Beijing can have confidence in its ability to maintain friendly relations with the USA and Japan for a sustained period of time. The military solution is very costly, and also risky, since other countries would see the same blue-water navy that from China's perspective was protecting its sea-lanes as a threat to their freedom of navigation. The USA is highly unlikely to accept a development where China gains naval supremacy in the South China Sea, because of the heavily used sea-lanes that run from the Strait of Malacca to the Taiwan and Luzon straits.

The fifth difficulty is *environmental*. China is becoming more environmentally conscious. There is a growing realisation that the country's coastal population depends on scientifically based resource management and protection of the maritime environment. In 1999 China was for the first time obliged to institute a temporary ban on fishing in the South China Sea. In 2000 it needs to overcome its

fear of internationalising the South China Sea issue and endorse a multi-national Strategic Action Plan developed by the United Nations Ecology Programme for saving the South China Sea's environment. There is an acute need for international co-operation in the management of fish stocks. There is also a strong need to protect the remaining coral reefs (which are essential to the natural breeding of fish), to reduce pollution from agriculture and industries, and to establish a capacity for rapid intervention in case of a blow-out or oil-spill from a tanker. The longer China sticks to its passive approach to international co-operation around the South China Sea, the more acute the environmental problems will become. There is a real risk that fish stocks could be depleted.

The sixth difficulty is *Taiwan*. Beijing and Taipei have the same claim in the South China Sea, on behalf of China. The first island in the Spratly area that came under permanent occupation by one of the states claiming these islands today, was Itu Aba, which for several decades has been under the occupation of the Republic of China. During the 1990s, Beijing seems almost to have appreciated the Taiwanese occupation of Itu Aba, since it confirms the identification of Taiwan with China; it would be difficult for Taipei to legitimate its occupation of Itu Aba on purely Taiwanese grounds. If China is to negotiate with the Philippines over maritime delimitation in the area between the two countries, or if China were to negotiate with Vietnam, Malaysia, Brunei and the Philippines about the Spratly area, it would be difficult to do this without some kind of Taiwanese participation. But if Taiwan were to participate in such negotiations, Beijing and Taipei would first need to tackle the difficult question of Taiwan's status. There might be ways of getting around this problem, but they would demand a minimum of trust between Beijing and Taipei. For Beijing it may seem preferable to postpone the resolution of the disputes in the South China Sea till after Taiwan has been reunified with the mainland. The problem is that this could delay resolution indefinitely.

The seventh and last difficulty is *internal*. In order to carry out a determined effort to resolve its maritime disputes, China will need a conscious medium term strategy, and also a political leadership who is able to impose their strategy on all branches of government. This may be difficult to achieve with China's present decision-making system. The way the system works today is difficult to comprehend. All branches of government operate on the basis of a few well-publicised statements by the President, the Prime Minister or one of the party elders. Prime Minister Li Peng laid down the principles for China's present South China Sea policy in 1990 when he proposed to shelve the disputes, and jointly develop resources. No similarly authoritative statement has been made since. Jiang Zemin, Zhu Rongji and a few others could change China's policy by making a new statement. All agencies concerned would then have to refer to that statement, interpret it and in some way follow it up. As long as there are no clearly publicised guidelines, the various agencies tend to have their own separate interpretations and agendas. The Navy modernises and makes its presence felt throughout the Chinese "maritime territory". Fishermen from Guangdong, Guangxi and Hainan go after fish where there is most to be found. When their own coastal waters are depleted, they go to the Spratly area or to Vietnamese waters, and expect protection from the Navy. The oil companies try to attract foreign participation in exploring for oil, while the State Oceanic Administration and various environmental agencies make scientific surveys and launch initiatives to protect the environment. Some of the coastal provinces also have their own agendas. To the extent that the activities of these agencies have

international implications, they are expected to be co-ordinated by the Foreign Ministry. In the case of the South China Sea, however, there does not seem to be any active co-ordination. The role of the Foreign Ministry seems to consist in delaying or vetoing all kinds of initiatives rather than pointing out a direction for co-ordinated efforts. Foreign Ministry officials have no doubt been anxious to avoid international complications. In the absence of clear signals from the top leaders, they have tended to put brakes on any kind of action. Only in one sense has the Foreign Ministry been a force for change: It has done its best to improve diplomatic relations with the Southeast Asian states. This may have prepared the terrain for conflict resolution.

In order to carry out new policies, the top leaders will need good advisers who also have the authority to carry out new policies once a decision has been made. The system of advice around Jiang Zemin is not well known. It appears to be almost as convoluted as it was under Mao and Deng. No one seems to really know whose authority they can safely rely on when the leaders at the top fail to issue proper directives. To change policy in such a system is either an extremely slow process (when the top leaders remain silent), or happens very abruptly (when the top leaders suddenly decide on a new initiative). In both cases it is difficult to develop a consistent strategy and co-ordinate its implementation.

Because of all these difficulties, it seems unlikely that China will radically change its approach to the South China Sea. Jiang Zemin may prefer to resolve the question of Taiwan before he launches any new initiative in the South China Sea. China is therefore likely to continue its reactive policy:

- block or delay attempts from ASEAN and other quarters to launch multilateral talks,
- warn against foreign interference in the disputes (internationalisation),
- from time to time wave the flag of "joint development".

Meanwhile the Chinese fishermen will catch as much as possible of rapidly diminishing fish stocks, the Navy will continue its modernisation drive, and the press and television will continue to tell the Chinese population about their huge "maritime territory" which is being violated by foreign countries.⁷

Is There a Way Out?

Could Beijing find a way out of its difficulties? Here we are not asking how likely this is to happen. We have already established that the chances are meagre. Still it may be useful to point out a way that China *could use* if it wanted to find an equitable solution to the South China Sea disputes. By adopting a more constructive approach, there is little doubt that China could seriously enhance its influence and prestige in the region. The way out is not military, but diplomatic. A sustained effort over many years would need to be co-ordinated by a group of decision-makers with authority to impose their policies not only on the diplomatic branch of China's government, but also on the Navy, the provinces, fishing authorities, oil companies, and other agencies. The standard and quality of the Chinese diplomatic representatives in Southeast Asia has improved tremendously during the 1990s. So has China's bilateral relationship with virtually all of the other countries surrounding the South China Sea, with the

⁷ For an analysis of the South China Sea rhetoric in the Chinese press, see Leni Stenseth: *Nationalism and Foreign Policy*.

exception of the Philippines. China could build on this. As Lee Kuan Yew said, the problems are not insurmountable. It would be possible for Beijing to play a leading role in a process of resolving the maritime disputes.

A diplomatic resolution could be accomplished in four stages, with China always in a central role:

At the first stage, China negotiates bilaterally with Vietnam a treaty on the delimitation of the Gulf of Tonkin (Beibu Gulf). The leaders of the two countries fulfilled their promise to resolve their disputes over the land border before the end of last year by signing a border treaty on 31 December 1999. They have made a similar promise to finalise negotiations about the Gulf of Tonkin before the end of 2000. This is the only part of the South China Sea where Beijing can negotiate a treaty on delimitation without being obliged to take Taiwan or the contested Paracels or Spratlys into account. The negotiations are difficult, but the problems are much less complicated in the Gulf of Tonkin than in other parts of the South China Sea. In the Gulf of Tonkin there are only two parties involved, and there are no islands to which both China and Vietnam claim sovereignty. The main problems are that Vietnam has more fish and more islands in the Gulf than China, while China has the largest fishing fleet. There may therefore be a need for an arrangement where Chinese fishermen obtain certain quotas in the Vietnamese sector. The two parties disagree on how much weight should be given to the Vietnamese islands when drawing a median line, but these disagreements do not seem insurmountable. By resolving the Gulf of Tonkin dispute in a way that builds on the rules established in UNCLOS, China and Vietnam may set a precedent for resolving other disputes in the South China Sea.

At the second stage, Beijing needs to enlist Taipei's co-operation, in order to be able to follow a co-ordinated negotiation strategy vis-à-vis the Philippines, Malaysia, Brunei and Vietnam. Beijing will probably want to form a mixed team, with Taipei's representatives getting some kind of auxiliary role. The Taiwanese may be tempted to use such an occasion to enhance their international status. An agreement on how to co-operate in the South China Sea may contribute to building confidence across the Taiwan Strait, and eventually become a step on the way to resolving the Taiwan issue. It will not at all be impossible for Beijing and Taipei to define the Chinese claim to a continental shelf and Exclusive Economic Zone (EEZ) in the South China Sea without prejudicing Taiwan's future status. The parties will simply establish a shared Chinese shelf and EEZ which, if need be, could later be divided, either in separate zones within the overall Chinese zone, or in fully independent, internationally recognised zones. This latter possibility would never need to be mentioned.

At the third stage, China (with Taipei) must make ready for *the big bargain*. This has to be achieved in a combination of multilateral talks within the region and bilateral talks between the representatives of China (including Taipei), the Philippines, Malaysia, Brunei and Vietnam. It could also be achieved through international arbitration, or be left to the international court in the Hague, but China will no doubt prefer a purely regional solution. As part of the big bargain, China has to make a huge concession, one that will greatly facilitate the delimitation of maritime zones. This is to recognise that none of the islands in the Spratly area can generate more than a 12 nautical mile territorial zone. Three good reasons make it necessary for China to make this concession: The first is that this is in accordance with a textual reading of UNCLOS. As mentioned, only islands that can sustain human

habitation and an economic life of their own have the right to more than 12 n.m. territorial zones. None of the "Spratly islands" has maintained permanent human habitation historically. They have only given shelter to fishermen during a certain period of the year. The second reason is pragmatic. If some of the islands in the Spratly area are granted a right to generate a continental shelf and EEZ, then it becomes all-important to occupy those islands. This will no doubt escalate the conflict. The governments involved will be tempted to resolve the dispute militarily. If, on the other hand, it is agreed that none of the Spratly islands have a right to more than 12 n.m. territorial zones, then the value of occupying these islands will greatly diminish, and the conflict can be demilitarised. The third reason is that China can only obtain important concessions from its counterparts by making a big concession itself.

Why then would it be so hard for China to recognise that none of the Spratlys can generate a continental shelf or EEZ? Because this will deprive China of any right to resources in the waters and under the seabed in the Spratly area, where Chinese fishermen have been fishing and catching turtles for centuries, and where Chinese oil companies hope to find great quantities of oil and gas. To give up the claim to have rights in this area will be hard for many people, but the Chinese coastline is too far away to generate a right to maritime zones in the southern part of the South China Sea. If one follows the law of the sea, then the Spratly area will be divided between the Philippines, Malaysia, Brunei and Vietnam (while China/Taiwan gets the tiny island Itu Aba and a 12 n.m. zone around it). The Chinese will have to forget their nine-dotted maps. This may be psychologically difficult, but should not be impossible.

What can China try to achieve in return? Full recognition for its sovereignty in the Paracels, and in addition a commitment from all the other parties to attribute the Paracels considerable effect in demarcating the Chinese maritime zones. This could find support in UNCLOS, since some of the Paracels are larger than the Spratlys, and have sustained human habitation if not permanently, then at least for the better part of the year. China may even try to gain acceptance for the archipelagic baseline it has drawn around all of the Paracels, although this seems to be in contravention of UNCLOS. Only archipelagic states, such as Indonesia and the Philippines, have a right to use archipelagic baselines. If, however, the other states decide to accept China's archipelagic baseline around the Paracels in order to reach an equitable solution, they would be free to do so. This would make it possible for China to claim a huge continental shelf and EEZ to the south and east of the Paracels, and to negotiate a median line with Vietnam between the Paracels and the Vietnamese coast. The recognition of Chinese sovereignty to the Paracels would be hard to swallow for Vietnam, not only because it claims the Paracels itself on the basis of "historic rights", but also because there would be a huge overlap between the Chinese and Vietnamese claims for maritime zones. Still it might be possible for Vietnam to make this concession since the country could expect international recognition of a huge Vietnamese zone in the western part of the Spratly area. This is the part that holds the greatest promise of finding oil and gas.

Only at the third stage, when the big bargain has been made, will the countries around the South China Sea find it useful to unilaterally define their precise claims to continental shelves and 200 n.m. EEZs. UNCLOS obliges all states to define and publicise such claims, but as long as it has not been agreed to deprive the Spratly islands of a right to continental shelves and EEZs of their own, it would probably only complicate matters if the states were to define and publicise their zone claims.

After it has been clarified that the Spratlys should be disregarded, all zone claims will be calculated from baselines along the coasts and coastal islands of Vietnam, East Malaysia and Brunei, from the Indonesian Natuna Island, from the archipelagic baselines of the Philippines, and from baselines around Taiwan, along the coast of Guangdong, around Hainan—and possibly around the Paracels.

At the fourth and last stage, the states will negotiate bilaterally and multilaterally to demarcate maritime borders where claims are overlapping. At this stage they will also have to decide if there remains any High Seas in the centre of the South China Sea, i.e., waters that are not contained in any national EEZ and therefore belongs to the global community. If such an area remains, some kind of management regime must be established. The region will then approach a situation where all areas of the South China Sea have been legally defined. This will clarify who has the right to exploit its resources, and also attribute responsibilities for a responsible resource management, and for protecting the environment.

Conclusion

The four stage process outlined above will no doubt be a drawn out affair, stretching over a period of at least 10–15 years. This is a highly optimistic scenario, based on the assumption that China's political leaders decide to commit themselves to a process of conflict resolution. This assumption is most probably flawed. Because of all the difficulties and dilemmas mentioned earlier, Beijing is likely to need a considerable period of time to abandon its less than constructive current stance, and adopt a proactive line of action.

The purpose of this paper has not been to make accurate predictions. The aim has been to point out the main difficulties that China needs to resolve before it can play a constructive role, and to suggest a possible way of establishing an equitable solution in the South China Sea. China has the main keys to resolving the dispute, but is reluctant to use them. Beijing needs to study the law of the sea thoroughly and utilise it. It also needs to prepare itself for the big bargain: bury its rhetoric about the inviolable Chinese sovereignty to the *Nansha* (Spratlys), while gaining recognition for its sovereignty to the *Xisha* (Paracels), and a vast economic zone in the northern half of the South China Sea.

One major problem remains, which has not been properly tackled in this paper: While the drawn-out process of conflict resolution goes on, fish stocks may already be depleted and the marine environment further destroyed. In addition to resolving the legal disputes, it will therefore also be necessary to launch joint efforts in the environmental sphere. This must happen as soon as possible. The risk that this could distract the negotiation process is minimal. Environmental co-operation will not only be important in its own right, but may also contribute to build trust needed for conflict resolution.

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