

BACK TO BASICS
TOWARDS A SAFER TOMORROW



Comments on the Border Management Authority Bill
Select Committee on Social Services
13 February 2018

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Purpose

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The purpose of the presentation is to brief the Select Committee on Social Services, on the SAPS comments regarding the Border Management Authority Bill (B9B-2016), Section 75 and further to:

- Share the status of SAPS participation in the establishment process of the BMA.
- Proposed options that led to the preferred scenario.



BORDER POLICING: PORTS OF ENTRY

AIR BORDERS

1. DR. TAMBO INTERNATIONAL AIRPORT -JP
2. KING SHAKA INTERNATIONAL AIRPORT -KZN
3. CAPE TOWN INTERNATIONAL AIRPORT -WC
4. UPTON INTERNATIONAL AIRPORT -MC
5. PILANSBERG INTERNATIONAL AIRPORT -NW
6. POLCKOWANE INTERNATIONAL AIRPORT -LIM
7. KRUGER MPUMALANGA INTERNATIONAL AIRPORT -MP
8. PORT ELIZABETH INTERNATIONAL AIRPORT -EC
9. BLDEMFONTEIN INTERNATIONAL AIRPORT -FS
10. LANSDERIA INTERNATIONAL AIRPORT -GP

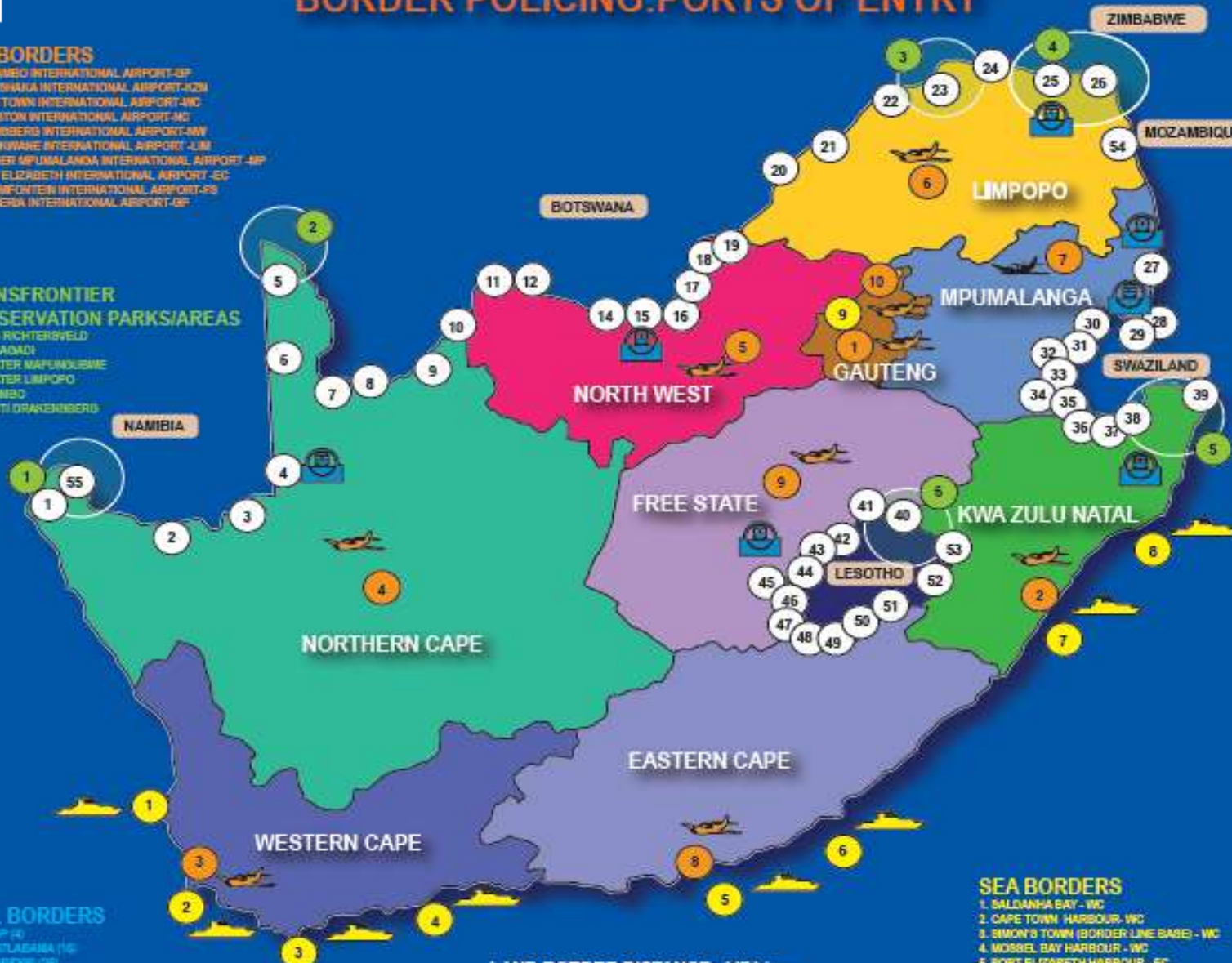
TRANSFRONTIER CONSERVATION PARKS/AREAS

1. A/ N/ B RICHTERSVELD
2. NGALAGADI
3. GREATER MAPS/MOURMIE
4. GREATER LIMPOPO
5. LUSOMBO
6. MALUTI DRakensBERG

RAIL BORDERS

1. NAKOP (D)
2. RAMATLABANA (MC)
3. BETERIDGE (FS)
4. LESOMBO (FS)
5. GOLELA (KZN)
6. MABERU BRIDGE (KZN)
7. MAMANGA (KZN)

LAND BORDER DISTANCE: 4471 km
 SEA BORDER DISTANCE: 2798 km
 AIR BORDER DISTANCE: 7660 km



LAND BORDERS

- ### NAMIBIA
1. ALEXANDER BAY - NC
 2. VOOLODRIFT - NC
 3. ONSEEPKAMS - NC
 4. NAKOP - NC
 5. MATA MATA (TAF) - NC
 6. RIETFontEIN - NC
 65. BENDELUNGSDRIFT - NC
- ### BOTSWANA
7. TWEE RIVEREN - NC
 8. GEMSBOEK - NC
 9. MIDDELPUTS - NC
 10. Mc CARTHY'S REST - NC
 11. MAKOPONG - NW
 12. BRAY - NW
 14. MAKOOBISTAD - NW
 15. RAMATLABANA - NW
 18. SKILPADS GATE - NW
 17. SMARTKOPFontEIN - NW
 18. KOPFontEIN - NW
 19. DERDEPOORT - NW
 23. BTOCKPOORT - LIM
 21. GROELERS BRIDGE - LIM
 22. ZANTBAR - LIM
 23. PLATJAN - LIM
 24. PONTDRIFT - LIM
- ### ZIMBABWE
25. BETERIDGE - LIM
- ### MOZAMBIQUE
29. FAFURU - LIM
 64. GRUYONDQ - LIM
 27. LESOMBO - MP
 39. KOSI BAY - KZN
- ### SWAZILAND
23. MANANGA - MP
 29. JEPPE'S REEF - MP
 32. JOEFSDAL - MP
 31. OSHOEK - MP
 32. MWERLEY - MP
 33. NERSTON - MP
 34. EMALATIN - MP
 35. BOTSHABCOOP - MP
 36. MAHAMBIA - MP
 37. ONVERWACHT - KZN
 38. GOLELA - KZN
- ### LESOTHO
40. MCHAMTSA PASS - FS
 41. CALEDONSPOORT - FS
 42. FICKSBURG BRIDGE - FS
 43. PEKA BRIDGE - FS
 44. MABERU BRIDGE - FS
 45. VAN ROOYENS GATE - FS
 48. BEPHAPUS GATE - FS
 47. MAKHALENG BRIDGE - FS
 48. TELLE BRIDGE - EC
 49. ONGELIN/BNEX - EC
 60. QACHA'S NEK - EC
 61. RAMATBELISO GATE - EC
 62. BUSHMAN'S NEK - KZN
 63. BANI PASS - KZN

SEA BORDERS

1. SALDANHA BAY - WC
2. CAPE TOWN HARBOUR - WC
3. SIMON'S TOWN (BORDER LINE BASE) - WC
4. MOSSIEL BAY HARBOUR - WC
5. PORT ELIZABETH HARBOUR - EC
6. EAST LONDON HARBOUR - EC
7. DURBAN HARBOUR - KZN
8. RICHARDS BAY HARBOUR - KZN
9. CITY DEEP (CONTAINER DEPOT) - GP

Introduction and Background

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- During August 2015, the Department of Home Affairs (DHA), as a Lead Agency, published a draft Border Management Agency Bill (“the Bill”) for comment.
- Further, on 6 October 2015, the DHA, introduced to the National Assembly, an explanatory summary of the Bill, which was published in Government Gazette, No. 39262.

Introduction and Background (1)

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The events leading up to the Bill can be summarised as follows:

- In the SoNA 2009, the President announced that government “will start the process of setting up a Border Management Agency”.
- In June 2011, the Minister of State Security, in his budget vote indicated that the JCPS Cabinet Committee decided to an integration model, other than coordination in the border environment, to be completed by 2014.

Introduction and Background (2)

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- The Medium Term Strategic Framework 2009-2014, has an item under **Strategic Priority 6**: Intensify the fight against crime and corruption. “Establish a border management agency to manage migration, customs and land borderline control services, to efficiently coordinate the services of other departments in Ports of Entry.”
- On 26 June 2013: Cabinet resolves to establish a BMA, endorses the formation of an Inter-Ministerial Oversight Committee for the duration of the BMA establishment, and further resolves that the DHA will be the lead department in establishing the BMA.

BMA Vision

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- Balance facilitation of **legitimate trade** and travel functions, while simultaneously addressing **security risks**.
- Be established as a **single body** under a single executive authority, constituted as a single accounting authority and established by an **enabling Act**.
- Assume control of the port of entry and borderline functions in the three spheres (Maritime, Aviation and Land).

Guiding Principles of the BMA

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- The BMA should be responsible and accountable for the entire border environment.
- To ensure coordination, collaboration, oversight control and effective management.
- To be achieved through integrated systems and cooperation within appropriate legal framework.

Comments on the BMA Bill

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→ On 8 June 2017, the National Assembly passed the BMA Bill that deals with the establishment of the Authority, however the Bill still has to go through the normal Parliamentary process, that includes it being referred to the National Council of Provinces before it is approved through endorsement by the President.

Comments on the BMA Bill (1)

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- Whereas the Bill should be viewed as an attempt to establish a framework for the establishment of a BMA, there are some concerns that the Bill, in its current format, may impact negatively on the SAPS.
- The concerns are that the Bill can lead to various interpretation difficulties, which may lead to unintended consequences in terms of its application and also in terms of SAPS functions.
- The Committee is referred to the written comments.

Comments on the BMA Bill (2)

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→ In the preamble of the Bill, specific mention is made of the Constitutional functions of the SANDF in relation to borders. There is, however, no reference to the constitutional functions of the SAPS. It should be noted that the establishment of the Border Management Authority will not take away the responsibility of the SAPS: “the ensuring that people are and feeling safe” (NDP-2030).

Comments on the BMA Bill (3)

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- Although the definition of “border law enforcement functions” is an improvement on the first Bill, it is still very vague.
- Clause 4(2) states: “The border law enforcement functions within the border law enforcement area and at ports of entry must be performed **exclusively** by the officers of the Authority.”
- “border law enforcement area” is defined as “in respect of -
 - (a) the land border, a distance of 10 kilometres or any reasonable distance inside the internationally recognised borders of the Republic; and
 - (b) the maritime borders, a distance of 10 kilometres or any reasonable distance on the landward side of the baselines extending seaward to the outer limit of the Exclusive Economic Zone, as defined in the Maritime Zones Act, 1994 (Act No. 15 of 1994);”.

Comments on the BMA Bill (4)

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- It is not clear whether this provision excludes the SAPS from the *border law enforcement area*, when performing policing functions. The unintended consequence of this clause may very well be that such an anomaly is created.
- The provision could be interpreted to exclude the SAPS when it needs to act in terms of section 13(10) of the South African Police Service Act, 1995 (Act No 68 of 1995), to set up a road block where it is *reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic*.

Comments on the BMA Bill (5)

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- It is respectfully submitted to the Select Committee that the parallel performance of policing functions, is a safeguard against possible corruption or where the illegal movement of people or goods across the borders is not detected by officers of the BMA.
- It is proposed that Clause 4(2) be amended to read:
- *(2) The border law enforcement functions within the border law enforcement area and at ports of entry must be performed exclusively by the officers of the Authority with due regard to the functions of the South African Police Service*

Comments on the BMA Bill (6)

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- Clause 19(2)(iv) deals with arrest. It is proposed that arrest is a serious infringement of the right to freedom and needs to be dealt with in a circumspect manner – see for instance Part VI of Chapter 33 of the Customs Control Act, 2014 (Act No 31 of 2014).
- It is valuable to note that the SAPS, whenever a suspect is arrested, is not only bound to the parameters of the Criminal Procedure Act, 1977 (Act 51 of 1977), or the applicable laws, but also internal rules related to arrest, search and seizure to ensure constitutional rights of an arrested person.
- It is proposed that the clause be expanded upon.

Comments on the BMA Bill (7)

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- Clause 21 deals with arrested persons and detained goods, but there is no procedure for the handling of persons after being handed over to the SAPS.
- Detention of a person after arrest is a serious infringement on constitutional rights and there must be a proper legal basis for the arrest and handing over of the person to SAPS.
- 19(2)(b)(iv) does not prescribe the manner and effect of arrest and it will be uncertain whether the arrest was lawful and whether the subsequent detention will be lawful.
- It is respectfully proposed that, at the very least, an insertion be made to specify that the Criminal Procedure Act, 1977 (Act No 51 of 1977), applies.

Comments on the BMA Bill (8)

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General input 1:

→ The objective of the BMA establishment, is to better the situation within the border environment, particularly the porousness within the borderline. However, the Bill is focused on the Ports of Entries (POEs), which was not a big problem. The Bill is silent on Airstrips, airfields, Slipways, Small Harbours and informal crossings.

Comments on the BMA Bill (9)

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Main Themes For SAPS Comment:

→ Recognition of the SAPS, as constitutionally mandated primary law enforcement agency for the Republic: It appears as if the drafters did not recognise that section 199(1) of the Constitution expressly states “The security services consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution”.

Comments on the BMA Bill (10)

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- The Bill does not distinguish between functions of the SAPS that relate to normal day-to-day policing and those that relate to border control. These constitutional imperatives must be recognised in any legislation, establishing a law enforcement agency and must be stated unequivocally.
- Unconstitutional transfer of the administration of legislation and assignment of functions: The manner in which clauses 22 to 26, deal with the issue, should be the subject of an opinion from the Office of the Chief State Law Adviser, as the mechanisms and processes seem to be unconstitutional.

Comments on the BMA Bill (11)

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- Vagueness of procedures: The Bill only recognises functions of the SAPS with regards to detention of persons. However, no procedures are contained in the Bill and the SAPS may be liable for civil claims as a result.
- Any unlawful arrest will obviously result in the unlawfulness of subsequently detention and it is proposed that the Bill makes provision for procedures.

Comments on the BMA Bill (12)

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→ The Bill further concentrates on the functions performed at the ports of entry, but misses the point that the police, deployed at ports are but part of the broader SAPS and all systems utilised, are linked to the broader SAPS and the transferring of such will literally mean the transferring of the entire SAPS systems to the BMA.

Comments on the BMA Bill (13)

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- SAPS proposed a deliberation regarding this matter between the Directors-General, and the following was agreed on:
- The BMA Bill will not affect the classical policing in the border environment. Despite the possible establishment of the BMA, the police will continue and remain with its functions and that no functions would be ceded.

Proposed Scenarios

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SAPS:

- A** To cede all powers to the BMA – members to be transferred into the Authority and cease to be members of SAPS.
- B** Detach members for a certain period to the Authority, on a rotational basis and have a dual reporting process.
- C** To function parallel to the Authority, while maintaining its powers and responsibility.

Proposed Scenarios (1)

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SCENARIO A:

→The SAPS Border operational units, those units at borders, may be considered to form part and parcel of BMA structures, with their appropriate command and control hierarchy and cease to be members of SAPS.

Proposed Scenarios (2)

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OBSERVATION:

- These units will be, in this scenario, detached permanently from the broader SAPS but may require certain linkages to SAPS. These units may benefit from the focused omnibus budget allocated to BMA.
- However, the SAPS will be deprived of the resources (approximately 7 000 personnel) and the accompanying operational budget.
- Opportunities for joint and cross training of officers under one Academy would be possible part of this scenario.

Proposed Scenarios (3)

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SCENARIO B:

→ In this scenario, the SAPS units operational at Borders, are seconded to BMA structure for a certain period of time, e.g. tour of duty of anything between 3 to 5 years. Then, another group is seconded for similar period and so it goes on.

Proposed Scenarios (4)

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OBSERVATION :

→ This scenario will allow members, who wish to continue with their careers as SAPS members to do so, after they have completed their BMA tour of duty. Any period less than three years, may not be sufficient for a member to master operational aspects of border operations. Again, to avoid family disruptions, such deployments must continue for a number of years and as such the beginning and the end of the tour of duty must coincide with programmes, such as school opening/closing calendar.

Proposed Scenarios (5)

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→ Detached members herein, may benefit from the omnibus BMA budget allocation while on secondment. Opportunities for joint and cross ***induction*** training of officers under one Academy would be a possible part of this scenario, as the SAPS members would be detached for a period of time.

Proposed Scenarios (6)

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SCENARIO C:

→ In this scenario, the SAPS operational units at borders remains outside BMA structures, however, they will continue to work alongside and in cooperation with BMA officers.

Proposed Scenarios (7)

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OBSERVATION:

- The BMA may have a focused omnibus budget that caters primarily for all stakeholders under BMA, to the exclusion of SAPS.
- The SAPS will, in this case, need to develop/keep a separate sets of policies and standards from the BMA ones, as well as a separate budget. Collective planning and budget reprioritisation may not always be possible in this scenario, e.g. Capital expenditures or prioritisations on transversal account procurement may not be optimised and synchronised, unless it is contained in the implementation protocols.

Proposed Scenarios (8)

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In all three above scenarios, the law enforcement (Policing) functions will be as follows:

- Shall include the policing of borders i.e. arresting, seizure of goods, opening case dockets, circulating of wanted or sought persons, goods, stolen/robbed vehicles, etc.
- The investigation of transnational crimes and other crimes, operationalising intelligence gathered, e.g. controlled deliveries and follow up investigations, etc.

Proposed Scenarios (9)

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→The collection, preservation and presentation of exhibits.

→Arrest and detention of suspects.

→The appearance and testifying in the courts.

All the above mentioned are functions to be executed by SAPS exclusively.

Recommendation

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- The Constitutional mandate of the SAPS should be acknowledged in the BMA Bill.
- Factors affecting the SAPS (Classical Policing) in the establishment of the BMA, should be acknowledged and dealt with.

Recommendation (1)

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It is recommended that option three is the preferred option of the SAPS, as the generality of the provisions in the Bill, do not exclude the preferred option, namely that the SAPS continue to function at the borders in the manner that it is presently done.

Conclusion

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- Border Control should not be a hindrance to cross border operation, instead, it should be seen as a vehicle to encourage the regulating of orderly movement of people and goods.
- Any controls or measures put in place, must be aimed at ensuring the healthy movement of people and goods as an essential step towards free trade, growth, prosperity and cross border movement.

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Thank you

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