BRIDGING THE GAP TO THE SEA FOR LANDLOCKED STATES: A CASE FOR BOTSWANA

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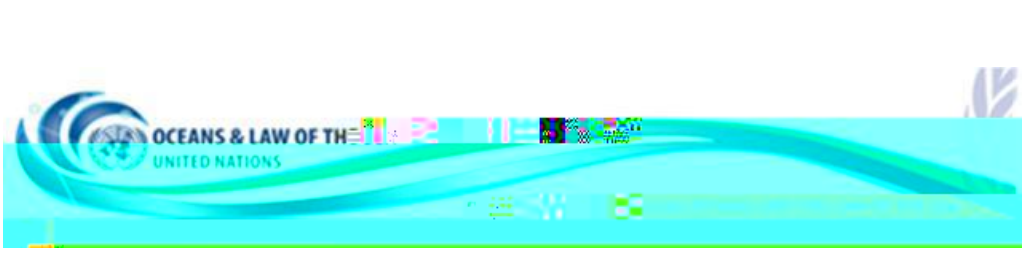

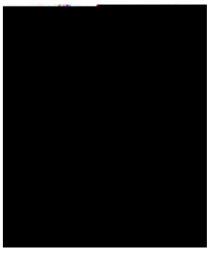

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Landlocked states strive to gain access to global resources in line with the minimum standards as set out by the United Nations Convention on the Law of the Sea (UNCLOS III).[2] Landlocked states acknowledge Article 69 of Part V, Part X and all other provisions in UNCLOS seeking to specifically address their plight in accessing the sea, as a compromise to their extensive demands over. UNCLOS lays a foundation through provisions which entitle landlocked states the rights to access to the sea by transit through coastal states, these rights are not absolute. It is a fact that securing a cost effective transit arrangement with minimum rights or freedoms of transit and access is highly dependent on diplomatic relations between the landlocked state and its transit or coastal neighbour.

Landlocked states are continuously working towards securing favourable

transit and coastal states the right to afford special treatment to landlocked states goods in transit, however, whether or not special treatment is granted is entirely dependent on the transit state.

Generally UNCLOS, which has attained near global ratification,[4] subjects the enjoyment of the right of access to the sea of landlocked states to the good will of transit and coastal states. Landlocked states may enter into bilateral and multilateral agreements with transit and coastal states on such terms as the parties deem fit. The usage of non-obligatory words such as “freedom” and “may” therefore suggests that Part X is non-binding. If the parties fail to agree on terms there could in fact be no agreement entered into between landlocked states and their neighbouring transit and coastal states. If we assume that there on an operational level already exist some unwritten cooperation bilaterally between some landlocked states and their neighbours, without a Part X agreement, the disadvantage will be that landlocked states would probably have not insisted in adoption of the technical details of the cooperation under Part X of UNCLOS as point of departure. UNCLOS is good for setting out a minimum standard and the tone on which landlocked states enjoying good political relations with their neighbours can insist on at the bare minimum. Invariably all UNCLOS rights should be included in any agreement purporting to grant access to the sea.

This paper argues that since coastal states are usually more economically advanced compared to landlocked states, they enjoy more political muscle and economic cloud over their landlocked neighbours and this has a great bearing on the extent of rights and freedoms that landlocked states may be granted by their transit and coastal state neighbours. Without sympathy of transit and coastal states, landlocked states right to access is only good on paper. In the event that a bilateral agreement is negotiated, landlocked states have no guarantee that they will be granted the full range of rights anticipated by UNCLOS. Political will and empathy are not a constant. They are always affected by a change in government leadership and policy, thus the uncertainty of the ability to exercise one’s rights at one’s own will casts doubt on whether landlocked states have any real rights to access the sea. It is yet to happen that a landlocked state seeks an advisory opinion on whether the right to execute an agreement is justiciable in the event a coastal state proves unwilling to engage in and conclude negotiations resulting in an agreement.

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[4] 168 state parties < http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 07-11-2016

The second half of this paper is entirely focused on the Walvis Bay Dry Port Lease Agreement (hereinafter referred to as “the Dry Port Agreement”) entered into between the Republics of Botswana and Namibia, who are neighbours. The Agreement took several years to negotiate. It has a specific scope and limited duration of sixty 60 years. Discussions of the Agreement aim to determine minimum adherence to UNCLOS noting that, although the Agreement is time bound, and could be considered to be of a short duration, this presents an opportunity for the governments of the Republics of Botswana and Namibia to return to the negotiating table, with a possibility to renew the agreement to have a larger scope, inclusive of more UNCLOS rights, or to execute more agreements focused on other specific UNCLOS permissions.

For the Namibian government, the developmental and pecuniary benefits of this Agreement, are without doubt a boost in the economy; it will benefit from infrastructure development and annual rental paid by the Government of Botswana. For Botswana the Agreement presents a necessary alternative to the ports in the Republic of South Africa which have been heavily congested resulting in an increase in costs and delayed services. It remains noteworthy however that in Southern Africa none of the coastal states have granted their landlocked neighbours Article 69 rights, that is exploitation of living resources in the coastal neigh

Transit Trade of Landlocked States.[5] The definition of landlocked states does not seem to be in dispute,

locked status; and heavily dependent on the exploitation of living resources in economic or fisheries zones of neighbouring states for nutritional needs.[11]

Some scholars have argued that there is a further distinction between enclaves and landlocked states raising the distinction that enclaves are states which are totally surrounded by the territory fof only one

PART 1

CHAPTER 1: DEVELOPMENT OF THE FREEDOM OF TRANSIT AND RIGHT TO ACCESS THE SEA FOR LANDLOCKED STATES

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At the eleventh (11th) United Nations General Assembly meeting, Resolution 1105 (XI) of 21st February 1957 was passed acceding to the request by landlocked states to include the consideration of the issue of free access to the sea by landlocked states.[26] By the eve of the First United Nations Conference on the Law of the Sea held in Geneva in 1958, landlocked states had already grouped themselves[27] at the

The Fifth committee initially considered two versions of proposed text: the Asia- African text and the Italy, Netherlands and United Kingdom text.[33] On discussion of the first text in support of the Memorandum, majority of transit states were unanimous in their rejection of the first (right of free access)

diplomatic relations between states are formulated. Therefore it is sacred and its overriding value cannot be underestimated.[40]

Following several modifications and re-amendments to the proposed wording of the principles[41] the Committee decided to adopt the Swiss amendment text, which as a compromise required landlocked states to grant reciprocal rights of transit as shall be granted to them by transit neighbours, and transit was to be within the confines of existing international conventions; thus keeping the scope of rights within limits predefined by previous conventions such as the Barcelona Convention.

The Principles of the Memorandum had an influence on the wording of Article 3 of the High Seas Convention. Article 3 provides that states having no sea-coast "should have free access to the sea". This Article, by using the word "should" has been described as merely expressing a moral duty of coastal states to recognise that landlocked states can have access to the sea, but it did not carry the weight of an obligation compelling coastal states to actively seek to ensure that this access is guaranteed for landlocked states. Article 3 only goes as far as suggesting a moral duty to "enter nego| Ï t

2. THE NEW YORK CONVENTION

At the New York Conference, delegates considered the critical issue of "whether free access was a natural right of states without borders or whether its duty was merely to solve the technical problems of transit transport of these states".[45] The New York Convention[46] based the right of free access to the sea on economic principles rather than general principles of International law,[47] hence the Preamble highlights the promotion of international trade. In addition Principle IV making particular reference to economic development.

The greatest achievement of the Conference was the adoption of the amended 1958 principles of the Memorandum, into the eight principles of the preamble of the New York Convention. The Convention's preamble also reiterates the UN Resolution 1105 (XI), Article 3 of the High Seas as well as aspects of the Barcelona Declaration. It is an all-encompassing convention. The Principles[48] were amended to address

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issues concerning trade which were of concern to landlocked states. Principle VI advocated for a universal approach to solving particular problems faced by landlocked states. Principle VII provided that landlocked states should be permitted facilities and special rights in order to mitigate[49] their special geographical position and excluded these efforts from operation of the Most Favoured Nation principle. Scholars have, however, described insertion of the Principles in the preamble as a reduced value of the principles as landlocked states had hoped that they would be adopted as the main articles of the convention[50]

coastal states. Coastal and transit states greatly opposed this proposed outcome,[54] most contended that the repetition of provisions from past or older treaties and declarations did not necessarily crystallise these provisions into rules of international law.[55] Essentially they refused to accept the provisions of the New York Convention as codification of existing customary international law.

A notable weakness of the New York Convention is its lack of universal ratification. It currently has 43 signatories and unfortunately to date the Republic of Botswana is not party to the Convention. Most the Convention's coastal state parties are not transit states in the sense that they do not have neighbours to grant transit rights to.[56] This results in minimal implementation. The Convention required membership of coastal states which share borders with landlocked states.

3. UNCLOS III

The Conference of UNCLOS III was the largest diplomatic conference

of divergent interests alongside recognised custom and emerging challenges such as pollution and marine scientific research. States were thus invited to submit positions and proposals for consideration.[61]

Groupings formed

resources of the seabed".[65] The Group expressed other interests including participation in marine scientific research and seabed mining, which interests fell into their third and fourth objectives. These objectives were respectively premised on the need to have a regime regulating exploitation of resources and access to the seabed thereby reducing coastal states' dominance over oceans resources. They also sought adequate representation in the institutions responsible for management of the seabed's resources.[66]

Prior to the Conference, Organisation of African Unity (OAU) had started holding a series of meetings to discuss pertinent issues which they wanted

States.[70] It contained nine principles which the group considered paramount to their interests and developmental needs especially regarding trade, commerce and communication.[71] Article 1 and 2 of the Kampala Declaration declared that the right of access for landlocked states and geographically disadvantages were 'cardinal' rights recognised as such under international law. The group demanded that transit states should respect and facilitate their unrestricted transit without discrimination.[72] It is apparent that by this time the Group was looking beyond access and transit as stand-alone rights, they viewed the right of transit and by extension, the right of access, to extend further to permit them to gain access to the seabed and its resources which coastal states had always enjoyed unimpeded access to. Thus their submission can be summarised in this order - they needed to participate in global trade; have the ability and access to communication; participation in exploitation and management of ocean resources and eventually these would ensure their much needed development.

The Kampala Declaration further demanded that in exercise of their high seas freedoms landlocked states should be accorded the freedom to use ports and facilities thereon on an equal basis with coastal states. They demanded as well that their traffic in transit should not incur any extra levies over and above those charged for services specifically rendered.[73] With regard to adequate and proportional representation in the organs of the international seabed[74] they demanded that the resources beyond the territorial sea should be governed by the concept of common heritage (within the meaning of the UN General Assembly 2467 A (XXIII)), which calls for consideration of interests of all states, coastal and otherwise.[75] The concept of common heritage of mankind regarding ocean resources was triggered by Maltesse Ambassador Arvid Pardo in his *Note Verbale* dated 17 August 1967 (commonly referred to as the Pardo Declaration) who requested that the General Assembly should consider the question,

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[70] Afghanistan, Bhutan, Bolivia, Botswana, Burkina Faso, Burundi, Czechoslovakia, Hungary, Lao PDR, Lesotho, Mali, Mongolia, Nepal, Paraguay, Swaziland, Uganda and Zambia.

[71] Kampala Declaration Preamble paragraphs 6 and 10.

[72] Article 3 Kampala Declaration.

[73] Articles 5 and 6 Kampala Declaration.

[74] Article 7 Kampala Declaration.

[75] Article 8 Kampala Declaration.

Declaration and Treaty Relating to the Exclusive Utilisation for Peaceful Purposes of the Seabed and Ocean Floor Beyond the Limit of Actual National Jurisdiction and for the Exploitation of Their

coastal states and unequitable access and utilisation of the ocean. The crux of the matter is coastal states had to prove that although as states they are equal and are entitled equally to the oceans, coastal states inherently and exclusively had access which they need not prove permission of customary international law. There was need to balance the scales.

After 9 years of negotiations, UNCLOS III was adopted with one chapter dedicated to the rights and freedoms of landlocked states. Although the provisions are brief, they are as attainment of some measure of success. The adoption of Article 69 and Part X (Articles 124 – 132) UNCLOS showed some recognition of what landlocked states had fought hard for, although not to the level they hoped to achieve. There are some supplementary Articles throughout UNCLOS which highlight further recognition of landlocked states' rights in the seas carried over from previous treaties and conferences.[81]

Part X provides for transit and access jointly, seemingly suggesting that the two issues are inseparable. It has a few positive points for which it can be hailed for. Firstly these rights and freedoms are to be exercised without the need for reciprocity, which is what previous conventions were heavily criticised for. In addition, Part X dictates minimum standards which landlocked states should become entitled to once they overcome the hurdle of entering into a bilateral or multilateral agreement with their coastal and transit neighbours. These minimum standards include equal treatment at ports.[82] Part X even goes further to suggest voluntary cooperation for the purpose of improving or constructing means of transportation necessary for the transit of landlocked states' goods.[83] Article 125 (1) suggests recognition of a real "juridical transit right" by using the word "shall" which has been seen as an improvement from the High Seas Convention, which only suggested a moral right in favour of landlocked states.[84]

Critics have argued, however, that Article 125 (1) does not grant any new rights to landlocked states.[85] The Article rather maintains the superiority of transit state sovereignty over the freedom of transit. The Article does not have the desired effect of encouraging transit states to facilitate transit as an obligation as

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[81] Articles 87 (Freedom of the High Seas), Article 90 (Right of Navigation).

[82] Article 131 UNCLOS.

proposed in the Kampala Declaration. However, the transit state continue to enjoy the flexibility to decide whether or not to assist the landlocked state where the facilities at its disposal prove inadequate. This should seemingly be triggered by the landlocked state as the end user of the facilities, the wording in the Article does not suggest that it is the transit state's prerogative. As a safeguard for coastal states Part X rights are the only rights that enjoy exemption from most favoured nation principle. This is assurance to transit and coastal neighbours that they will not incur extra obligations over and above what they are prepared to offer.

Article 127 obliges the waiver of customs duties and other charges which may be charged on traffic in transit over and above for the transportation service costs.[86] This could be taken as recognition of the disproportionate and excessive burden of transportation costs due to the long transportation routes which landlocked states encounter due to their proximity (or lack thereof) to the sea. In the African context the Southern African Customs Union (SACU) works to implement Article 127 in that it has standardised customs duties, taxes and exempted goods in transit from any additional charges. The Southern African framework and practices are discussed in the next chapter.

The carefully worded Part X has been criticised for using the word "freedom" regarding transit instead of referring to it as a right, just as UNCLOS does with regard to access.[87] The criticism is premised on the fact that transit and coastal states enjoy "rights" to take measures to safeguard their legitimate interests as necessary against a landlocked state's enjoyment of its "freedom". In the debate concerning the hierarchical tussle between rights and freedoms, it has been explained that,

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coastal states[92] not only regarding transit but also when it comes to resources of the Exclusive Economic Zone (EEZ).[93] Landlocked states have the right to participate on an "equitable" basis in the surplus of the living resources of the EEZ under Article 69 (1). The word equitable is not defined but it could be assumed that this would mean they have equal rights as all other landlocked states. This is because coastal states have to consider their communities' needs first, therefore participation is not equitable as regards local coastal communities. Secondly, access is to the surplus after the coastal state has satisfied itself of the adequacy of the living resources and harvested to its satisfaction. Therefore the equity bar does

to be determined strictly through scientific assessment[94] aimed at ensuring that there is sustainable

monitoring of, collecting of information and reporting on state practice in the implementation of the Convention.[97]

[97] UN-OHRLLS input into the UNSG annual report on the Oceans and the Law of the Sea (5 July 2013) 4 < http://www.un.org/Depts/los/general_assembly/contributions_2013_2/OHRLLS.contribution%205.July.2013.pdf> accessed 12-09-2016.

CHAPTER 2: ACCESS TO THE SEA AND TRADE FACILITATION

> In order to maintain their identities as independent states, land-locked countries must trade or else lose their sovereignty[98]

The predicament for landlocked states stems from their need to function and have opportunities just as any other state would, including engaging in trade on an international platform. It is undisputed that world economy integration has b(s)q80(c)-10mnt y irtent t f

Almaty Programme of Action was adopted as an initiative to address the special needs and problems of landlocked states, by bringing together all relevant stakeholders that could assist in overcoming specific and peculiar challenges that hinder international trade for landlocked states.

General Assembly Resolution 66/214, which reaffirmed the right of access of landlocked countries, as well as freedom of transit,[115] recognised the Almaty Programme of Action as a fundamental framework for genuine partnerships between landlocked and transit developing countries and their development partners at all levels including national and sub-regional levels.[116] It further acknowledges that international trade and trade facilitation is one of the priorities of the Almaty Declaration and Program of Action as a means to ensure that landlocked developing countries get a more efficient flow of goods and services through trans-border trade,[117] amongst other things.

Article 129 of UNCLOS calls on cooperation aimed at facilitating transit for landlocked developing states, and the Almaty Declaration is aimed at this very purpose. It emphasises the need to identify mutual interests between landlocked countries and transit countries, describing them as complimentary and reinforcing. The Almaty Declaration call for a paradigm shift allowing active involvement of the private sector who are the main providers and users of transit transport services.[118] This could be the most progressive approach so far as it recognises the key role played by transit states as well as the vital role played by donors and financiers in developmental efforts that can alleviate landlocked states from their geographical inequities. Paragraph 14 of the Almaty Declaration calls for genuine partnerships amongst stakeholders. It is important for landlocked states to feel that coastal states treat them as equal partners and will not arbitrarily curtail their transit routes through sovereign acts without consulting them on the need of the sovereign act, and giving them a chance to consider alternative routes if necessary.

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[115] Specific Actions related to the Particular needs and Problems of Landlocked Countries: Outcome of the International Ministerial Conference of Landlocked and Transit Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation A/RES/66/214) Paragraph 2.

[116] *Ibid* Recital paragraph 13.

[117] *Ibid* Paragraph 12.

[118] *Ibid* Paragraph 6.

The Almaty Declaration firstly highlights that most landlocked and developing transit countries are in Africa.[119] The Declaration then identifies the fact that in Africa transit and coastal states are developing states and are not necessarily more developed than their landlocked neighbours. This mutual quest for development should be the very basis of the cooperation encouraged by

interests. The Almaty efforts can therefore be appreciated for their attempt at showing that coastal states and landlocked states can have common interests, they need not always be in a tug of war.

2. 2050 Africa's Integrated Maritime Strategy

The Strategy was adopted in January 2014.[121] It aims to ensure that the African continent is a key player in maritime affairs

and resolution on maritime boundaries. Perhaps this could be premised on the fact that the Strategy assumeeaiendegy 81ls(e)-we ateeat eegy 7(a)-n10(t)5(e)-(e)-on10(t)5le eegy t eaeeend 3()-1/Typev(e)-ng00912 010(

CHALLENGES FACED IN THE IMPLEMENTATION OF THE FREEDOM OF TRANSIT AND RIGHT TO ACCESS

Notwithstanding ongoing reginal efforts, it remains however, that landlocked developing countries still cannot

2. Dependency

There is much reliance on coastal neighbours' already poor infrastructure, administrative processes and indeed, political stability or otherwise. In Africa landlocked states vulnerability was most evident during the Cote d'Ivoire's insurgency of 19 September 2003 when rebels took control of the ports in the north leaving landlocked states like Mali, Burkina Faso and Niger with no option but to seek the usage of further alternative ports.[141] These landlocked states found themselves facing an unpredictable increase in budgeted expenses, invariably making it difficult for these landlocked states to obtain essential commodities for their citizens.[142]

Landlocked states depend on their transit neighbours to handle administrative processes associated with import and export of their transit goods at point of entry, exit and border crossings. The exception to this is where a landlocked state has a free zone in a transit state and runs its own customs office. Administrative processes are particularly a challenge where they aren't harmonised or predictable, landlocked states always find that their goods going through so much red-tape and risk being treated as second priority when there is congestion at borders. Harmonisation could begin with border operating hours, or creation of one stop border posts. There are already such efforts underway between Botswana and Namibia aimed at reducing border processes and having more coordinated efforts.

3. Political will and stability

The UN Office for the High Representative for the Least Developed Countries, landlocked Developing countries and Small Island Developing States noted that,

> [a]lthough there is a legal basis for rights of landlocked developing countries to access to and from the sea, as outlined in Article 125 (1) of the United Nations Convention on the Law of the Sea (UNCLOS) (1982) in practice the right of access must be agreed upon with the transit neighbour

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[141] Uprety *The Transit Regime for Landlocked States* 12.

[142] *Ibid* 12.

(Article 125 (2) and (3)) and is determined by the relationship and cooperation between the countries.[143]

This is the most critical hurdle faced by landlocked states.

An example is the case of Malawi, which usually utilised the ports in Mozambique to reach its eastern markets. During the civil war in Mozambique it had to re-route its transoceanic trade through the ports of Durban in South Africa and Dar es Salaam in Tanzania, both are longer routes compared to the Mozambique route.[148] Similarly, in 1986 the Republic of South Africa staged a blockade of all of the Kingdom of Lesotho's transit routes. The Kingdom of Lesotho is a total enclave in the Republic of South Africa, therefore it was worse off than Malawi as it had no alternative transit routes. Such a move for the most vulnerable landlocked state could lead to a total collapse of the economy, and even surrender of sovereign power to the coastal neighbour.

Diplomatic will and political instability are by far the most overwhelming challenges faced by landlocked states to which landlocked states have minimal control

a written agreement,[150]

of SADC in his remarks[171] highlighted that it is important for the SADC to "seriously address" transit facilitation for the 6 landlocked SADC countries, being, Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe in order for them to enjoy "realistic, competitive prices for landed products as well as exports to global markets."

The Master Plan was developed in consultation with all stakeholders, ranging from landlocked, coastal and transit states, financial sponsors and the private sector. It has six pillars, amongst them is transportation, which has its own Transport Sector Plan which was adopted in 2012. The Master Plan acknowledges that the SADC region is characterised by "highly priced, unpredictable transport and logistics services, especially for landlocked states".[172] It forecasts that transit traffic for landlocked SADC countries will increase from 13 million tonnes in 2009 to 50 million tonnes by 2030 and 148 million by 2040, at an av13(st)8(a)2(a)-10(t)5( )-22((st)8(a)2(a)-10(t)5( )-22((st)8(a)2(a)-10(t)5( )-22((st)8(a)2(a)-10(t)3h11.4 Tm0 ka

Interestingly, SADC member states are obliged to offer equal treatment to both SADC and non-SADC states. The Protocol therefore endorses the most favoured nation principle, which explains why the Protocol only acknowledges landlocked states in its recitals[184] without going further to mention that they need special facilitation. The rest of the text of the Protocol follows suit as it not draw a distinction between coastal and landlocked states in application. This is not necessarily advantageous for landlocked states because the Protocol does not have a substantive Article dedicated solely to recognition of the need for specific participation by landlocked states.

The legal force of a provision in a treaty is determined by its placement in the treaty. When placed in the body of the text of the treaty the provision becomes obligatory and enforceable.[185] Recitals therefore only capture the objectives of the parties to a treaty, laying foundation to the enforceable provisions found in the main text a treaty. Hence the Protocol's main enforceable provisions only appear post the phrase "hereby agree as follows". Evidencing that the preceding recitals are not considered part of the 'agreement' but are more indicative of the common goals of the parties.

Although the Protocol insists on adherence with UNCLOS it has a disconnect with UNCLOS. Article 297 (3) of UNCLOS highlights that (a) a coastal state can opt not to participate in conciliation regarding its sovereign decision whether or not to declare surplus (b) the conciliation commission cannot substitute its discretion for that of a coastal state, should a coastal state take a decision regarding exploitation or non-exploitation of living resources in its EEZ. The Protocol sets an obligation for SADC coastal states at Article 18 (4) to "make public the rationale and criteria pertaining to the determination of total allowable catches, allocation of quotas, permits, licensing and other rights to the use of living aquatic resources." The Protocol it appears to offer a more juridical approach to landlocked states participation in living resources of coastal states EEZs as they can bring an action of non-compliance with Article 18.

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[184] The final recital reads "Acknowledging the special position of landlocked Member States".

[185] Uprety "Access to the Sea of Land-Locked States" 40.

In an attempt to implement Article 127 of UNCLOS III, which requires that transit traffic of landlocked states should enjoy equal treatment and not be subjected to charges and taxes beyond those specifically for services rendered, SADC adopted Annex IV Concerning Transit Trade and Transit Facilities of the SADC Protocol on Trade.[186] Article 15 of which provides,

> [p]roducts imported into, or exported from, a Member State shall, as provided for in Annex IV of this Protocol, enjoy freedom of transit within the Community and shall only be subject to the payment of the normal rates for services rendered.

Annex IV of the Protocol on Trade provides that goods in transit should be issued with a SADC Transit Document[187] to ensure they are recognised and treated as such. This will have the effect of standardising licences and permits which SADC states already have. The Protocol

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by a Committee of Ministers Responsible for Trade (CMT). The regional institution is a regulator for and on behalf of all member states to ensure there is uniform application of these rules.

Similarly within the Sub-Saharan Africa there exists a customs union called Southern African Customs Union (SACU)[191] which predates the SADC. The SACU does not draw tuntiot drg12 792 re-22(S)1 0 0 n77

The SACU agreement therefore defines the scope of sovereign muscle that transit states can flex, its landlocked neighbours are able to exercise their freedom of transit with clarity and caution. The only shortcoming of the SACU is its membership. It is made up of 5 countries, 3 of which are landlocked (Botswana, Lesotho and Swaziland) while Namibia and South Africa are the only coastal states therefore the SACU agreement is applicable only amongst these 5 states, to the exclusion of the larger SADC group. Due to this long standing relationship these states have enjoyed good diplomatic relations[192]and now enjoy harmonised policies. How the sub-Saharan states have managed the overlap in the membership of SADC and SACU as well as their protocols remains a topic for another paper.

[192] Michael L. Faye *et al* "The Challenges Facing Landlocked Developing Countries" *Journal of Human Development* 5.

BACKGROUND TO THE DRY PORT LEASE AGREEMENT BETWEEN BOTSWANA AND NAMIBIA

In Africa, partly because of the similarity in production between the neighbouring countries and partly because of infrastructure and other barriers to trade, most trade is international and not sub-regional. This means that trade logistics encompass not only land transport, but also ports and shipping issues.[193]

This is true for sub-Saharan countries. Botswana and Namibia are both exporters of beef and minerals, therefore they have limited trade between themselves and will look for alternative markets which will be receptive of their products. Since Southern African local market has the same produce states therefore have to import from markets

Cameroon, Road Transport Agreements as between Togo and Niger, and, rail transport agreements. Other notable regional examples include the ASEAN Framework Agreement on the Facilitation of Goods in Transit[202] which is a harmonised and comprehensive agreement providing minimum standards on treatment of goods in transit for its members. It is comprehensive in the sense that it dictates detailed obligations aimed at reducing transit times, such as mutual recognition of inspection certificates,[203] frontier posts should be physically adjacent to one another to facilitate expedient clearing of goods to avoid offloading and reloading at each boarder.[204] Over and above this there are agreements where states establish one stop border posts for the expedient facilitation of border crossing, such as Kenya and Uganda, Uganda and Rwanda as well as Uganda and Tanzania.[205]

The first thing that stands out when reading the Botswana – Namibia Agreement for the lease of a Dry Port in Walvis Bay, is that its title refers to it as an *Agreement of Lease*. It does not refer to is as transit agreement, nor does it refer to it as an access facilitation agreement. From this title it is already nearly conclusive that the states have chosen to have a landlord – tenant agreement. Possibly reducing the agreement to a purely commercial agreement. Generally landlord –

seeming transfer of sovereign rights to the United States of America.[208]Whether the Dry Port Agreement falls is a real lease thereby falling under private law or public law shall be determined by the terms stipulated therein. Another factor to consider before categorising the agreement into public or private law, is the nature of the parties. Agreements executed inter-state (between governments) are distinguishable from individual or natural persons agreements; the former often fall under the ambit of public law as they are sovereign acts of states, while the latter are governed by private law and have no bearing on the daily operations of the state.

The first party to the Lease Agreement is the Government of Botswana, the other party is the Namibian Ports Authority (Namport), a body corporate established under the laws of Namibia mandated by the Namibian Government to manage and control Namibian ports and conduct its business with a view to yield a fair and reasonable profit. Ideally Botswana should have also mandated an authority to enter into this Agreement for and on its behalf, however by the date of execution and commencement, 1st October 2009, Botswana did not have a registered authority to attend to its operations at the dry port. Therefore the Government of Botswana entered into a commercial agreement with a body corporate whose mandate is to earn annual profit from renting out a dry port to Botswana, these factors make this a commercial agreement. For the avoidance of doubt, in the final provisions of the Agreement there is a provision titled "waiver of sovereign immunity" stipulating that the Agreement is a private and commercial act by the Government of Botswana as tenant, and the tenant waives any claim of sovereign immunity against its landlord Namport.

Since UNCLOS does not offer guidance on minimum contents to a port agreement, it is probably acceptable that this Dry Port Agreement does not have a single provision on transit issues. It is silent on whether the portion leased by the tenant links to a transit route specifically dedicated to Botswana's commerce, whether there shall be harmonised customs administrative processes or any other operational

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[208] *See* Danwell "Guantanamo Bay, a legal "black hole" pg 1. Article III reads,

> the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas [Guantanamo Bay] of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

matter. This is distinguishable from the Nepal and India agreements which always had specific provisions on transit. For instance, their 1950 and 1960 Treaties of Trade and Commerce had provisions seeking to guide how transit of Nepalese goods through India was to be operationalised, including the establishment of customs liaisons at the major trans-shipment points.[209] On the contrary, the Dry Port Agreement is much like the Afghanistan – Pakistan agreements, which permitted transit but left out issues relating to customs procedures and transportation of goods.[210] Even then the latter Agreement provided a more secure right of transit to the Dry Port Agreement as it had provisions on transit.

In the instance of the Dry Port Agreement, it could be assumed that since the sub-region is tirelessly working at integration, the Parties will elect to implement regional harmonised policies and practices as a minimum, which should have been highlighted in the preamble for the avoidance of doubt. On a general note, bilateral Agreements between landlocked and their transit coastal neighbours could learn a lot from the level of detail of the Versallies Treaty[211] which had articles dedicated to specific landlocked neighbours and allies of Germany. Part XII of the Treaty had dedicated sections which dealt in great detail with the lengths and breath of Germany's Allied and Associated Powers rights vis-à-vis transit and ease of trade. Provisions were categorised into General, Navigation (dealing with freedom of navigation, usage of ports and navigation of international waterways) and Railway lines.

The first shortcoming of the Dry Port Agreement is its lack of reference to already established regional treaties or harmonised policies within the region, which provide a framework through which this Agreement is to be implemented. The Dry Port Agreement does not draw a connection to any bilateral arrangements nor seek to create special benefits for Botswana regarding transit facilitation nor customs processes. The Governments of Namibia and Botswana have a separate agreement for the establishment

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[209] *See* Martin Ira Glassner "Transit Problems of Three Asian Land-locked Countries: Afghanistan, Nepal and Laos" *Contemporary Asian Studies Series* (1983) 18.

[210] *See* Ingrid Delupis, Nee Detter "Land-locked States; and the Law of the Sea *Scandanavian Studies in Law* 101 (1975) <http://heinonline.org> accessed 30-10-2016 .

[211] Treaty of Peace between the Allied and Associated Powers of Germany. Entered into force on 10 January 1920. The principal allied powers were the United States of America, British Empire, France, Italy and Japan. The other associated powers included 22 nations, among them Czechoslovakia. The Treaty became ineffective in 1939 when WWII broke out, however undertakings regarding Part XII remained valid and operational.

of a One-Stop-Border-Post where goods imported or exported through the Walvis Bay directly undergo customs clearances, yet the Dry Port Agreement still makes no reference to this. Its scope is specifically limited to the creation of lessor – lessee relations.

CHAPTER 2: SALIENT FEATURES OF THE LEASE AGREEEMENT

A common feature for most international leases is that they have mostly been advantageous and favourable to one party, primarily the leasing party[212]

1. Governing law

The Dry Port Agreement is governed entirely by Namibian law, and does not extend its regulation to specifically include regional law or international conventional law which both Botswana and Namibia are party to. Therefore this Agreement once again affirms how it is purely commercial and thus governed by contract law, which falls under private law. This Agreement was preceded by a Memorandum of Understanding between the Governments of Botswana and Namibia which asserted Botswana's right of access to the Walvis Bay Port. The Memorandum of Understanding[213] was not commercial at all, it rather created a stepping stone for the development of subsequent binding arrangements between the two Governments to ensure more security of access to Walvis Bay Port for Botswana. A memorandum of understanding, under Botswana law is not considered a legally binding document, hence the need to conclude this Dry Port Agreement. The intention was to create a binding arrangement with the intention to regularise Botswana's right to access and use of Namibia's port.

Since this is a commercial Agreement, it is subject to the laws of Namibia as far as they regulate the port's activity and the commercial relationship between Botswana and Namport. The Namibia Ports Authority Act and the Walvis Bay Port Regulations are the primary legislation which Botswana is obliged to comply with. Under the Agreement the Namport does not warrant that the portion of the port being

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We also emphasize that the private sector, as a service provider and as user of transit system services, is an important stakeholder in society and should be a main contributor to the development of infrastructure and productive capacity in both landlocked and transit developing countries.

2. Duration and renewal

The issue of duration and whether it is accompanied by the right to automatic renewal addresses the question of just how secure the rights of access enjoyed by landlocked states remain in this day. It has a bearing on whether landlocked states can make long term developmental plans or not. The duration of this Dry Port Agreement is 50 years, meaning that it will automatically expire on its anniversary in October 2060. The Agreement does not provide for automatic renewal. Therefore, Botswana's continued access to the port after 2060 is not a secure right.

Longer leases have been entered into by states, however even a 99 years long lease is not long enough to lay to rest the question whether a secure right of access to a port is guaranteed. The Treaty of Versailles[218] through which Germany granted the modern day Czech Republic a 99 years long lease in 1929 for the use of the Moldauhafen and Saalehafen ports in Germany,[219] is due to expire in 2028.[220] Germany, has considered reclaiming the ports leased to Czech Republic for developmental purposes, and as a gesture of good faith, it has suggested that it was willing to offer an alternative port to the Czech Republic, seemingly more advantageous.[221] The Czech Republic however has a third port within German territory,

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[218] Treaty of Peace between the Allied and Associated Powers of Germany. Entered into force on 10 January 1920. The principal allied powers were the United States of America, British Empire, France, Italy and Japan. The other associated powers included 22 nations, among them Czechoslovakia. The Treaty became ineffective in 1939 when WWII broke out, however undertakings regarding Par XII remained valid between Germany and Czech Republic

[219] Articles 363 of the Versailles Treaty.

[220] "What N

Parties should meet to discuss how to proceed. Initially, the proposal on the table was to automatically extend the lease for the duration of the negotiation should the delay have been occasioned by the landlord. This would have meant that Botswana would continue paying rent for the duration of this undefined extension. The final agreement to meet and resolve the matter expeditiously should present an opportunity for the parties to settle preliminaries such as whether rent is due and if there is temporary (defined) extension.

On the inverse, where the Landlord determines that he has developmental plans for the portion leased out by Botswana, and for this reason would like the reclaim it upon expiry of the Agreement, the Landlord should notify Botswana of such intention within 24 months prior to the automatic expiry of the lease. This provision has two angles, firstly, the landlord is seemingly precluded from entering notice and reclaiming the port prior to the full term of the lease thereby giving Botswana full access to the lease for its full anticipated duration. Secondly, the notification period has the effect of countering Botswana's preferent right to enter negotiations for renewal as Botswana can only enter notice of intent to renew 24 months prior to the termination date. The question then becomes when both party notify each 24 months prior to the Agreement's termination, who's rights outweigh the other's rights? Can Botswana insist on its preferent right over and above Namport and Namibia's sovereign right to do with the port as it pleases?

The landlord is the property owner. The same argument can be raised if the Government of Namibia was itself party to this Agreement. It remains to be seen how the parties will handle this situation. The Parties should have negotiated a period which permits Namport the right to notify Botswana of its plans prior to Botswana's notification of intention to negotiate a renewal, that way Botswana will be placed on notice in advance and start seeking out alternative ports well in time. Since Namport has the benefit of ownership of the port, naturally it has an inherent right to decide whether to continue leasing it out or reclaim its use.

The Agreement does not give Botswana security of continuity in that it does not undertake to offer alternative ports should Botswana continue to have a need to have unimpeded access to a port in Namibia. The issue whether a landlocked state in need of a port can compel a port owner to enter negotiations will not arise as the Agreement clearly stipulates at Clause 3.3,

..it being agreed that the Tenant’s rights...shall be limited to constitute a preferred right to negotiate with the Landlord on renewing the Lease, but the landlord shall not be obliged to enter into a renewal of the Lease, particularly if the landlord int2sate

Where it finds that some improvements have been installed or altered without its prior written consent, it has the power to require the removal or restoration of the Improvements.

Upon termination, the landlord has the right to request the tenant to remove all improvements on the premises, at the expense of the tenant. Where the tenant fails to honour this request the landlord shall forthwith remove the improvements, costs incurred shall be settled by the tenant. Where the landlord decides to retain the improvements upon termination, the parties shall negotiate compensation due to the

escalates annually,[226] the rental escalation is fixed and the tenant is able to make accurate projections for purposes of annual budgeting. The landlord grants the tenant a discount on the rent when the tenant makes an early payment. The formula for calculation of the discount is stipulated so the tenant is once again able to make projections on the precise amount that will become due.

Non-payment of rent is a ground for termination under the breach clause. The tenant should have "failed to pay rent on the due date on three or more occasions". Interpretation of this breach provision should prove to be interesting. It can either mean that consistent late payment, even if by a month, for three consecutive years or which ever greater period the landlord can indulge Botswana for, can have the cumulative effect of being a ground for breach. The liberal and alternative interpretation could be that, where Botswana has totally failed to pay rent for three years running, then the landlord can terminate for breach. The question then becomes what triggers the claim of breach, is it the failure to pay rent completely, which amounts to non-performance, or consecutive and consistent late payment, without condonation from the landlord.

The only provision where Botswana will enjoy some facilitation is with regard access to utilities. The

it is Sea-Rail is handling all the port activities and management for and on behalf of the Government of Botswana. In the event that they have to take action beyond their competency it is possible to execute a supplementary services contract, currently there is no other agreement between Namport and the Government of Botswana.

5. Dispute Settlement

otherwise would be overridden by the established notion that states are independent sovereign actors, they have the prerogative to accept or decline offers which they find unreasonable[227] seemingly under the circumstances of regional integration Botswana found this Agreement to be acceptable and necessary for purposes of access to a port.

[227] Harrison James *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University, Cambridge University Press 2011) 2.

The Governments of Botswana and Namibia have other bilateral memoranda for the very operationalisation of their transit and access undertakings with the ultimate goal of trade facilitation in order to drive the regional developmental agenda. These are invariably going to have an impact on the implementation of the Dry Port Lease Agreement. One such arrangement is the Agreement establishing the One Stop Border Post (OSBP Agreement).[231] This Agreement

coastal state fear economic prosperity of its landlocked neighbour. Coastal states are already vested with the right to grant or deny transit. As discussed in previous chapters, it is possible and has been observed in history that where one country becomes threatened by the economic perseverance of its neighbour it may elect to make transit impossible for it.[237] This was seen several times t1 0 0 1 72.0imee andlocked ate rsnee m

Botswana stands to be the biggest loser, regardless of which party evoked the provision on temporary measures.

The clause on temporary measures based on economic interests grants a scope even greater than provided by international and regional treaties. The Convention on Transit Trade to Landlocked States has a provision which could be in line with protection of economic interests. Article 11 (3) (b) provides that the application of the Convention shall not affect measures already in place, emanating from other treaties where such treaties seek to protect industrial,

products are restricted, yet this will still not result in border closures. It stands therefore that although the parties chose not to define nor refer to any international agreement for the implementation of this Clause on temporary measures under the OSBP Agreement, the parties need to have a common understanding of what kind of economic factors are permissible under this provision, otherwise “economic factors” may be referred to arbitrarily.

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quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.”

PROGRESS ON THE PORT SO FAR

In an interview[242] with Sea-Rail they stated that the portion of the Walvis Bay port they are leasing is 36 200 square metres in size. Since the Agreement stated that the portion Botswana is leasing was not developed at all

Kalahari Corridor Client Service Charter; reduction of border clearance (dwell time) from over several hours to a maximum of 1 hour and a minimum of 30 minutes.[246]

The successful implementation of all these instruments always depends on whether the legal environment is an enabling stepping stone. The Dry Port Agreement is limited in terms of its predefined and deliberately restricted scope and duration. On its own, it is not concerned with 'facilitating' access to the sea and on paper it has a disconnect with all these regional instruments and efforts. Facilitation of access to the sea, in my opinion entails taking deliberate steps to ease the burden faced by Botswana as a geographically disadvantaged party, and such steps should be tailored into agreements aimed at such. As noted, the Dry Port Agreement lacks specific provision on transit or exemptions in domestic process, which UNCLOS encourages under the Most Favoured Nation provision of Part X. This could lie in the fact that the Namibian party is not the Government of Namibia but rather a commercial agent of the Government of Namibia.

The question then becomes whether the parties can expand the scope of this Agreement should they require to have detailed provisions on transit facilitation. The conclusion that the Agreement is strictly a landlord – transit arrangement and the fact that Namibian party is strictly a port authority with no or a limited mandate on facilitation, point to the possibility that the Governments of Botswana and Namibia will need a new and separate arrangement with specific transit and trade facilitation provisions.

The Dry Port Agreement has not been subjected to any scholarly review hence views on whether this Agreement is sufficient for pusposes of implementing aspects of Part X of UNCLOS, remains unsettled for now. However, leasing of ports in foreign land as a means to facilitate access to the sea is not a new concept. There have been leases such as the agreement between Germany and Czech Republic of 1929 (herein the Czech Lease) and the lease between United States of America and Cuba on leasing of Guantanamo Bay contained in the Treaty between United states of America and Cuba of 1934 (herein the

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[246]Presentation by the Trans- Kalahari Corridor Secretariat, African 2013 Almaty PoA Review Meeting <http://www.unohrlls.org/UserFiles/File/LLDC%20Documents/ALMATY%20+10/Africa%20regional%20review/lldc2013_tkcmc-presentation-apoa-july2013.ppt>.

Guantanamo Lease).[247] There is no minimum standards on the form an agreement leasing a port should take. Each lease is unique in formulation of its provisions as well as in effect and implementation. The Czech lease was of a 99 years duration while the Guantanamo Bay Lease, is for an unlimited duration and remains in force to this day. Although all these are for the common purpose of leasing ports, they all have unique objectives which remain the determining factor of the technicalities therein.

The benefit of having a time bound agreement lies in the fact that there comes a point where the parties get an opportunity to go back to the drawing board and possibly revise the object, scope and technical terms for renewal. This provides opportune for inclusion of new dynamics of global development, improved and more balanced beneficial cooperation. The However this is an optimistic view.

[247] *See* Hanna Danwall "Guantanamo Bay, a legal "black hole"? 12.

rivers which were considered international rivers. The Versailles Treaty[253] and Barcelona Convention are such examples. However, international conventions which provide for navigation of rivers up to the sea highlight that a river should be navigable. This means that it is possible to have a non-navigable river, and this determination must be made by the riparian states. In the context of Southern Africa, the Treaty between Great Britain and Portugal of 1890 permitted free navigation of Zambezi river by the Portuguese merchants from its African colonies[254] in recognition of its commercial navigability.

On the northern border of Botswana lies a river called Chobe,[255] which leads to and connects to the Zambezi River as it flows to the east. Although Botswana navigates this river mainly for tourism purposes, there is no indication of whether there has been consideration to utilise it for commercial

from it

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[253] Article 331

The following rivers are declared international:
the Elbe (*Labe*) from its confluence with the Vltava (*Moldau*), and the Vltava (*Moldau*) from Prague;
the Oder (*Odra*) from its confluence with the Oppa;
the Niemen (

high seas. This therefore presents an opportunity for landlocked states to be active participants not only in High Seas fishing but in conservation initiatives. Coastal states will to recognise their involvement in global marine conservation as pertinent. However High Seas fishing does not seem feasible for developing landlocked states as the High Seas have become further to reach due to the ever increasing continental shelves of coastal states.

Previous submissions by landlocked states at diplomatic conferences, focused solely on securing recognition of their right to have free transit until the UNCLOS III conference. At this Conference landlocked and geographically disadvantaged states sought recognition of greater rights such as fishing, exploitation of sea bed resources and participation in the general governance of global ocean resources. This was captured in the Kampala Declaration. This Declaration sought to re-emphasise that the sea and its resources should be enjoyed by all nations on the basis of equality and non-discrimination.[265] The rights enunciated in the Declaration seem to have been listed in their order of priority, with the right of free and unrestricted access to and from the sea for both landlocked and geographically disadvantaged states being described as cardinal in Articles 1 and 2[266]. Article 4 provided the next priority for landlocked states, the right of free access to and from the sea-bed in order for landlocked and geographically disadvantaged states to participate in the exploration and exploitation of the Area and its resources. This right is underpinned by the principle that all resources nned by the princi7Tf1 0 0 1 72td 15(nne)-10(d)(phi)5(c g0 G[(. A

Pertaining to the technical details of transit, the Sub-Saharan region has progressed in the identification of joint corridors through which there shall be common regulation on customs, taxes and documentation for ease of movement of goods and people for purposes of trade facilitation. The region is working on improving regional railway lines, which have been noted to provide a cheaper alternative to road transportation. In the interest of regional integration landlocked states have permitted transit through their territories, which shows that they are willing to reciprocate any freedoms they can for purposes of common developmental goals. Previous treaties upheld the principle of reciprocity, it is now evident that landlocked states are willing to implement it when need be.

The region would benefit from river navigation, which is even cheaper than railway transportation. River navigation is the oldest means through which states used to reach the sea as noted in previous treaties such as the Versailles and the Barcelona Convention which both date as far back as 1920s. To this day river navigation is still greatly utilised in regions such as Europe (Rhine river) and north-western part of Africa (the Niger river). It is essential for landlocked states to have several alternatives that provide transit and river navigation remains a viable option. The need to have viable options and alternative routes is even greater for landlocked states which are total enclaves such as the Kingdom of Lesotho. Lack of access to external trade could lead to a total collapse of the economy, while total dependency on a neighbouring coastal state needs to be kept at a minimum.

At the end of the day, each landlocked state should pursue the kind of transit and access it deems it needs and deserves. The ongoing discussions at the United Nations on the possibility to regulate areas beyond national jurisdiction are pertinent for landlocked states because those are the only parts of the oceans landlocked states have a real right to. Once again landlocked states are faced with an opportunity to assert their presence and their value as beneficiaries to the oceans. The hope is that landlocked states will assert their rights and just like coastal states, jealously guard their legitimate interests.

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