

APPLICATION OF THE PRINCIPLE OF RECIPROCITY IN THE CONFISCATION OF ASSETS PROCEEDING FROM MONEY LAUNDERING CRIMES LOCATED ABROAD WITH THE STATE *NON-MLA TREATY BASED*.

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Abstract

Money laundering is a serious problem involving cross-border transactions using lower tax loopholes, resulting in a decrease in the proceeds of criminal acts being laundered by criminals. Mutual Legal Assistance (MLA) is a solution through the principle of reciprocity, which facilitates cooperation between countries in investigating, prosecuting and handling cross-border crimes. This research aims to analyze the application of the Reciprocity Principle in MLA legal efforts with countries that do not yet have mutual assistance agreements with Indonesia in handling money laundering cases. Data from the digital survey is supported by analysis of Indonesian criminal law regulations, laws on eradicating money laundering, international cooperation law, as well as national and international literature references. Implementation of the principle of reciprocity can be done through informal regulations (Arrangements) that apply on a case-by-case basis, enabling effective law enforcement against transnational crimes such as money laundering.

Keywords: Money Laundering, *Mutual Legal Assistance*, Principle of Reciprocity, Confiscation

INTRODUCTION

Crime is behavior that is considered unlawful behavior. This is a special form of deviant behavior that is formally and officially established by the authorities. Many types of deviance are not crimes. Corruption is a crime that has a negative impact on victims and also financially harms the state. To overcome various types of crime, including major ones such as corruption, intensive efforts have been made. One method taken is to develop special criminal law regulations that support the application of criminal law in general. This is done to increase effectiveness in handling these crimes.

In today's modern era, society continues to develop with technology, facilities and infrastructure that are increasingly modern in terms of how they are used and the results of using these facilities and infrastructure. People living in this modern era often find new ways

to break through the walls of limitations with online media which gives everyone access to interact, carry out daily activities, to the point where some people even use online media as a livelihood.

In line with advances in technology, media, facilities and infrastructure towards positive things, so does crime. Crime is an action that violates rules or norms that are considered or should be considered detrimental, disturbing and unacceptable behavior. A society that develops rapidly with development is called a society *polyvalent*. Public *polyvalent* is a society that at the same time accommodates people with diverse attitudes and views and displays a pluralistic system structure.¹

That with various aspects of society in responding to rapid changes which are always accompanied by crime, the law always remains the guardian of the public from acts against the law. As in the law that applies in Indonesia, as a legal state Indonesia always seeks and studies legal facts that exist in society so that legal reforms can then be carried out. The relevance of law is closely related to the conditions of a country, including Indonesia. However, not only Indonesia but also the international world is experiencing similar challenges due to the intensity of accelerated technological development which has an impact on the level of sophistication of crime, especially crimes related to finance. Because it uses technology that can transcend transnational boundaries, each country has its own jurisdiction and territorial principles, like Indonesia. Crimes related to this include Human Trafficking, Immigrant Smuggling, Firearms, Narcotics, Corruption and Money Laundering.

Money Laundering is an attempt by criminals to "hide or disguise" the origin of assets obtained from criminal acts by entering the proceeds of criminal acts into the financial system. The crime of money laundering is carried out using many modes, including donations, safekeeping, exchanging currency or objects, payment for an object/service, and transfer.² The crime of money laundering is increasingly complex along with advances in financial science and increasingly sophisticated technology. However, the implementation of the Money Laundering Crime Law (TPPU) faces certain challenges. One of the problems that arises in law enforcement of Law Number 18 of 2010 concerning Eradication of the Crime of Money

¹ Sitompul, Sofyan, "Penerapan Asas Pembalikan beban Pembuktian Dalam Perkara Money Laundering," (Jakarta : Imaji Cipta Karya., 2020), hal.15

² Da'I Bachtiar, "Pedoman Penyidikan Tindak Pidana Pencucian uang." (Jakarta: 2003), hal.1

Laundering is the tendency of criminals to carry, transfer, change currency abroad and change the form of assets resulting from the original crime.

Washing is done in many varieties. The modus operandi of the perpetrator of the predicate crime (predicate crime) cannot be classified one by one considering that there are so many types of criminal acts that can occur predicate crime. That in the matter of where modernization provides a lot platform for each person to be able to carry out actions that are outside the norm, especially in financial sector crimes such as Money Laundering, this makes it very easy for someone to be able to hide and disguise the results of criminal acts such as embezzlement or corruption. However, with the latest laws in force, of course the banking sector and financial service providers are protected by legal protection transfer money in general. However, it is actually a less likely reason for a perpetrator not to carry out the money laundering process in Indonesia as the country where it occurred predicate crime Moreover, making the proceeds of a criminal act an object of taxation will reduce the proceeds of criminal acts laundered by criminals.

With this fact, quite a few money laundering criminals launder money abroad with much lower taxes and are far from the reach of law enforcement officials. Likewise, on the other hand, money is often the result of money laundering or in the process of money laundering through a process that involves Indonesian citizens or occurs in Indonesia. Therefore, efforts are really needed to enforce the law regarding both perpetrators and evidence who may be abroad. The problem with law enforcement officials legally is that jurisdiction limits their authority to act to carry out legal remedies. With this kind of dilemma, it is increasingly important to increase international cooperation efficiently in dealing with crime challenges both national and cross-border.³

Mutual Legal Assistance is an agreement which basically involves a request for mutual assistance between the requesting country and the requested country, related to investigations, investigations, prosecutions, court hearings, and other legal actions, carried out by the Requesting Country to the Requested Country.⁴ Whereas in Article 3 paragraph (1) of Law of

³ Romli Atmasasmita, *“Tindak Pidana Narkotika Transnasional dalam Sistem Hukum Pidana Indonesia”*, (Bandung: Citra Aditya Bakti, 1997). Hal. 36

⁴ Sunarso, Siswanto, *“Ekstradisi dan Bantuan Timbal balik dalam Masalah Pidana: Instrumen Penegakan Hukum Pidana Internasional,”* (Jakarta: Rineka Cipta, 2009), hal.133

the Republic of Indonesia Number 1 of 2006 concerning Mutual Assistance in Criminal Matters it is stated:⁵

“Mutual assistance in criminal matters, hereinafter referred to as Assistance, is a request for Assistance in connection with investigations, prosecutions and trials in court in accordance with the provisions of the laws and regulations of the Requested State.”

The assistance referred to in paragraph (1) as above can carry out search and confiscation requests. Likewise, the Minister can submit a request for assistance to a foreign country to issue a warrant to block, search, confiscate or take other actions required in accordance with the provisions of laws and regulations relating to the examination of criminal cases in Indonesia. However, of course, considering that mutual assistance between countries is an extraordinary legal act, a general agreement is needed in the form mutual legal assistance cooperation agreement or Mutual Legal Assistance. However, what about a situation where Indonesia does not yet have a mutual assistance agreement with the country concerned. Where evidence that is closely related to a criminal act, such as the proceeds of a money laundering crime, is placed abroad.

Article 5 paragraph (2) of Law of the Republic of Indonesia Number 1 of 2006 concerning Mutual Assistance in Criminal Matters, regulates that in the event that there is no agreement, assistance can be provided on the basis of good relations based on the principle of reciprocity. So what is the process of applying the principle of reciprocity in cases where mutual assistance is needed, such as in cases of money laundering for the proceeds of a criminal act and/or evidence for an alleged criminal act located abroad? The author is interested in discussing this research with the title Application of the Principle of Reciprocity in the Confiscation of Assets Proceeding from Criminal Acts Located Abroad with the State Non-MLA Agreement.

METHOD

Data

This research aims to discover and classify in detail the application of the Reciprocity Principle in legal efforts *Mutual Legal Assistance* with countries that do not yet have mutual

⁵ Pasal 3 ayat (1) Undang-Undang Republik Indonesia Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik Dalam Masalah Pidana

assistance agreements with Indonesia in handling cases of criminal acts of money laundering. So there are two problems that are at the core of this research, namely:

- 1) What is the practice of law enforcement in confiscating assets resulting from criminal acts/evidence in Law Number 1 of 2006 concerning Mutual Assistance in Criminal Matters?
- 2) How to apply the principle of reciprocity as a general principle of reciprocity in *Mutual Legal Assistance* between Indonesia and other countries or vice versa?

The data collected comes from statutory regulations, court decisions and online digital survey data. The data is then analyzed and researched to find answers to the questions as above regarding the confiscation of assets resulting from criminal acts/evidence in Law Number 1 of 2006 concerning Mutual Assistance in Criminal Matters.

The various variables in the laws governing criminal law in Indonesia need to be analyzed by considering various criminal law regulations and principles as well as other legislative aspects. The author collects various basic regulations of Indonesian criminal law, criminal law procedures, laws regarding eradicating money laundering, international cooperation law, as well as references from national and international literature regarding other legal remedies. Data from the digital survey will be evidence of the author's opinion, which is supported by analysis of other related data..

RESLUTS

Authority and Procedures for Law Enforcement in Carrying out Confiscation in Law Number 1 of 2006

Collaboration in form *Mutual Legal Assistance* It is an important need to ensure effective steps in investigating, prosecuting and examining cases involving both countries, both the country requesting assistance and the country being requested assistance.[6] In terms of the provisions of Law Number 1 of 2006, Article 4 explains clearly that the provisions in this Law do not provide authority to carry out:

- a. extradition or surrender of persons;
- b. arrest or detention for the purpose of extradition or surrender of the person;
- c. prisoner transfer; or

- d. transfer of matter.

That what is meant by the formulation of the article above illustrates that the authority granted by law cannot intersect with the criminal procedural law of another country except by the force of a treaty or agreement between countries. Article 5 explains that assistance can be provided with an agreement. Assistance that can be provided in a reciprocal manner in criminal matters is as follows:

- a. identify and locate people;
- b. obtain a statement or other form;
- c. present documents or other forms;
- d. seeking the presence of people to provide information or assist in investigations;
- e. It is. delivering letters;
- f. executing search and seizure requests;
- g. confiscation of criminal proceeds;
- h. recover fines in the form of money in connection with criminal acts;
- i. prohibit wealth transactions, freeze assets that can be released or confiscated, or that may be needed to fulfill fines imposed, in connection with a criminal offense;
- j. seeking assets that can be released, or that may be needed to satisfy fines imposed, in connection with a criminal offense; and/or
- k. Other assistance in accordance with this Law.

This provision is in line with Article 46 paragraph (3) UNCAC 2003 which regulates the scope of mutual legal assistance which stipulates that requests for mutual legal assistance can be submitted for various purposes as follows:⁶

- 1) Taking evidence or statements from people.
- 2) Submitting court documents.
- 3) Conduct investigations and seizures and freezes.
- 4) Checking goods and places.
- 5) Providing information, evidence and expert assessments.
- 6) Provide original documents or certified copies and relevant records, including government, bank, financial, corporate or business records.
- 7) Identify or trace criminal proceeds, assets, means or other things for evidentiary purposes.
- 8) Facilitate the voluntary presence of persons in the requesting party country.
- 9) Other assistance that does not conflict with the national law of the State Party is requested.

⁶ Pasal 46 ayat (3) United Nations Convention against Corruption 2003

- 10) Identify, freeze and trace the proceeds of crime in accordance with the provisions of Chapter V of this Convention.
- 11) Returning assets, in accordance with the provisions of Chapter V of this Convention.

The objects of mutual legal assistance include taking and providing evidence, including statements, documents, notes, identifying the location of a person's whereabouts, carrying out requests for evidence search and seizure, searching, freezing and confiscating assets resulting from crime, as well as facilitating consent from witnesses or individuals willing to assist with investigations in countries requesting MLA legal assistance in criminal cases.⁷

In Requesting Mutual Assistance in Criminal Matters from Indonesia, the Minister can submit a request to a foreign country directly or through diplomatic channels. This request for assistance was submitted by the Minister at the request of Kaplari or the Attorney General. Requirements for assistance must include:⁸

- a. identity of the requesting institution;
- b. the subject matter and essence of the investigation, prosecution or examination in court relating to the request, as well as the name and function of the institution carrying out the investigation, prosecution and judicial process;
- c. summary of relevant facts except requests for assistance relating to juridical documents;
- d. the provisions of the relevant laws, the contents of the articles, and the criminal threats;
 - i. It is. a description of the Assistance requested and details of the specific procedures required including confidentiality;
- e. the purpose of the Assistance requested; And
- f. other conditions determined by the Requested State.

If it is believed that there is evidence that is strongly related to a criminal act in the process of prosecution investigation and court hearings in Indonesia, the Minister can submit a Request for Assistance to a foreign country to be able to seek:⁹

- a. taking statements in foreign countries; or
- b. submission of documents or other evidence located in a foreign country.

Furthermore, statements received from foreign countries based on requests for assistance in collecting evidence can be accepted as evidence in the litigation process as long as they have been acknowledged and/or signed by the person making the statement and the official who took the statement. The Minister may ask the person who provides a statement or shows

⁷ Sigalingging, Bisdan. "Bantuan Hukum Timbal Balik Dalam Perampasan Aset Korupsi Antar Lintas Batas Negara." *Iuris Studia: Jurnal Kajian Hukum* 2.3 (2021): 387-398.

⁸ Pasal 10 Undang-Undang Nomor 1 tahun 2006

⁹ Pasal 12 ayat (1) Undang-Undang Nomor 1 tahun 2006

documents or other evidence related to the request for assistance to be examined or cross-examined through a direct meeting or with the help of a teleconference or live broadcast via communication or other electronic means either at the stage of investigation, prosecution or examination in court with law enforcement officers or suspects/defendants and/or with their legal representatives.

Furthermore, Article 19 of Law Number 1 of 2006 gives the Minister the authority to submit requests for assistance to foreign countries to issue blocking, search, confiscation or other actions required by the provisions of laws and regulations related to the examination of criminal cases in Indonesia. The Minister can submit a request for assistance to a foreign country to obtain evidence that is in the foreign country through search and confiscation as intended in Article 19.¹⁰

With the existence of regulations for law enforcers to be able to request the Minister to request reciprocal assistance from foreign countries to be able to carry out confiscation and blocking required in handling Money Laundering Crime cases. Of course, in practice, this request is requested based on a request from the Chief of Police or the Attorney General, meaning that the Regional Police or other investigators in their respective cases can make a specific request to the central agency regarding actions that are treated through letters.

The Principle of Reciprocity in the International Legal Framework

The principle of reciprocity or reciprocity basically implies that if a country expects favorable treatment from another country, then that country is also expected to provide the same or equal treatment to the country concerned.¹¹ In the context of diplomatic law, the principle of reciprocity is a very important principle. Within the framework of diplomatic law, the principle of reciprocity is considered as a legal principle that underlies various provisions in international agreements and customary international law, and this principle is widely recognized. This principle also reflects the principles of state sovereignty and legal sovereignty, as well as the principles of sovereignty of the Indonesian state and nation. Apart from that, these principles also emphasize the importance of mutual respect between nations and countries in the world.

¹⁰ Pasal 20 Undang-Undang Nomor 1 tahun 2006

¹¹ Eddy O.S Hiariej, 2016, Prinsip-Prinsip Hukum Pidana: Edisi Revisi, Cahaya Atma Pustaka, Yogyakarta, hlm. 26

The principle of reciprocity is recognized internationally as a solution to facilitate cooperation between countries, both in civil and criminal matters, especially for countries that do not yet have official cooperation agreements. This principle basically aims to strengthen good relations between two countries.¹² According to the principle of reciprocity, acceptance or rejection of requests for assistance can be flexible, which means that even though requests for assistance should be rejected, due to good relations between the two countries, assistance can be provided. This occurs when there is no formal agreement between the two countries regarding mutual assistance, or when the penalty threatened is the death penalty.¹³

Mutual Legal Assistance, as part of this type of international agreement, must fulfill all the requirements set out in international law, as described in Article 11 of the 1969 Vienna Convention:¹⁴

“The consent of states to be bound by a treaty may be expressed by signature, exchange of instrument constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”

About settings Mutual Legal Assistance available in several international agreements, each of which regulates different aspects. Before carrying out mutual legal assistance cooperation, it is important to first determine what will be regulated in the agreement, so that the legal basis can be properly understood.¹⁵ The 1969 Vienna Convention, known as the "Vienna Convention on the Law of Treaties," not only codified customary international law regarding treaties, but also represented progress in the development of the international law of treaties. Nevertheless, the Vienna Convention still recognizes the existence of customary international law related to agreements, especially in matters that have not been regulated in detail in the convention. International treaties are agreements between international legal entities that give rise to binding obligations in the context of international law. This type of agreement can be bilateral or multilateral.

State responsibility is essentially related to state sovereignty. International law, through bilateral, regional, or multilateral agreements, establishes obligations for states to protect the

¹² Badan Pembinaan Hukum Nasional, "Analisis Dan Evaluasi Hukum Terhadap Bantuan Tombal Balik Dalam Masalah Pidana," Dokumen BPHN, hlm. 19

¹³ *Ibid*, hlm.22

¹⁴ Konvensi Wina 1969

¹⁵ Febrianti, Erica, Josina Augustina Yvonne Wattimena, and Dyah Ridhul Airin Daties. "Pengaturan Mutual Legal Assistance Dalam Hukum Internasional (Kasus Konfederasi Swiss-Indonesia)." *TATOHI: Jurnal Ilmu Hukum* 3.2 (2023): 112-122.

individual and property rights of foreigners. An agreement to be bound by an agreement is a follow-up to negotiations and creates certain obligations for the state. This obligation includes the obligation not to conflict with the objectives of the agreement. The principle of reciprocity, which is recognized internationally, is the basis for Mutual Legal Assistance in Criminal Matters, especially for countries without cooperation agreements. This assistance aims to meet domestic and international needs and is in accordance with FATF recommendations regarding Anti Money Laundering Regime. This is what makes the principle of reciprocity the basis of mutual assistance for criminal matters involving matters where the criminal act and/or related matters are cross-border.

Another example of the basic model of cooperation based on the principle of reciprocity is contained in Law Number 1 of 1979 concerning Extradition which includes:¹⁶

- a) The existence of the same political interests (*Mutual Interest*) among countries.
- b) There are the same advantages (*Mutual Advantages*) when doing cooperation.
- c) There are similarities in goals (*Mutual Goals*)
- d) Respect on the basis of “*State Sovereignty*” between countries that cooperate

Implementation of the principle of reciprocity does not require a formal agreement (Treaty), but can be done through informal regulations (Arrangement) which applies on a case-by-case basis. The smooth implementation of this regulation only requires factors that confirm that the procedure "Non-treaty Based" can be included in statutory regulations.¹⁷

DISCUSSION

Application of the Principle of Reciprocity in Mutual Legal Assistance No Agreement

Based on the crime of money laundering, it is a financial crime which is defined as anyone who places, transfers, spends, pays, grants, entrusts, takes abroad, changes form, exchanges for currency or securities, or performs other actions on assets with the intention of to hide or disguise the source of the assets will be punished as a crime of money laundering.¹⁸ This results in almost every money laundering crime case placing the proceeds of the crime abroad, making it difficult to follow the traces of the transactions. Law enforcement against actions similar to this requires cross-border action as well.

¹⁶ Sary, Dian Venita. "Motivasi ASEAN dalam Upaya Penanganan Kejahatan Transnasional (Studi Kasus: Implementasi MLA (Mutual Legal Assistance) di Wilayah Asia Tenggara)." *Journal of Diplomacy and International Studies* 5.01 (2022): 16-22.

¹⁷ *Ibid.*

¹⁸ Undang-Undang Nomor 8 Tahun 2010 Tentang Undang-Undang Pencucian Uang

That it is clearly explained in Law of the Republic of Indonesia Number 1 of 2006 in Article 5 that assistance can be provided based on an agreement, and in the event that there is no agreement, it can be provided on the basis of good relations based on the principle of reciprocity. With the enactment of Law no. 1 of 2006 concerning Mutual Legal Assistance in Criminal Matters, is expected to facilitate law enforcers in obtaining evidence related to criminal acts that fall into the category of transnational crimes. For example, the bilateral agreement between the Republic of Indonesia and Australia regarding Mutual Assistance in Criminal Matters has legal force after the promulgation of Law Number 1 of 1999.

The best approach is through the establishment of bilateral or multilateral agreements between parties involved in criminal matters. This type of agreement is generally referred to as a mutual assistance cooperation agreement in criminal matters. This kind of agreement will become the legal basis governing cooperation between countries in criminal matters. Mutual Legal Assistance (MLA) can basically be carried out both bilaterally and multilaterally. Bilateral MLA can be based on an MLA agreement or on the basis of a mutually beneficial relationship (reciprocity) between two countries. To date, Indonesia has signed several Bilateral MLA cooperation agreements with Australia, China, Korea and the United States.

In terms of its application to criminal cases, it is necessary to pay attention to how the follow-up to Law Number 1 of 2006 is carried out by the police/prosecutor or investigators with the Minister. For example, the BNI case with Adrian H. Woworuntu involved a request for confiscation and confiscation of assets through mutual assistance in criminal matters, based on the principle of reciprocity. The process began with the receipt of information via fax from the Indonesian Consulate General in Los Angeles in October 2004, which stated that Woworuntu had invested USD 12 million in the US. The FBI is willing to help retrieve the money on condition that Indonesia provides information regarding the transfer of money, the amount Woworuntu took from BNI, the people involved, and others.

In response to this, the Central Authority held a coordination meeting between departments to determine the Indonesian government's position regarding the USA's offer. The next step is to send an official letter to PPATK, Bareskrim POLRI, Ses NCB Interpol, and Jampidsus Attorney General's Office of the Republic of Indonesia to request the information needed to apply formal request mutual assistance in criminal matters to the USA in the case of

Adrian H. Woworuntu. The purpose of applying for mutual legal assistance is to obtain evidence that will be used in examinations at court hearings, secure funds resulting from crimes, and compensate for state financial losses resulting from criminal acts committed by Woworuntu. However, the response from relevant domestic agencies was mixed. PPATK provided information about the transfer of funds from Woworuntu's sister to the USA, Bareskrim POLRI provided limited answers, while Jampidsus Attorney General's Office did not provide a response. This happened even though the request was submitted during the trial of the defendant Adrian H. Woworuntu at the South Jakarta District Court.¹⁹

That in this case Indonesia and the United States do not yet have an agreement regarding criminal matters or an extradition agreement and the like. Reciprocal actions based on the principle of reciprocity can of course be carried out with interests in accordance with the Criminal Procedure Law which requires legal action to resolve a case.

Mutual Legal Assistance as an institution to overcome the problem of transnational crime such as Money Laundering, Smuggling of Goods and/or People, Human Trafficking, Narcotics crimes and other crimes that have a cross-border dimension or size and have a dual principle (Double Criminality). The meaning of this dual principle is that although a criminal act is considered a crime according to the law of each country (requester and requested), the criminal act is only recognized and acted upon in the country where the crime was committed. Overcoming the difficulties of the double crime principle requires a convention involving international cooperation, which is considered more effective in fighting international crime. Therefore, states will be more efficient in fighting international crime if they are more inclined to cooperate through international conventions.²⁰

According to the author, the focus on crimes committed by Woworuntu shows that law enforcement agencies in Indonesia, such as PPATK, Bareskrim, and the prosecutor's office, tend to have an attitude that is too rigid or egocentric. Only PPATK agrees with this Mutual Legal Assistance (MLA) process. According to the authors, law enforcement agencies should not rely too heavily on MLA agreements to ensure effective law enforcement.

Basically regarding reciprocal relations in criminal matters that do not yet have an agreement Mutual Legal Assistance do not have rights and obligations as the basis for binding legal consequences is an agreement. However, the public interests protected by the Criminal

¹⁹ Badan Pembinaan Hukum Nasional, *Op.Cit* , 38-40

²⁰ Sary, Dian Venita. *Op Cit*. hal.18

Law of each country are the basis for the necessity of reciprocal efforts even though they do not yet exist Mutual Legal Assistance.

CONCLUSION

Money laundering is a serious problem involving cross-border transactions using lower tax loopholes and sometimes involving individuals or processes inside and outside Indonesia. To deal with this, law enforcement efforts are needed that involve international cooperation through Mutual Legal Assistance (MLA), which allows countries to provide assistance to each other in the investigation, prosecution and handling of cross-border crimes. The principle of reciprocity is also recognized as a solution to facilitate cooperation between countries, especially for countries that do not yet have formal cooperation agreements. In conclusion, law enforcement against transnational crimes such as money laundering requires strong international cooperation through principles such as MLA and reciprocity. It is hoped that in the future Indonesia can continue to enter into MLA Agreements with countries that do not yet have an Agreement with Indonesia.

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