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Limitation of Foreign Investment in the Banking Sector in Indonesia

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Abstract

Introduction to The Problem: The liberalization of the banking sector as an implication of Act No. 10 of 1998 regarding amendment of Act No. 7 of 1992 concerning Banking comes into force. In a state, banking has become one of the most crucial sectors in economic matters. Its role is to stimulate the economic growth in the state, according to Mohammad Hatta, the bank is the principle of improvement in the society if a bank does not exist then there will be no improvement like nowadays.
Purpose/Objective study: The research aims to describe and examines issues of the Effect of Foreign Capital Restrictions in the Indonesian Banking Sector in a legal, economic, and political perspective. The study looked from the Conception of Welfare State and the Political Strategy of the Law of Economic Development In the case of Foreign Capital Restrictions in the Indonesian Banking Sector to compete globally.
Methodology/Approach: This legal writing is normative juridical research that uses a statute approach and a historical approach to be able to provide solutions to existing legal issues.
Findings: The results of the analysis show that the Politics of the law of foreign investment in the banking sector must be referred to Banking Act of 1992 in Article 22-26 before anything happens that endangers the interests of the nation and the State. Also, it needs for regulations from Bank Indonesia to leverage foreign capital in the banking sector that will directly improve the economy in the real sector, in order to anticipate the impact of foreign capital ownership in the future of Indonesian banks.
Paper Type: Research Article
Keywords*:* Deregulation; Limitation of Foreign Capital Ownership in Banking Sector; Reciprocal Principle; Welfare State.

Introduction

One goal that Indonesia always dreamed of is to become an advanced country or at least have an essential role in the world's activities. These goals are one of Indonesia effort in actualizing its value that stated in Pancasila and the 1945 Constitution. Indonesian founders had formulated the concept of the state then included in Constitution, such as Indonesia with its 1945 Constitution. One of the most defining conceptions of Indonesia was in Article 1 paragraph (3) of the 1945 Constitution

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"Indonesia is state law" then in the concept of state law it is ideal that law is the most fundamental rule in statehood not politic or economic (Asshiddiqie, 2008).

Since the beginning, the founding father had formulated the economic system as one of the essential substances in the constitution. It is reflected on how brilliant the formula of the economic system then included in provision Article 33 constitution of 1945, as one of the systems that integrate state-local wisdom so that the norm can be so visionary and progressive.

The process of law-making in a state according to Friedmann is that Law is the outcome from a bargaining process between social-politic powers, control social institutes, including in it human condition, social-economic / business including global and national condition affect the law-making process. State policy, which is expressing what contained in society and to achieve the goals that had been dreamed of, is called politics of law (Friedmann, 1990b).

The development and advancement of technology encourage us to enter into the era of economic globalization. It is sometimes misused by certain parties who are not responsible for gaining an advantage for himself (Bramita, 2018). Legal policy in the economic sector has a connection with institution concept of the welfare state, and it is not loosed from the series of politics of law study that underlie human rights in that economic sector and the correlation of politics of law between the economic structure in Indonesia. Political law, according to Padmo Wahjono, is an administrator state policy about what criteria that are used to penalize something that includes establishment, application, and law enforcement (Mahfud MD, 2010).

In reality, government policy in the form of constitution, sometimes create pro and cons in the society, for example, the policy on the liberalization of the banking sector in Indonesia regarding foreign direct investment, this issue got people attention in the recent time. Related on capital investment, Article 1 number 1 Law No. 25 the year 2007 regarding Capital Investment defines the capital investment that is "All forms of capital investing activity, both by domestic capital investor and foreign capital investor, to undertake business within the territory of the Republic of Indonesia." Based on this definition, investors have the right, through shareholding to some degree throughout the company (Bintang, 2010).

The liberalization of the banking sector as an implication of the Law No.10 of 1998 regarding amendment of Law No. 7 of 1992 concerning Banking comes into force. In a state, banking has become one the most crucial sector in economic matters; its role is to stimulate the economic growth in the state, according to Mohammad Hatta, the bank is the principle of improvement in the society if a bank does not exist then there will be no improvement like nowadays. A state who does not have much bank that upright and decent is retarded (Hasibuan, 2001).

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Because of the impact on the monetary crisis in 1998, many big private banks change their ownership to the foreign. Besides that, there is also a bank that shares its ownership with the foreign, for example, Bank BCA, Bank Danamon, Bank Niaga, Bank Lippo, Bank BII. Then soon or later, the nationality feels that worry about the significant impact that caused by the foreign bank will emerge (Lumbuun, 2015).

On the other side, it is approved that this foreign bank introduces new technology, excellent quality of public service, have broad networking outside the country that will help Indonesia improve in the import-export sector and also provide lots of new fund for a company in Indonesia. However, there are concerned-questions arise regarding foreign bank, is it care about the stability of monetary and credit expansion on small and middle business? Will the foreign bank disposed to follow the regulation of the central bank to maintain the stability value of rupiah and commitment in enforcement on the real sector? The society also observes that the banks that collapsed in monetary crisis 1998 are the private national bank, instead of the foreign bank in Indonesia, which remain healthy and stable (Lumbuun, 2015). Juwana explains that banking regulation has to create a condition so that there will be no domination by the megabank against baking activity in a whole (Juwana, 2002).

Like we know the banking industry in Indonesia not only possesses by Indonesia but half of it posses by foreign people. In Bank Indonesia regulation, it is arranged about possession. Detailed regulation on Bank possession stated in Article 22 Law No.10 year 1998 jo Article 26 Law No.10 year 1998, Bank Indonesia Regulation No. 14/8/PBI/2012 about Public Bank Stock Possession and Bank Indonesia handbill No. 54/DPNP.

Agus Martowardojo, in his statement, asked Bank Indonesia to encourage banking to decrease it is foreign possession. According to him, the baking industry situation in Indonesia is very different from another country, Indonesia banking industry consider quite open compared to other Asian countries (Yos, 2011). Besides opening a branch, foreign people can also freely buy the bank stock in our country. Because of that, Sunaryati Hartono said that we have to avoid this situation, just like our ancestor occupied by the colony and right now multinational company colonizes us (Hartono, 1991). In this situation, we need a sharp regulation regarding economic law. On the other hand, it is expanding our international collaboration in the economic sector, and it could protect our nation in this wave of globalization. In this case, we could also see how our national law determines our national endurance.

The occurrence of contra that happened in foreign investment on banking sector in accordance to "*das sein*," it is seen that we need to study "*das sollen*" about regulation on foreign investment on banking sectored in Indonesia (Notohamidjojo, 2008). Currently, based on several international agreements, Indonesia has exposed to investment in the country. One example of international agreements that underlie the entry of investment in Indonesia is the ASEAN Comprehensive Investment Agreement

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(ACIA) which makes the implementation of free investment flows as one of the pillars in the formation of the ASEAN Economic Community (MEA) 2015, together with the free flow of goods, services and expert labor and free flow of capital (Delfiyanti, 2017).

From the exposure of the phenomenon that explains above, Indonesia shall pay attention about limitation in foreign investment in the banking sector and not separated from what will be expected by the welfare state conception who can compete in the International world.

Based on what has been explained in the background, the further issues that will be discussed are: 1) How is the impact of limitation of foreign investment in Indonesia Banking Sector against Welfare State Conception; and 2) How Political Economic Growth Legal Strategy regarding limitation of foreign investment in Indonesia Banking Sector to compete in global scale?

Methodology

This research is qualitative normative legal research or legal doctrinal research. It studied through literature as the secondary data (Surakmad, 1994). The study investigated using statute and historical approach (Marzuki, 2011). The sources then analyzed and explained descriptively by convey and describe it according to the identification of the problem.

Analysis and Results

Politics of law Denote State Policy on the Law

Since the change of the New Order regime to the reform regime in 1998 until now the public question and legal experts about the direction of Indonesian legal politics in the middle of the globalization pressure. It has become essential and relevant to how Indonesia prepares a legal system that pays attention to a balance between domestic interests and the interests of international relations in all areas of social life. It also how the Indonesian legal system incorporates two controversial interests, namely the interests of the state on the one hand and the interests of citizens on the other hand (Abdullah, 2014).

Politics of law according to Mahfud MD is "a legal policy or official policy regarding law that will be enforced by making a new regulation or substitute the old regulation, in terms of achieving state goals." The politics of law is about the choice of regulation that will become into force or choice of regulation that will be a substitute to achieve the state goals (Mahfud MD, 2006). In this theory, the law is equipment to reach state goals.

Politics of law is a fundamental policy that determines the direction, forms, and even the context of regulation. His other book says that politics of law is a state administrator policy about what criteria that are used to penalize something that includes establishment, application, and law enforcement. Politics of law, according

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to Padmo wahjono, has a connection with the law that will become into force in later times (Syaukani & Thohari, 2006).

Teuku Mohammad Radhie, in his writing "Pembaharuan dan Politik Hukum Dalam Rangka Pembangunan Nasional" said that politics of law is the state authority of will regarding a valid regulation in his jurisdiction and to determine the aim of the regulation. His statement about "the valid regulation is his jurisdiction" is a regulation that applies directly in time (*constitutum*) and "knowing aim of regulation" is a valid regulation in the future time (*ius constituendum*) (Syaukani & Thohari, 2006). In contrast to the definition of legal politics by Padmo wahjono, the definition of legal politics formulated by Radhie seems to have two continually interrelated faces, *ius constituendum*, and *ius constitutum*.

Satjipto Rahardjo defines legal politics as the choosing activity and the way to achieve a social goal with specific laws in a society whose scope includes answers to some fundamental questions. The questions are about the goals of the existing system, the ways for achieving those goals, the time needed for the law to be changed, and the ability of well-established pattern for deciding the process of achieving the goals (Mahfud MD, 2006).

Politics is an essential means to achieve specific goals. Law that seeks to choose the goals and ways to achieve these goals (Dirdjosisworo, 2008). Politics of law is a legal discipline that specializes in efforts to portray the law in achieving the goals aspired by a particular society. Political Law, interpreted as *Beleid*, (policy), briefly means Legal policy. The policy is an act consciously and systematically, using appropriate means, with clear political goals as targets, carried out step by step. Sri Soemantri concluded that Politics of law is a state policy to express what is contained in society and to achieve what is reported (Soemantri, 2010).

National Law Politics circle around four concepts. First, the consistency of the existing legal implementation. Second, legal development. Third, the affirmation of the functions of law agencies. Lastly, the fourth is increasing community legal awareness (Syaukani & Thohari, 2006).

From the description above, the writer concludes that the politics of law is a state policy regarding the law. It also the policy of the state's ruler regarding the law. Legal politics are realized by the provisions of generally accepted laws and regulations, made by authorized institutions and enforced by the state authorities. The essence is all efforts to achieve the ideals of the state, by heeding the rules of decency, rules of modesty, and religious rules (Hartono, 1991). The content of legal politics uses the legal system approach of L. Friedman, which covers three main things. Those three are the legal structure, legal substance, and legal culture (Friedmann, 1990a).

The Impact of Foreign Investment in Indonesian Banking

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The business activities aim to increase economic development. Economic development involving the private sector, both originating from foreign investment and domestic capital, has an essential role in economic activity. Because after all economic growth is closely related to the level of investment, so to achieve high economic growth is also required the level of high investment (Melisa, Yahya, & Syahbandir, 2017) and this also affects the banking sector in Indonesia

Basically, Indonesian Banking Law is currently regulated by the Banking Law 1998, Law Number 3 Year 2004 concerning Amendments to Law Number 23 Year 1999 concerning Bank Indonesia (abbreviated as BI Law 2004), in addition to related laws such as Law Number 25 of 2007 About Investment (abbreviated as the 2007 Investment Law).

Banking is everything that concerns the bank, including institutions, business activities, and ways and processes in carrying out its business activities. Banks are business entities that collect funds from the public in the form of deposits and distribute them to the public in the form of loans or other forms in order to improve the lives of many people

There are fundamental differences between Commercial Banks and Rural Banks. The Rural Banks are prohibited because it is accepting deposits in the form of demand deposits, participating in payment traffic; conducting business activities in foreign exchange and capital participation. Capital is assets in the form of money or other forms owned by investors who have economic value. Foreign capital is capital owned by various entities, such as a foreign country, foreign citizen, foreign business entity, foreign legal entity, or Indonesian legal entity owned by an outside party.

Investment in a broad sense includes both direct investment and indirect investment (Muhammad, 2002). Direct investment is carried out by the owners of capital by establishing their own company, providing funds, and running the business; while indirect investment is carried out by capital owners by buying shares or bonds issued by a company or government unit (Sihombing, 2009).

Foreign investment, based on Chapter I Article 1 number 1 2007 is an investment activity to do business in the territory of the Republic of Indonesia which is carried out by foreign investors, both those who use wholly foreign capital and those who are associated with domestic investors. The 1998 Banking Law does not regulate (foreign) investment directly in banking. Foreign investment in the banking sector related to the establishment of a mixed bank refers to the 2007 Investment Law. Judicially, the use of foreign capital thoroughly does not pose a complicated problem because it is clear that not only capital but power and decision-making are carried out by external parties as long as everything is approved by the Indonesian government or as long as it does not violate Indonesian law and public order. Using foreign capital that is in combination with domestic investors is more difficult because of the variety of interests in the form of a joint venture which include: capital balance, power

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(management), language differences, legal systems, and bargaining position between both of them (Prabawa, 2013).

Indonesia, as a developing country, requires greater legal certainty than developed countries to ensure open and fair international trade. The aim is to attract investors to invest their capital, so the government is ready for the things needed for these investors. Thus, the task of the government is to prepare and plan carefully to guarantee legal certainty for investors by establishing effective implementation and supervision policies on investment activities. So, they can be directed towards national development priorities (Diantari, 2012). Investment activities allow society to improve economic activities and employment opportunities continuously. It also increases national income and increases the level of the community's prosperity. Associated with the legal politics of investment, Rahmi Jened said that political factors are determinant aspects of investors in making decisions to invest (Muchtar, 2018).

Foreign elements within Indonesia's banking system, according to the Law Number 14 of 1967 are the foreign bank and mixed bank. It states that a foreign bank can only establish if a bank's subsidiary already existed overseas or it is a mixed bank between foreign and Indonesia's national bank. According to Law Number 1 of 1967 about Foreign Investment, it is a business sector that is not sealed to foreign investment. The implication is that foreign investors can invest their capital directly by establishing mixed banks between foreign banks and national banks. Foreign Banks which are branches of their head-quarters from abroad are not direct investments, as the criteria in the PMA Act 1967, because the terms of foreign investment must be Indonesian legal entities.

Regarding the legal substance aspect, the legal policy of foreign investment in Indonesian banking under the Banking Act of 1967, is only permitted in mixed banks, which are joint ventures between foreign banks and national banks in the form of limited liability companies. This mixed bank is categorized as a foreign bank so foreign banks can own that majority shares. Mixed banks are a direct investment of the National Bank, which includes 1) Government-owned Bank; 2) National private banks; and 3) Cooperative-owned Bank, which its shares cannot be transferred to foreign investors. It means that external parties can directly invest in national banks. The objective of legal politics of foreign banks allowed to open a business in Indonesia is in the context of Indonesia's economic development which desperately needs channels for foreign capital, both for ordinary financing needs and for financing long-term investments.

Referring to Law No. 1 of 1967 concerning Foreign Investment's legal structure, the amendment of the Banking Act 1992 with the Banking Law 1998 did not cause changes in the type of bank as stipulated in Banking Act 1992, which consisted of Commercial Banks and Banks People's Credit. Outside parties can also take part in Indonesia by establishing Foreign Banks, Mixed Banks, and National Commercial

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Banks. From legal substance, a fundamental change is a change in ownership of commercial banks as stipulated in Article 22 of the Banking Law 1998, which was initially stated in Article 22 of the Banking Act 1992. This editorial change allows investors to become owners of commercial banks in Indonesia with opportunities for foreign nationals and foreign legal entities other than foreign banks.

Both Investment Law and Banking Law/Sharia Banking Law do not regulate the limits of foreign ownership in national banks. The limit of foreign ownership can be found in Government Regulation Number 29 of 1999 concerning the purchase of shares of commercial banks. It stated in Article 3 that "The total share ownership of the Bank by Foreign Citizens and or Foreign Legal Entities is obtained through the purchase directly or through the Stock Exchange as much as the amount is 99% (ninety-nine percent) of the number of shares of the Bank concerned." Likewise, the regulation on the implementation of the Investment Law, namely Presidential Regulation Number 77 of 2007, states that the banking sector business is an open business field with requirements, namely the maximum limit of foreign capital ownership in this banking sector, a maximum of 99%.

Politics of law on Foreign Investment in Indonesian Banking in Realizing Welfare State

One of the objectives of forming a state government is to advance public welfare. The mandate, among others, has been described in Article 33 of the 1945 Constitution of the Republic of Indonesia and is a constitutional mandate that underlies the formation of all laws and regulations in the economic field (Hadad et al., 2004).

The constitution mandates that national economic development must be based on democratic principles that can create the realization of Indonesian economic sovereignty. The linkage of economic development with populist economic actors is strengthened again by the Decree of the People's Consultative Assembly of the Republic of Indonesia Number: XVI/MPR/1998 concerning Economic Politics in the Context of Economic Democracy as a source of material law. In this regard, the investment must be part of the implementation of the national economy and be placed as an effort to increase national economic growth, create jobs, improve sustainable economic development, increase national technological capacity and capabilities, encourage the development of people's economy, and realize the welfare of the community.

For ensuring the development activities are practical and efficient, National development planning is needed; so that a National Development Plan can be drawn up and it will guarantee the achievement of state goals. For that reason, Indonesia stipulated the Article 1 paragraph (3) and Article 33 of the 1945 Constitution; also the Law Number 25 of 2004 concerning the National Development Planning System.

Banking life based on economic democracies means that the community must play an active role in banking activities. While the government, including, in this case, Bank

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Indonesia, acts to provide guidance and guidance to the growth of the banking world while creating a healthy climate for its development (Djumhana, 2008). Indonesia's economic development mandated by the constitution must be carried out with all the existed-potential in the community. Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia states that the national economy is held based on economic democracy with the principle of togetherness, environmentalism, independence, and by maintaining a balance of progress and unity of the national economy. So that national economic development must be pursued based on its strength so that development can be carried out sustainably (Sihombing, 2008).

In practice, the principle of independence cannot be fully implemented in national economic development. To support economic development that is overgrowing, it requires significant funding sources. The government must seek development funding sources and alternatives that are available, both from domestic sources and those sourced from abroad. However, in pursuing foreign funds, it needs to be careful to pay attention to the interests of the nation in the long run and not to take shortcuts. Jusuf Anwar stated that the paradigm of 'law that answers the problems' must be changed into a paradigm of 'law that can look forward' which faces various possibilities of civil or criminal cases that have never happened before (Anwar, 2003). According to Lee Kai, various studies on legal relations and economic development showed that economic development would not succeed without legal reform. Strengthening legal institution is the precondition for economic change and that the shortcuts that have been taken to rule out the law, in the long run, have ensnared us in the cobwebs (Rajagukguk, 2003).

The purpose of the formation of the State Government in the Preamble of the 1945 Constitution of the Republic of Indonesia, paragraph IV, among others, is to advance public welfare. The aim of advancing public welfare with social justice according to the Preamble of the 1945 Constitution proves that the Indonesian state was from the beginning is a welfare state (Sihombing, 2008).

According to Espring-Andersen, welfare states refer to the role of the State which is active in managing and organizing the economy which includes the responsibility of the state to ensure the availability of essential welfare services at a certain level for its citizens (Tribowo & Bahagijo, 2006). In line with these essential welfare services, Ross Cranton defines a welfare state as a country that determines minimum standards of social welfare. In many countries, the essence of the welfare state is imposed on the minimum standards guaranteed by the state, namely: income, food, health, housing, and education (Nugraha, 2004).

Law is a means to achieve idealized goals together. The ideas of the law itself institutionalized through the ideas of the democratic state and realized through the idea of state law; both are intended to improve the public welfare. The rule of law functions as a means to realize and achieve the four objectives of the Indonesian state.

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The development of the Indonesian state will not be trapped into just a 'driven-rule,' but it is a 'driven-mission' which still based on rules (Asshiddiqie, 2008).

The welfare state is closely related to Utility Theory from Jeremy Bentham. Bentham (Ikhwansyah, 2010) applied one of the principles of utilitarianism to the legal environment, namely: human beings will act to get as much happiness and reduce suffering. Bentham explained that legislators should be able to produce laws that could reflect justice for all individuals. By adhering to the principle, the legislation should be able to provide the greatest happiness for most people) (Rasjidi, 1985). With the flow of thought from the flow of utilitarianism, Indonesia's economic development carried out by the government must always be sought to provide happiness to the people. The achievement of people's happiness has become the most crucial point of view (Sihombing, 2008).

The 1945 Constitution also formulated a conception of the welfare state into the phrase "people's prosperity." The phrase integrated into two provisions: first, the state revenue and expenditure budget as a manifestation of state financial management are stipulated annually by law. Invited and implemented openly and be responsible for the greatest prosperity of the people. Second, it found in Article 33 of the 1945 Constitution that the earth, water, and natural resources contained therein are controlled by the State and are used for the greatest prosperity of the people.

According to Soeharsono Sagir, the economy of each country must run according to a specific system. The system adopted by Indonesia as the basis of development from time to time is the Democratic Economic System. In this system, sovereignty in the economy is in the hands of the people, and because of that, the modern economy is related to the idea of economic democracy which is nothing but people's sovereignty in the economic field (Asshiddiqie, 2008). The national economy is organized based on economic democracy with the principle of togetherness, the efficiency with justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and unity of the national economy. In Economic Democracy, as stated in Article 33, Paragraph (4) of the 1945 Constitution, is accommodated by the existence of the principle of togetherness, fair efficiency, and environmental insight in Indonesia's national economy.

With the principle of togetherness in Article 33, Paragraph (4), the principle of the family must be understood in a broad sense, not in an organic sense. Also, with the principle of togetherness, the principle of kinship will not be misused as reflected in the practices of corruption, collusion and nepotism (KKN) in the New Order era (Asshiddiqie, 2008).

According to Jimly Asshiddiqie, the government intentionally formulated Article 33 Paragraph (4) which contains the new principles**,** so that the provisions of the Constitution are not misused (Asshiddiqie, 2009)**.** Pancasila and the 1945 Constitution of the Republic of Indonesia require balance in all aspects of state life.

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The ideal balance also includes the balance between competition**,** cooperation**,** and the principles, which in one sense prioritize efficiency, but on the other hand, must guarantee justice. Furthermore, it is related to accommodating the principle of fair efficiency, A.M. fatwa says that existing resources must be allocated efficiently to support national economic growth and at the same time to achieve justice (Fatwa, 2009).

Conclusion

Based on the above discussion, it can be concluded that the Politics of Foreign Investment Law in Indonesian Banking is linked to the welfare state. Through that sense, the state does not take policies that momentarily ignore the vision of creating protection, prosperous, smart and fair, and not sacrifice future generations. It is urgent then, in the future, that investment activities in the banking sector refer to Article 22- Article 26 of the 1992 Banking Law concerning Banking. Before anything happens, that endangers the interests of the nation and the State.

Based on this, it is expected that the need for regulations from Bank Indonesia to leverage foreign capital in the banking sector is directed at improving the economy in the real sector, in order to anticipate the impact of foreign capital ownership in Indonesian banks in the future. Also, the need for the Government and Bank Indonesia to issue a policy to restore the national bank shares which not controlled by foreigners, by imitating the policies of advance neighboring countries.

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