

## THE WHALING CASE: AUSTRALIAN PERSPECTIVES

*Donald R. Rothwell*

*Professor of International Law, ANU College of Law, Australian National University*

### INTRODUCTION

Australia commenced proceedings in the International Court of Justice (ICJ) in May 2010 after a long running period of diplomatic activity at a bilateral and multilateral level to stop Japan's whaling programs in the Southern Ocean. First with JARPA (1987-2005), and then JARPA II (2005-2014), successive Australian governments sought to raise their concerns over Japan's whaling programs within the International Whaling Commission (IWC), with other conservation-minded States, and directly with Japan (Anton 2009). Only after having had these multiple diplomatic efforts rebuffed, did Australia finally commence ICJ proceedings in 2010. Litigation in the ICJ was commenced against a backdrop of Australia and Japan having a very strong post-war bilateral relationship, founded on trade and increasing security ties (Klein 2009: 143).

The court's judgment on 31 March 2014<sup>1</sup> was the culmination of Australia's long running campaign to bring about an end to Japanese whaling in the Southern Ocean and represented the conclusion of legal argument that had been in development since 2005. The decision was a vindication for the non-government organisation (NGO) community in Australia and internationally which had been fiercely opposed to both JARPA and JARPA II, and also for the decision of the Labor government of Prime Minister Kevin Rudd to implement its 2007 pre-election policies opposing JARPA II and to explore the commencement of international litigation against Japan if ongoing diplomatic efforts failed (Klein 2009). This essay briefly reviews the background to the *Whaling* case (see generally Rothwell 2013), considers Australia's objectives in the proceedings before the ICJ, and reflects upon the outcome for Australia.

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<sup>1</sup> *Whaling in the Antarctic* (Australia v. Japan; New Zealand Intervening) Judgment of 31 March 2014 [2014] ICJ Reports.

## BACKGROUND TO THE WHALING CASE

The development of the *Whaling* case for Australia has its foundation in the 1978 decision of the then Liberal/National Coalition government of Prime Minister Malcolm Fraser to ban all whaling in Australian waters (Pash 2008). This set in train a process in which Australia joined an international campaign alongside other conservation minded countries to halt commercial whaling. This process focussed on the IWC, and pro-conservation members seeking to adjust the Schedule of the 1946 International Convention for the Regulation of Whaling (ICRW) to reflect conservation objectives.<sup>2</sup>

The conduct of Article VIII special permit whaling following the introduction of the moratorium in 1986-1987 was the subject of a number of IWC Resolutions in 1986,<sup>3</sup> 1987<sup>4</sup> and during the 1990s in which the Commission continually expressed its concern about the issuing by Contracting Governments of special permits. Australia was often at the forefront of that debate, highly critical of Japan's conduct of JARPA (Darby 2007: 230-246). In 2001<sup>5</sup> and 2003<sup>6</sup> the IWC called upon Japan to halt the lethal take of minke whales and revise its research program to focus on non-lethal means of research. As JARPA was conducted in the Southern Ocean, issues were also raised within the IWC as to its consistency with the provisions of the IWC-endorsed Southern Ocean Sanctuary within which all commercial whaling activity is prohibited.<sup>7</sup>

When Japan announced in 2005 that it was concluding JARPA and expanding its Special Permit program with JARPA II from the 2005-2006 season the International Fund for Animal Welfare (IFAW) promoted the development of an international legal strategy that pro-conservation governments could pursue through international courts. It was a strategy that had both a global reach, but increasingly began to focus on Australia and New Zealand. Between 2006-2009 IFAW sponsored four international legal panels to consider various aspects of the development of legal argument and legal proceedings against Japan regarding the conduct of JARPA II. They were as follows:

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<sup>2</sup> The Schedule is attached to the ICRW and contains technical provisions that relate to the manner in which whaling can be conducted, individual provisions regarding certain species, and provisions for closed seasons. Importantly for the present discussion, the ICRW is subject to simple modification via a three-quarter majority of ICRW members states present at an IWC Annual Meeting.

<sup>3</sup> IWC Resolution 1986-1 'Resolution on Special Permits for Scientific Whaling'.

<sup>4</sup> IWC Resolution 1987-1 'Resolution on Scientific Research Programs'.

<sup>5</sup> IWC Resolution 2001-7 'Resolution on Southern Hemisphere Minke Whales'.

<sup>6</sup> IWC Resolution 2003-3 'Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling'.

<sup>7</sup> IWC Resolution 1996-7 'Resolution on Special Permit Catches by Japan'; IWC Resolution 1998-4 'Resolution on Whaling under Special Permit'.

- Paris Panel of May 2006 resulting in the *Report of the International Panel of Independent Legal Experts On: Special Permit (“Scientific”) Whaling under International Law* (International Fund for Animal Welfare 2006a);
- Sydney Panel of December 2006 resulting in a report titled *Japan’s Special Permit (“Scientific”) Whaling under International Law* (International Fund for Animal Welfare 2006b);
- London Panel of November 2007 resulting in a report titled *The Taking of Sei and Humpback Whales by Japan: Legal Issues Arising under the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES)* (International Fund for Animal Welfare 2007); and
- Canberra Panel of January 2009 resulting in a report titled *Japan’s ‘Scientific’ Whaling Program and the Antarctic Treaty System* (International Fund for Animal Welfare 2009).

In light of their close alignment with the Australian application before the ICJ and legal argument advanced by Australia, the work of the Paris and Sydney Panels will now be briefly assessed.

The Paris Panel comprised a group of eminent international legal experts<sup>8</sup> who were asked by IFAW to assess:

- a) what conditions a state party to the ICRW entitled to carry out scientific whaling should have regard to under Article VIII of the Convention and other international instruments,
- b) whether scientific whaling being carried out by some members of the IWC was consistent with the ICRW, and
- c) the consequences that would follow if the IWC were to adopt a resolution indicating that scientific whaling conducted by a member of the IWC was lawful.

The Panel concluded that the whaling conducted by some members of the IWC did not meet the requirements of paragraph 30 of the Schedule and therefore did not meet the exemption provided for in Article VIII of the ICRW and as such was unlawful (International Fund for Animal Welfare 2006a [2]). It was considered that there was “strong evidence” that the scientific whaling conducted by some members of the IWC was in violation of the moratorium on commercial whaling (International Fund for Animal Welfare 2006a [2]). The Panel also assessed the relevance of the 1982 United Nations Convention on the Law of the Sea (LOSC),<sup>9</sup> and identified 11 articles of that instrument where scientific whaling raised “serious questions of compliance” (International Fund for Animal Welfare

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<sup>8</sup> The members of the Paris Panel were Professor Laurence Boisson De Chazournes, Professor Pierre-Marie Dupuy, Professor Donald R. Rothwell, Professor Philippe Sands (Coordinator), Ambassador Alberto Székely (Coordinator), William H. Taft IV, and Kate Cook (Rapporteur).

<sup>9</sup> United Nations Convention on the Law of the Sea, United Nations Treaty Series 1833: 397.

2006a [2]). Likewise, similar serious questions were raised with respect to compliance with the Convention on Biological Diversity,<sup>10</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>11</sup> and 1980 Convention on the Conservation of Antarctic Marine Living Resources (International Fund for Animal Welfare 2006a [2]).<sup>12</sup> In light of those findings it was considered that the conduct of scientific whaling by some members of the ICRW, including Japan, was not consistent with the ICRW. Particular reference was made to JARPA II (International Fund for Animal Welfare 2006a [2]). Note was made of the failure by Japan to demonstrate to the IWC Scientific Committee that its special permit whaling had been authorised in exceptional circumstances. Finally, the Paris Panel concluded that a Resolution adopted by the IWC determining that such scientific whaling was lawful would not be capable of altering the legal obligations arising under the ICRW in relation to the prohibition of commercial whaling (International Fund for Animal Welfare 2006a [2]).

The Paris Panel Report was initially distributed by IFAW to pro-conservation members of the IWC, and advocacy work was undertaken on the report during the 2006 IWC meeting in St. Kitts and Nevis. The Report was subsequently made available to the public, a copy was posted on the IFAW website, and hard copies were printed for distribution. It provided a framework for the legal analysis undertaken by the later Legal Panels and laid the groundwork in identifying the key substantive legal issues that would be relied upon in seeking to contest the legality of Japan's conduct of JARPA II.

The Sydney Panel comprised a group of Australia international law experts,<sup>13</sup> and was asked by IFAW to consider the legality of Japanese whaling in Antarctica and the options available to Australia and New Zealand to pursue international legal action against the Government of Japan in relation to its Antarctic whaling activities under JARPA II. The Panel's report was concluded in December 2006, and delivered to the Australian and New Zealand Governments in January 2007. The Panel noted that the extension of JARPA II to humpback whales was especially significant to Australia given the annual migration of that species along the Australian coastline. The potential economic impact of the killing of humpback whales was also noted given the growth of whale-watching as a tourist and recreational activity.

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<sup>10</sup> Convention on Biological Diversity, United Nations Treaty Series 1760: 79.

<sup>11</sup> Convention on International Trade on Endangered Species of Wild Fauna and Flora, United Nations Treaty Series 993: 243.

<sup>12</sup> Convention on the Conservation of Antarctic Marine Living Resources, United Nations Treaty Series 1329: 47; see International Fund for Animal Welfare (12 May 2006) [2].

<sup>13</sup> The members of the Sydney Panel were Dr Natalie Klein, Associate Professor Greg Rose, Professor Donald R. Rothwell (Chair), Professor Ivan Shearer, Dr Tim Stephens (Rapporteur), and Dr Christopher Ward.

In its Report, the Panel found that Australia and New Zealand had a number of international legal options open to them to challenge the ongoing conduct by Japan of JARPA II. The legal options canvassed extended from the sponsoring of meetings of scientific, legal and policy experts to review alternative options for the resolution of the dispute within the IWC, to potential international litigation before the ICJ. The Panel also found that it was possible to raise concerns about Japan's scientific whaling program within other international forums, including the Antarctic Treaty System. The principal conclusions of the Panel included:

1. That Australia and New Zealand consider sponsoring meetings of legal, scientific and policy experts to discuss options to resolve the dispute with Japan and the future of whale conservation within the International Whaling Commission;
2. That Australia and New Zealand consider requesting Japan to agree to an ad hoc arbitration of the dispute on mutually agreeable terms;
3. That Australia and New Zealand seek to raise their concerns over the conduct of JARPA II before the Antarctic Treaty parties, including at the Commission for the Conservation of Antarctic Marine Living Resources ;
4. That Japan's actions under JARPA II may be contrary to the requirement to undertake an environmental impact assessment under the provisions of the Convention on Biological Diversity;
5. That Japan's authorisation of JARPA II may lead to breaches of CITES;
6. That Australia and New Zealand consider commencing a legal claim before the International Tribunal for the Law of the Sea (ITLOS) seeking compulsory settlement of a dispute under the LOSC;
7. That Australia and New Zealand also consider commencing a legal claim before the ICJ arguing that Japan's conduct of JARPA II was contrary to the ICRW.

In reaching these conclusions, the Sydney Panel noted that ultimately it was a matter for the Australian and New Zealand governments to weigh up which were the most suitable for pursuing action against Japan in relation to JARPA II. However, the Panel did particularly note that Japan proposed under JARPA II to begin the take of humpback whales as from the 2007/8 season and that with an apparent shift taking place within the IWC as to the merits of maintaining a moratorium on commercial whaling that Australia and New Zealand could face a diminishing period in which a successful international claim could be commenced and argued.

Australia's decision on 31 May 2010 to commence proceedings in the ICJ would appear to partly reflect the influence of IFAW in the development of litigation strategies for Australia and other like-minded countries in contesting the legality of JAPRA II before an international court or tribunal. At this point in time the precise impact of IFAW's advocacy on these matters is not possible to identify,

and will most likely only be revealed once relevant Australian government Ministers who were involved in the decision-making processes associated with the decision to commence the proceedings against Japan write their biographies, or when Australian government archives make available relevant government documents. Nevertheless, on the basis of the narrative above, the connection between the international legal options considered in the Paris and Sydney Panel reports, and the fact that three members of the Paris Panel were also members of the legal team that represented Australia in the ICJ against Japan,<sup>14</sup> it can be assumed that IFAW's work in developing and promoting the legal case against Japan not only influenced the Australian government to commence proceedings against Japan but also found its way into Australia's actual legal argument.

#### **AUSTRALIA'S OBJECTIVES BEFORE THE ICJ**

Australia's principal objective before the ICJ was to seek orders from the court that Japan's conduct of JARPAII was inconsistent with the ICRW and accordingly contrary to international law. If successful, Australia would have been of the view that any such judgment would have brought about an end to Japanese whaling in the Southern Ocean. However, Australia's objectives before the ICJ needed to be framed in terms of a request consistent with appropriate remedies available under international law and within the ambit of the jurisdiction of the court. Australia's application before the ICJ therefore sought that the court "adjudge and declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean" and additionally that Japan be ordered to:

- a) Cease implementation of JARPA II;
- b) Revoke any authorisations, permits or licences allowing the activities which are the subject of this application to be undertaken; and
- c) Provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.<sup>15</sup>

Australia's objectives were therefore relatively limited and focussed upon legal argument and relief framed around an interpretation of JARPA II, but were aimed at ensuring that if the ICJ accepted its arguments JARPA II would not be permitted to continue in its existing form or in any related form until such time as Japan's conduct was brought into conformity with international law. This was substantially then an application by Australia in which it sought to ensure that JARPA II was brought

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<sup>14</sup> Those members of the Paris Panel who were also members of the Australian legal team were Professor Laurence Boisson De Chazournes, Kate Cook, and Professor Philippe Sands.

<sup>15</sup> *Whaling in the Antarctic* [23].

to an end, thereby removing the immediate controversy that had developed between the two countries over the conduct of Japan's Southern Ocean whaling program. But the Australian application did implicitly acknowledge that Japan may seek to undertake a future Southern Ocean whaling program, and to that end orders that Australia sought to ensure that "JARPA II or any similar program" be "brought into conformity with its obligations under international law" is significant. As such, Australia understood when making its application to the ICJ that it had a limited ability to bring about a complete cessation of Japanese whaling in the Southern Ocean, but that it could seek to ensure that any future conduct by Japan was in conformity with international law.

In this respect it needs to be recalled that Australia's 2010 application not only referred to Japan's obligations under the ICRW, but also to the potential obligations of Japan under the Convention on Biological Diversity (CBD), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Ultimately, Australia did not pursue substantive argument before the ICJ based on the CBD and CITES, and chose to substantively frame its argument around Article VIII of the ICRW. However, even with the decision to focus the legal argument upon Article VIII, Australia was well aware that the ICJ was not capable of striking Article VIII out of the ICRW and the removing that provision entirely from the convention. The result was that even if Australia succeeded with its application, Article VIII would always remain as a legitimate provision within the convention. Australia was therefore aware that it would have to deal with that reality and that there was the potential that if the Australian application succeeded the court would have provided sufficient guidance for Japan to reassess the conduct of JARPA II and seek to develop an alternate whaling program framed around the court's judgment and interpretation of the ICRW and Article VIII in particular.

Finally, it can be observed that Australia did not seek to raise before the court Japan's conduct of JARPN II. In principle there was nothing to stop Australia seeking to have made such an application as the foundation of the Australian case was not that Japan was conducting whaling in waters within Australian jurisdiction, or adjacent to Australian territory, but that Australia sought to contest Japan's interpretation of the ICRW via its conduct issuing Article VIII special permits and that Australia's standing to do so before the ICJ was based upon Australia's position as a party to the ICRW. Australia could, if it had wished to do so, have expanded its application to challenge both JARPA II and JARPN II. This would have significantly expanded the scope of the Australian case, most likely have resulted in delays in the progress of the case, added additional complexities with respect to not only the legal argument but also the scientific evidence, and created challenges for the ICJ in having to deal with two related but different Article VIII special permit programs. An expansion of the case to also include JARPN II would also have raised issues within Australia as to the national interest in challenging Japan's North Pacific whaling program where Australia does not have a direct interest.

This is not the case with respect to JARPA II which has been conducted within the Australian proclaimed 200 nautical miles ‘Australian Whale Sanctuary’ offshore the Australian Antarctic Territory. While Japan does not recognize either Australia’s territorial claim to Antarctica, or the Australian Whale Sanctuary underpinned by the Environment Protection and Biodiversity Conservation Act 1999 (Stephens and Rothwell 2007, Anton 2009), both provide a legal and national interest for Australia with respect to JARPA II which is absent in the case of JARPN II.

### THE JUDGEMENT FROM AN AUSTRALIAN PERSPECTIVE

The judgment in the *Whaling* case of 31 March represented a significant victory for Australia’s legal argument before the court. Though not all of Australia’s legal arguments were adopted and endorsed by the court, the great majority were and ultimately the ICJ adopted an interpretation of Article VIII that endorsed the Australian position that Japan’s conduct of JARPAII was not consistent with international law, including a significant finding that Japan was conducting commercial whaling. In summary the critical elements of the court’s Orders from an Australian perspective are as follows:

1. That JARPA II Special Permits do not fall within the provisions of Article VIII;
2. That JARPA II does not fall within Japan’s obligations under paragraphs 10 (e) and (f) of the ICRW Schedule to not engage in commercial whaling, and use factory ships;
3. That JARPA II does not fall within Japan’s obligations to refrain from conducting commercial whaling within the IWC’s declared Southern Ocean Sanctuary.<sup>16</sup>

In addition, the court also decided that:

“Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that programme”.<sup>17</sup>

The court therefore found in favour of the Australian perspective as to how Article VIII should be interpreted, agreed with Australia that Japan’s conduct of JARPAII was not “for the purposes of” scientific research, and that in the absence of Japan being able to issue legitimate special permits to conduct JARPAII that Japan’s conduct was properly characterised as “commercial” rather than “scientific” and as such was contrary to the global moratorium on commercial whaling under the ICRW. Given that Japan’s conduct was taking place in the Southern Ocean Whale Sanctuary, the ICJ also found that Japan’s actions were in violation of the prohibition of commercial whaling activities within those waters. In making these observations the court reinforced the view that the ICRW only

<sup>16</sup> *Whaling in the Antarctic* [247].

<sup>17</sup> *Whaling in the Antarctic* [247].



contemplates three forms of whaling activities: special permit whaling under Article VIII, commercial whaling, and aboriginal subsistence whaling. As Japan's conduct was not consistent with Article VIII, and Japan did not claim to be engaging in aboriginal subsistence whaling, then by default Japan was engaging in commercial whaling which remained prohibited as a result of the moratorium.

Notwithstanding Australia enjoying great success before the court, the ICJ declined to issue all of the orders Australia had sought. In the final operative paragraph 246 of the judgment, the court noted as follows:

The Court sees no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for the purposes of scientific research within the meaning of Article VIII. That obligation already applies to all States parties. It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.

The most immediate consequence of these orders was that JARPA II was to cease immediately (Payne 2014). As the judgment was delivered a few weeks after the conclusion of the 2013-2014 JARPA II season it had no immediate implications for any Southern Ocean whaling activities that may have been ongoing at the time. The immediate effect then of the court's orders related to the conduct of JARPA II in the 2014-2015 season and Japan has already indicated that it will abide by the decision of the court and cease both current and future JARPA II conduct. In that respect, Australia's immediate objective of seeking to bring about an end to JARPA II has been a success and on the basis of statements made by Japan that form of purported Special Permit whaling will not be undertaken again in the future.

Nevertheless, there are some dimensions of the court's judgement and Japan's subsequent conduct that would concern Australia. The first is that soon after the judgment the Japanese whaling fleet commenced JARPN II for the 2014 season (Darby 2014). While the ICJ's judgement does not directly apply to JARPN II, that Japan continued with an activity based upon Article VIII Special Permits so soon after its processes relating to the issuing of such permits in the case of JARPA II were found deficient is a cause for concern. The second is that while Japan has indicated that it will not attempt to conduct any form of Southern Ocean whaling for the 2014-2015 season, it has confirmed that it will conduct some form of future Southern Ocean whaling program from the 2015-2016 season (Darby 2014, Fensom 2014). The precise dimensions of that program are presently uncertain.

In this respect, paragraph 246 of the judgment may prove to be especially significant for both Australia and Japan. While the ICJ clearly found that JARPA II was contrary to international law and Article VIII of the ICRW, the court was not prepared to go beyond the boundaries of Australia's case

and make any orders or observations on any future Article VIII “special permit” program that Japan may undertake in the Southern Ocean. Indeed, the court specifically left open the prospect of a future Japanese whaling program in the Southern Ocean, observing only that it “is to be expected that Japan will take account of the reasoning and conclusions” if it were to evaluate “the possibility of granting any future permits” under Article VIII. The court therefore specifically contemplates the prospect of Japan resuming whaling in the Southern Ocean at a future point in time, either under another iteration of JARPA such as a JARPA III, or a radically different type of “special permit” scientific research program which may or may not involve the lethal take of whales.

How Japan actually responds to this aspect of the judgment remains to be seen. It is clear that JARPA II can no longer continue. Even if it was to be significantly adjusted so as to bring it more into compliance with the ICJ’s interpretation of Article VIII, a legacy of the court’s critique of the original JARPA II would inevitably create suspicions as to the legality of the program. Japan would therefore most likely seek to devise a completely new scientific research program if it was to resume “special permit” whaling in the Southern Ocean. To that end the court’s judgment gives considerable guidance as to how such a program could be devised consistently with the ICRW and international law, even if such a program was to include the lethal take of whales. In this respect the elements that the ICJ seized upon in its review of JARPA II will be critical. These elements included:

- Decisions regarding the use of lethal methods;
- The scale of the programme’s use of lethal sampling;
- The methodology used to select sample size;
- A comparison of the target sample size and actual take;
- The time frame associated with the program;
- The programme’s scientific output; and
- The degree to which a programme coordinates its activities with related research projects.<sup>18</sup>

Japan will no doubt be studying this aspect of the judgment very carefully. If it does elect to commence a new Southern Ocean whaling program, however, its conduct will come under additional scrutiny within the IWC, which at the 2014 IWC meeting by way of Resolution 2014-5 instructed the Scientific Committee to review all new special permit programs and provide advice to the Commission which will then in turn consider that advice and make recommendations on the merits of a proposed Article VIII program.

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<sup>18</sup> *Whaling in the Antarctic* [88].

## CONCLUSION

From an Australian perspective the decision by the ICJ in the *Whaling* case was a vindication of a politically and legally risky strategy to challenge the international legal validity of JARPA II. The decision of the court has set a precedent for the interpretation of Article VIII of the ICRW which will become a reference point for all subsequent debates over the conduct of special permit whaling, especially in the Southern Ocean. Whether Australia is ‘satisfied’ with the decision will ultimately depend upon how Japan responds in the medium to long term to the decision and in particular whether Japan elects to undertake a modified whaling program in the Southern Ocean. The *Whaling* case is not the first occasion that Australia and Japan have found themselves before an international court, having in 1999 appeared alongside New Zealand in the *Southern Bluefin Tuna* cases before the International Tribunal for the Law of the Sea (Klein 2009). The bilateral relationship survived that disagreement and in light of Prime Minister Abe’s successful visit to Australia in July 2014 there is every indication that efforts to ‘silo’ the disagreement over whales has been a great success. However, how Japan responds to the ICJ’s 2014 judgment in the future will be a test with respect to Japan’s interpretation and respect for international law which may cause further challenges for Australia/Japan relations.

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