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The Transatlantic Trade and Investment Partnership provides an opportunity to address numerous barriers to trade

Recent reports indicate that the EU fruit and vegetable industry is becoming increasingly frustrated with certain non-tariff measures (hereinafter, NTMs) imposed by the US, which it reportedly claims to act as non-tariff barriers (NTBs) to trade. The Transatlantic Trade and Investment Partnership (hereinafter, TTIP), which is currently being negotiated by the EU and the US, may provide an opportunity to address such measures or barriers.

Over the last 20 years, countries have been very successful in lowering tariff rates multilaterally, through the WTO, as well as plurilaterally (*e.g.*, the Information Technology Agreement), regionally (*e.g.*, the North American Free Trade Agreement) and bilaterally through hundreds of preferential trade agreements around the world. As a result, the focus of international trade agreements has arguably shifted from tariff rate reduction to identifying NTMs and reducing NTBs. This distinction between NTMs and NTBs is important, and is helpful for understanding the current approach towards eliminating unnecessary barriers to trade. NTMs are not (necessarily) NTBs. In fact, very few are. NTMs are generally defined as measures other than tariffs, which have an effect on trade. International trade agreements include transparency obligations (*e.g.*, Article X of the WTO General Agreement on Tariffs and Trade, or GATT), which, in part, require that parties notify the potential adoption of measures that may have an effect on trade. Such a system provides the ability for trading partners to open a dialogue regarding the notified measures and discuss whether they may serve as disproportionate NTMs of unjustified NTBs to trade. Transparency mechanisms are also helpful for identifying issues that should be addressed through new international trade agreements.

One category of measures to address in new agreements are those that act as barriers to trade, but which do not necessarily violate obligations contained in current trade agreements (*e.g.*, they are necessary to pursue legitimate policy objectives or act as the least trade-restrictive alternative for pursuing a legitimate policy objective). With respect to NTMs, the United Nations Conference on Trade and Development (hereinafter, UNCTAD) publishes a Classification of Non-Tariff Measures guide, which many consider to be a useful guide regarding the types of modern NTMs that traders may encounter. The UNCTAD NTM Classification organises various types of NTMs into 16 chapters, including: (A) Sanitary and phytosanitary (hereinafter, SPS) measures; (B) Technical barriers to trade (hereinafter, TBTs); (C) Pre-shipment inspection and other formalities; (D) Contingent trade-protective measures;

(E) Non-automatic licensing, quotas, prohibitions and quantity-control measures other than for SPS or TBT reasons; (F) Price-control measures, including additional taxes and charges; (G) Finance Measures; (H) Measure affecting competition; (I) Trade-related investment measures; (J) Distribution restrictions; (K) Restrictions on post-sales services; (L) Subsidies; (M) Government procurement restrictions; (N) Intellectual property; (O) Rules of origin; and (P) Export-related measures. The types of NTMs covered under the classification are broad, and arguably most traders or governments associate the idea of NTMs to SPS measures and TBTs, both of which are regulated multilaterally through dedicated WTO agreements (*i.e.*, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and the WTO Agreement on Technical Barriers to Trade). However, many potential NTBs are also covered under the GATT, including, *inter alia*, measures classified as '*pre-shipment inspection and other formalities*'. Indeed, in *Colombia – Ports of Entry*, the parties agreed that restrictions on the port of entry for goods constituted "*rules and formalities in connection with importation*" under Article I:1 of the GATT.

In October 2015, one such instance was highlighted by the Committee of Professional Agricultural Organisations and the General Confederation of Agricultural Cooperatives (jointly, and hereinafter, referred to as COPA-COGECA) in the EU in relation to the importation of fruits and vegetables from the EU into the US. In particular, the Secretary General of COPA-COGECA, stated that *"for fruits and vegetable products, all EU products have to go through one single port, the port of Philadelphia*". However, it appears as though this statement may have been meant to refer to citrus fruits from Spain, in so far as Philadelphia is best equipped to handle large amounts of imports requiring the use of '*Cold Treatment Facilities*'. In total, there are 14 ports of entry in the US with '*Cold Treatment Facilities*', which have been approved by the US Department of Agriculture's Animal and Plant Health Inspection Service (hereinafter, APHIS). In general, at least 16 ports of entry in the US accept fruit and vegetables, where rules and regulations are enforced by the US Department of Agriculture's APHIS, the US Food and Drug Administration, and the US Customs and Border Protection. Although purely legal restrictions on the port of entry do not appear to be in place, the broader issue of NTMs that may rise to the level of NTBs still stands. For example, the US Food and Drug Administration must be given '*Prior Notice*' of food products exported to the US, imports are subject to pre-inspection in the country of export, and exporters must hold a written permit from APHIS for, *inter alia*, fruit and vegetable imports. In addition, practical challenges arise that could be better-addressed during FTA negotiations. Perhaps transport costs and logistical efficiencies dictate that only certain ports are practical for importation, or that only certain ports can handle the volume or storage requirements of certain importers. Moreover, the challenges of meeting varying regulatory requirements, such as those contained in SPS measures, in different countries adds significant costs to businesses. Such issues can be observed with respect to imports throughout the world, but have been highlighted as they pertain to the EU and the US in recent months due to the ongoing negotiation of the TTIP.

In order to effectively utilities the opportunity that the TTIP provides to lower the costs of transatlantic trade, businesses, trade associations and governments need to clearly communicate barriers to trade (as they perceive them), whether they be purely regulatory or a mix of practical problems that relate in part to legal issues. For example, according to COPA-COGECA, the current barriers to trade experienced by EU businesses amount to a *de facto* 10% duty on fruit and vegetables entering the US. Interested stakeholders should take an active role to ensure that NTMs or other hindrances to trade are identified and duly addressed within the ongoing negotiations.

The EU and the Philippines announce the launch of negotiations for a free trade agreement

Following the authorisation by the Council of the EU for the EU Commission to begin FTA negotiations with the Philippines in November 2015 (see Trade Perspectives, Issue No. 22 of 4 December 2015), EU Trade Commissioner Cecilia Malmström and Philippines Secretary of Trade and Industry Gregory Domingo officially announced the launch of bilateral FTA negotiations on 22 December 2015. With this future upgrade of the EU-Philippines relations, currently governed by the Partnership and Cooperation Agreement signed in July 2012, the EU is adding another Member State of the Association of Southeast Asian Nations (hereinafter, ASEAN) to its future FTA partners.

With the 2006 Global Europe Strategy, the EU shifted its policies from a mostly exclusive focus on multilateral trade negotiations and launched a number of bilateral and regional negotiations. ASEAN was identified, *inter alia*, as a priority region. In 2007, the EU and ASEAN initiated negotiations to conclude a '*region-to-region*' agreement, but in May 2009 the parties agreed to put the discussions on hold, due to the complexity and sensitivity of '*block-to-block*' trade negotiations and other more political irritants. Instead, the Council of the EU decided to pursue negotiations with individual ASEAN Member States (hereinafter, AMSs). Negotiations with Singapore were concluded in 2014, with Viet Nam in 2015, and negotiations with Malaysia and Thailand are ongoing, but *de facto* suspended. The entry into force of the EU-Viet Nam FTA is envisaged for early 2018, while the ratification process regarding the EU-Singapore FTA has been suspended as the EU Commission has asked the European Court of Justice to render an opinion on the EU's competence to sign and ratify the FTA due to the inclusion of the investment chapter. The strategic objective of a '*region-to-region*' agreement was maintained, insomuch as the individual agreements are to be concluded with a view to eventually use these agreements as '*stepping stones*' for an EU-ASEAN FTA (see Trade Perspectives, Issue No. 9 of 4 May 2012). More recently, the EU has been eyeing the reopening of the '*region-to-region*' negotiations.

The EU makes substantial efforts in the preparation and conduct of trade negotiations. Most notably, the EU Commission systematically performs sustainability impact assessments on any such deal on the EU and on the other country. In 2009, the EU completed its Final Report on the Trade Sustainability Impact Assessment of the Free Trade Agreement between the EU and ASEAN (hereinafter, EU-ASEAN SIA). Since its decision to negotiate with individual AMS, the EU Commission has added country-specific annexes to the position paper. In addition to the impact assessment, the EU has more recently stepped up its efforts in terms of transparency and engaging civil society in the negotiations. In the course of the negotiations, the EU Commission typically releases '*non-papers*', position papers and negotiating texts, to be circulated informally among delegations, for discussion purposes, and/or to be made publicly available. This approach also includes public consultations on certain issues and proposals, as well as regular meetings for civil society organisations. While the negotiations with the Philippines are unlikely to gain as much attention as, for instance, the TTIP negotiations, regular meetings and hearings on the progress of the negotiations can nonetheless be expected and present good opportunities for relevant stakeholders. The EU will follow the negotiating mandate obtained in 2007 for the '*region-to-region*' agreement and negotiations will be led by the EU Commission on behalf of the EU. The EU and the Philippines have expressed their ambition to conclude an agreement that covers a wide range of issues, including the elimination of customs duties and other barriers to trade, services and investment, access to public procurement markets, as well as additional disciplines in the area of competition and protection of intellectual property rights. According to the EU, the agreement will also include a comprehensive chapter aiming at ensuring that closer economic relations between the EU and the Philippines go hand in hand with environmental protection and social development.

The EU-ASEAN SIA stresses that the Philippines stands to gain in a diverse number of sectors, including motor vehicles and parts, textiles, clothing and footwear. However, it also noted that an FTA with the EU would result in an economic decline in the Filipino sectors of

cereals and grains (*e.g.*, rice), as well as in the gas sector. As of current statistics, EU exports to the Philippines are dominated by transport equipment (32%), machinery (15%) and food products (13%), while the Philippines exports mostly office and telecommunication equipment (45%), machinery (15%) and food products (12.5%) to the EU. An issue with increasing importance has been the question of preference erosion (*i.e.*, losing preferential access to other markets). Since 25 December 2014, the Philippines benefits from the trade preferences granted by the EU under the Generalised Scheme of Preferences (GSP)-plus, a scheme that activates the full removal of tariffs for a large number of product categories, namely 6,274 products. According to the Philippine Department of Trade and Industry, an important factor for engaging in FTA talks with the EU was to be able to allow greater access for exports to the bloc even after it graduates as a beneficiary of GSP-plus. While GSP-plus status was granted for ten years, the Philippines may graduate from that scheme during the coming years at a time when FTA negotiations might not yet have been concluded. Accordingly, the Philippines is interested in swift negotiations and also needs to ensure that the future FTA will not fall behind their current preferences and potentially includes products excluded from GSP-plus.

Three areas of interest can be identified. Firstly, one of the more complicated and controversial issues may be the issue of fisheries and of illegal, unreported and unregulated (hereinafter, IUU) fishing. In 2014, the EU issued a warning to the Philippines regarding a possible violation of the European standard on traceability of imported fish products. The Philippines was asked "*to fulfil its commitment in deterring and preventing IUU fishing to avoid the possibility of being identified as a non-cooperating country in the international fight against [IUU fishing]*". The warning was revoked by the EU after the Government of the Philippines enacted a new fisheries law that is supposed to ensure compliance with international agreements on fishing, as well as instituting measures to help prevent illegal fishing and protect marine resources. Secondly, the issue of illegal logging, timber trade and deforestation may develop into another topic of interest. In recent years, there has been an increase in activities from mining and agribusiness exploiting the Philippines' natural resources. The EU-ASEAN SIA already takes account of this issue and recommends that the respective issues be addressed in an integrated way, through enhanced application of voluntary certification schemes and negotiation of FLEGT Voluntary Partnership Agreements. A third sensitive issue, which is already mentioned in the EU-ASEAN SIA, will be the regulation of the rice sector. This may especially hold true as a special treatment in rice, allowing the retention of its import monopoly and quantitative restrictions that the WTO granted to the Philippines in 1995, will expire by 2017. The expiration of this special treatment will likely cause intensified competition from imports and lower domestic prices and thus decrease farmers' income.

Though it is difficult to make projections on the expected duration of the FTA negotiations, they can be expected to last 3-4 years, similarly to what happened in the EU negotiations with Singapore and Viet Nam. During this time, respective stakeholders should have their say. But as a strong routine can be expected on the EU negotiation side, the Philippines and local stakeholders should similarly undertake careful economic and legal impact assessment studies, identify sensitive issues and address specific problems that restrict market access to the EU. So far, no position papers have been published by the EU as regards the updated impact assessment or any other issue. Stakeholders in both regions, including industry representatives and businesses, need to ensure that their interests are adequately considered during the negotiation process. The first round of negotiations is scheduled to take place in the first half of 2016 in the Philippines and negotiations can then be expected to take place alternatively in Brussels and the Philippines on a regular basis.

Food intended for sportspeople: the regulatory framework after 20 July 2016

On 20 July 2016, a new legal framework comes into effect for the so-called '*food for specific groups*', established by *Regulation (EU) No. 609/2013 on food intended for infants and young*

children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No. 41/2009 and (EC) No. 953/2009 (hereinafter, FSG Regulation). Food intended for sportspeople placed on the market under *Directive 2009/39/EC on foodstuffs intended for particular nutritional uses* (hereinafter, the PARNUTS Regulation) will be affected by the repeal of this legislation as such food has not been included in the FSG's scope.

The FSG Regulation does not define '*food intended for sportspeople*'. Similarly, the PARNUTS Directive did not define '*food intended to meet the expenditure of intense muscular effort*'. The concept of such food (hereinafter, referred to as '*food intended for sportspeople*'), interpreted in the broadest manner, covers food specifically produced for and marketed to people doing any kind of sport-related activity (from professional sportsmen to amateur sportsmen and people undertaking occasional exercise). The concept also covers certain foods that, even if not specifically produced and marketed as such, would satisfy the specific nutritional or physiological requirements of people in the context of sport-related activity and are, therefore, consumed by them. Some sectors of the respective industry define such food as '*products specifically designed, formulated and marketed in relation to physical activity, physical performance and/or post-exercise recovery*'. However, other parts of the respective industry do not see the need for such a definition and rather consider such products as normal food. This category may include food, drinks and food supplements. The FSG Regulation repeals, in particular, the PARNUTS Directive (also known as '*Dietetic foods Directive*'), including the specific directives adopted under this framework (however, no specific directive has been established for food intended for sportspeople) and replaces it with a new framework covering only food for certain vulnerable groups of consumers, for which specific composition and information rules are deemed justified (*i.e.*, food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control). After the entry into effect of the FSG Regulation and repeal of the PARNUTS Directive on 20 July 2016, food intended for sportspeople may thus no longer be classified as dietetic food, but as food for normal consumption governed by relevant horizontal rules regarding EU food law.

In the past, with regard to food intended for sportspeople, no successful conclusion could be reached with respect to the development of specific provisions under the PARNUTS Directive, due to widely diverging views among EU Member States and stakeholders concerning the scope of the specific legislation, the number of subcategories of food to be included, the criteria for establishing compositional requirements, and the potential impact on innovation in product development (see in this context, Trade Perspectives, Issue No. 8 of 17 April 2014). Meanwhile, on the basis of requests submitted by food business operators, related claims for such food have been considered for authorisation in accordance with *Regulation (EC) No. 1924/2006 on nutrition and health claims* (hereinafter, NHCR). Different views exist, however, as to whether additional rules are needed to ensure adequate protection of consumers of food intended for sportspeople. In this regard, Article 13 of the FSG Regulation required the EU Commission to present a report to the European Parliament and to the Council, by 20 July 2015, after consulting the European Food Safety Authority (hereinafter, EFSA), on the necessity, if any, of provisions for food intended for sportspeople. To date, this report has not yet been published.

EFSA provided scientific assistance regarding food intended for sportspeople on 29 September 2015. EFSA compiled existing scientific advice in the area of nutrition and health claims and dietary reference values for adults, that are relevant to sportspeople, and informed the EU Commission that the recommendations of the report of the Scientific Committee on Food (SCF) adopted in 2001 on composition and specification of food intended for sportspeople, and the subsequent scientific advice provided by EFSA, is still fully valid.

A question is why the repeal of the PARNUTS Directive has such an impact on the marketing of food intended for sportspeople. The PARNUTS Directive established general rules for dietetic food to ensure product safety, suitability and appropriate consumer information. In its Article 1(2), it defines foodstuffs for particular nutritional uses as "*foodstuffs which, owing to their special composition or manufacturing process, are clearly distinguishable from foodstuffs for normal consumption, which are suitable for their claimed nutritional purposes and which are marketed in such a way as to indicate such suitability*". Article 1(3)(b) of the PARNUTS Directive states that "*a particular nutritional use shall fulfil the particular nutritional requirements of certain categories of persons who are in a special physiological condition and who are therefore able to obtain special benefit from controlled consumption of certain substances in foodstuffs*". Information on the particular nutritional characteristics of food intended for sportspeople and its beneficial health effect can be provided either under Article 9 of the PARNUTS Directive, as mandatory requirement if the food intended for sportspeople is classified as food intended for particular nutritional use, or as authorised claim under the NHCR if such food is classified as food for normal consumption and governed by horizontal rules of food law. The PARNUTS Directive requires, in addition to the indication of the particular nutritional characteristics, that foods covered by its scope be intended for the particular nutritional uses and be clearly distinguishable from foodstuffs for normal consumption. In the absence of specific provision after 20 July 2016, denomination and instructions for use on sports food will be governed only by the NHCR and *Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, the FIR). Article 17 thereof lays down provisions on the name of the food and Article 9(1)(j) on the instructions of use, which shall be indicated in such a way as to enable appropriate use to be made of the food. The possibility to make so-called '*suitability statements*' on food intended for sportspeople, which currently does give manufacturers some margin to make statements that are something like claims, is likely to disappear without the PARNUTS Directive.

According to the EU Commission, with respect to the marketing techniques for foods intended for sportspeople, information on the label was identified by operators as one of the most significant marketing techniques. Information on the label can relate to the: 1) sale denomination: clear description of the function of the products (*e.g.*, energy bars); 2) brand and packaging (*e.g.*, the use of photos of sportspeople); 3) clear instructions for use (*e.g.*, during or after physical activity); 4) composition and ingredients; 5) use of information such as '*high energy*', '*source of glucose*' used as mandatory indication required by the PARNUTS Directive; and 6) use of health claims authorised under the NHCR.

It appears that the delay of the EU Commission's report and the repeal of the PARNUTS Directive on 20 July 2016 does not allow sufficient time to adopt new legislative measures for food intended for sportspeople. There is, therefore, a risk that the current mandatory requirements for such food will be repealed before any new provisions have been adopted. This would put certain products at risk of incompliance with, *inter alia*, the FIR and the NHCR. On 20 July 2016, the PARNUTS Directive will be repealed and the concept of '*dietetic food*' will disappear, and food intended for sportspeople will no longer be considered '*dietetic*'. If no specific legislation is introduced, these will have to comply with the existing relevant rules of EU food law, and in particular with the FIR, the NHCR, *Directive 2002/46/EC on the approximation of the laws of the Member States relating to food supplements*, and *Regulation (EC) No. 1925/2006 of the European Parliament and of the Council on the addition of vitamins and minerals and of certain other substances to foods*. Reportedly, sports nutrition products such as electrolyte drinks, creatine supplements and whey powders will, as of 20 July 2016, fall under general EU food law. Article 20(3) of the FSG Regulation establishes that products on the market, or labelled before 20 July 2016, can be sold through until stocks are exhausted.

While it appears that the majority of EU Member States believe that the existing horizontal rules are suitable for regulating food for sportspeople, other EU Member States have recognised the need for specific rules for food intended for sportspeople. In fact, there are currently national rules or guidelines in place in some countries, including France. In the absence of any specific rules at the EU level, EU Member States may have their own rules on foods intended for sportspeople. In Case C-107/973 *Rombi and Arkopharma*, the Court of Justice of the EU (CJEU) dismissed that certain rules in force in France on food for sportspeople were contrary to EU legislation. THE CJEU concluded this on the fact that no specific EU legislation had been established with respect to such food.

Food business operators appear to be divided on the question of whether specific legislation is necessary for food intended for sportspeople or whether such food should be governed by existing horizontal EU food law. The industry group SNE, whose members are the national associations of EU Member States representing medical, sports, infant and other specialist food firms, is in favour of specific legislation and believes that, under horizontal rules of food law, the quality of the products and the communication on food intended for sportspeople cannot be guaranteed, in particular as far as the NHCR is concerned. Other industry groups (*i.e.*, UNESDA, the Union of European Soft Drinks Associations and ESSNA, the European Specialist Sports Nutrition Alliance) appear to consider that the applicable horizontal rules are sufficient to govern the different aspects (*e.g.*, food safety, composition, and information) related to food intended for sportspeople. However, these industry groups acknowledge that some specific aspects, in particular regarding the NHCR for food intended for sportspeople, are not adequately addressed under the horizontal rules of food law, which should therefore be adapted.

Amending EU food labelling legislation may be desirable to better inform sportspeople about the sportspeople food's particular nutritional characteristics and instructions of use that are not covered under the FIR. The NHCR addresses nutrition and health effects in the general populations and may need to account for the specific needs of sportspeople. Some of the communications currently made on food for sportspeople may be difficult to make under the FIR and the NHCR, which essentially do not allow for the information that consumers may need or expect on food for sportspeople.

According to the EU Commission, the EU-wide market for sports nutrition and drinks was worth EUR 3.07 billion (retail value) in 2014 and approximately 30,000 sports food products were identified. The highest number of sport food products can be found in the category of protein-based sports food. However, from the market value point of view, sports drinks can be considered as the most important category, followed by (protein-based) muscle strengthening, bodybuilding and post-exercise recovery products. Reportedly, consumer demand is growing and the market for sports nutrition products, which previously supplied mainly athletes and body builders, increasingly attracts a young non-athlete consumer group. To meet the requirement of an expanded consumer base, manufacturers need to invest in new product development. Arguably, foods intended for sportspeople are, therefore, not specialist products or the preserve of a small group, but ones widely used by the public.

The existing market for food intended for sportspeople is already highly fragmented as EU Member States adopted distinctive approaches, which obstructs trade in the EU's internal market and innovation. Currently, diverging national rules often make it difficult to commercialise a single sport food product across the whole of the EU. A possible temporary solution may be to call upon the EU Commission to delay the repeal of the current PARNUTS Directive (where it relates to food intended for sportspeople), so as to allow enough time for the EU Commission to finalise its report on sports foods, and consider appropriate legal avenues, either adopting a separate legal framework for food for sportspeople or adjusting the existing horizontal EU food law. The next steps taken in the EU on food intended for sportspeople (in particular the report and eventual legislative proposals put forward by the EU

Commission) should be monitored and stakeholders should be prepared to participate in shaping potentially upcoming EU legislation by interacting with relevant EU Institutions, trade associations and affected stakeholders, seeking (where necessary) expert legal advice.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2016/32 of 14 January 2016 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) 2015/82 on imports of citric acid originating in the People's Republic of China to imports of citric acid consigned from Malaysia, whether declared as originating in Malaysia or not*

- *Commission Implementing Regulation (EU) 2016/12 of 6 January 2016 terminating the partial interim review of the anti-dumping and countervailing measures applicable to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2016/24 of 8 January 2016 imposing special conditions governing the import of groundnuts from Brazil, Capsicum annuum and nutmeg from India and nutmeg from Indonesia and amending Regulations (EC) No 669/2009 and (EU) No. 884/2014*

- *Commission Implementing Regulation (EU) 2016/6 of 5 January 2016 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station and repealing Implementing Regulation (EU) No. 322/2014*

Other

- *Commission Implementing Regulation (EU) 2016/9 of 5 January 2016 on joint submission of data and data-sharing in accordance with Regulation (EC) No. 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)*

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