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THE ROLE OF MEDIATION AND CONCILIATION IN THE INTERNATIONAL INVESTOR STATE DISPUTE SETTLEMENT

РОЛЬ МЕДІАЦІЇ ТА ПРИМИРЕННЯ У МІЖНАРОДНОМУ ВИРІШЕННІ СПОРІВ МІЖ ІНВЕСТОРАМИ І ДЕРЖАВАМИ

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Abstract: *The rising role of the alternative dispute resolution, including mediation and conciliation, in commercial arbitrations had long been considered less prominent in the field of investor state dispute settlement. However, this attitude is gradually changing as all stakeholders show more interest towards alternative dispute resolution to overcome systematic challenges of the ISDS, including excessive costs and duration of investment arbitration. This article argues that this change is evidenced, inter alia, by adoption of the ICSID Mediation Rules in 2022. This article further tests the hypothesis of alternative dispute resolution's cost and time efficiency by analyzing available data on ICSID conciliation proceedings. It then reviews to which extent mediation and conciliation are envisaged in modern investment practice of Ukraine through a comprehensive review of all 65 bilateral investment treaties in force for Ukraine. Finally, it compares Ukrainian treaty practice against Ukraine's track-record of disputes with foreign investors to assess the practical role of alternative dispute resolution and establish potential obstacles to its wider use.*

Keywords: *ISDS, mediation, conciliation, investment arbitration, alternative dispute resolution, Singapore Convention, ICSID, ICSID Convention, ICSID Mediation Rules, ICSID Conciliation Rules, settlement agreement.*

Анотація: *Зростаюча роль альтернативного вирішення спорів, зокрема медіації та примирення, у комерційному арбітражі тривалий час вважалася менш помітною у сфері врегулювання інвестиційних спорів між державами та інвесторами. Однак ця позиція*

поступово змінюється, оскільки всі зацікавлені сторони виявляють дедалі більший інтерес до альтернативного вирішення спорів з метою подолання системних викликів ISDS, включаючи надмірні витрати та тривалість інвестиційного арбітражу. У цій статті стверджується, що така зміна, зокрема, підтверджується прийняттям Правил медіації ICSID у 2022 році. Далі в статті перевіряється гіпотеза щодо ефективності альтернативного вирішення спорів з погляду витрат і часу шляхом аналізу наявних даних про процедури примирення ICSID. Також розглядається роль медіації та примирення у міжнародних угодах про захист інвестицій, шляхом всебічного аналізу всіх 65 чинних двосторонніх інвестиційних договорів України. Нарешті, українська договірна практика порівнюється з практикою вирішення спорів України з іноземними інвесторами для оцінки практичної ролі альтернативного вирішення спорів і визначення потенційних перешкод для його ширшого застосування.

Ключові слова: *ISDS, медіація, примирення, інвестиційний арбітраж, альтернативне вирішення спорів, Сінгапурська Конвенція, Вашингтонська Конвенція, Правила Медіації ICSID, правила Примирення ICSID, угода про мирне врегулювання.*

Introduction. Mediation, along with negotiations, conciliation and good services, is often contrasted with formal 'judicial' or 'arbitral' means of settling a dispute. These means of dispute settlement are often grouped together as Alternative or Non-Adjudicative Dispute Resolution (ADR) procedures. Unlike the former, ADR does not seek to resolve a dispute through binding judgement or award, but rather to bridge the gap between parties through facilitating a settlement agreement between them.

Mediation and conciliation have long been recognised among established means for peaceful settlement of international disputes in public international law, appearing in international treaties from the second half of 19th century (*Vicuña, F., Mediation, 2010*). Throughout 20th century, mediation and conciliation played an increasingly prominent role in the field of commercial and civil disputes before national courts. This trend spilled into arbitration of international commercial disputes. At the same time, ADR is often perceived as less common in investor state dispute settlement (ISDS). Yet, the developments of the past decade attest to a growing awareness and acceptance of ADR by arbitral institutions, governments and scholars in the field of the ISDS.

The purpose of this article is to analyse the recent change of perception towards mediation and conciliation in the ISDS with reference to available procedural options and ISDS reform discussed within UNCITRAL Working Group III. The article further focuses specifically on mediation and conciliation within the framework of ICSID. It then seeks to establish whether there is a reliable dataset to assess effectiveness of ADR as compared to investment arbitration, focusing primarily on ICSID Conciliation. Finally, it seeks to establish the role of ADR in Ukraine's international investment treaty and international investment dispute resolution practice and analyse whether there is a room for its more active use.

Literature review. Mediation and conciliation of disputes between investors and states has not been specifically addressed in the Ukrainian scientific literature. On international level, there have been several studies reviewing alternative dispute resolution as part of investor state dispute settlement, most notably by Titi, C., Fach Goméz K., Dumanova, M., Neuburger, P., and Ubilava, A., which have been considered for this article. The issue of alternative dispute resolution, including mediation, has also figured in the work of UNCITRAL Working Group III, a leading international task force for potential ISDS reform. The authors have not encountered other studies addressing ADR under Ukrainian bilateral investment treaties specifically.

Main results of the research. In the realm of international commercial arbitration, mediation has for some time been recognized among the most popular and successful ADR methods. A recent report by a Task Force of the International Chamber of Commerce acknowledged a significant shift in the conceptual view on ADR's and, particularly, mediation's role in dispute settlement, stating that "the debate has now moved from whether arbitrators (and arbitral institutions) should take steps

to facilitate settlement, to how that should be done" (*ICC Report (2023), p. 4*). This transition is evident in the arbitration rules of major international arbitral institutions, with more and more of them mentioning some form of mediation, adopting separate mediation rules or even directly mandating parties to seek to settle their dispute through mediation while the arbitration is ongoing (*ICDR AAA Rules 2021, Article 6*). According to the recent study conducted by a task force of scholars, this shift largely coincides with the shift of expectations from commercial arbitration, where parties expect arbitrators to be more active in facilitating settlement (*Sussman E. (2021), Arbitrator Techniques*).

Another indication of the rising importance of dispute settlement is the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), which was adopted in 2018 and entered into force in 2020. The Convention was developed under the auspices of the UNCITRAL II Working Group. It seeks to promote mediation by creating an obligation for state parties to enforce settlement agreements resulting from mediation. The structure of the Singapore Convention echoes somewhat the structure and essence of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Like the New York Convention, the Singapore Convention seeks to promote internationally the binding nature of the outcome of the relevant procedure, namely an arbitral award in case of arbitration and settlement agreement in case of mediation (*Redfern, 2022*).

An interesting aspect of the Convention is that it defines mediation as "a process, irrespective of the expression used". This phrase hints to the initial name of the Singapore Convention, which used the term 'conciliation' instead of 'mediation'. For instance, UNCITRAL II Working Group initially used the term 'international commercial conciliation' in its working documents (*UNCITRAL WG II Note, 2015*). Thus, the terms conciliation and mediation may be viewed as interchangeable, which is further supported by modern academic writings (*Titi, 2019*). At the same time, as this article explains below, there is a significant difference between the terms in the context of ICSID dispute settlement infrastructure.

But can this increased interest to mediation in the context of commercial arbitration can also be registered in the field of the ISDS?

Returning to the Singapore Convention, it is quite telling that there are differing views about the Convention's applicability to mediation of investment disputes. The core of this controversy lies in the use of the term 'commercial' by the Convention, which, according to some commentators, may not cover the whole range of matters that come into play in investor state disputes. For instance, where regulatory measures of a state are challenged as discriminatory (*Kapoor, 2019*). This debate perfectly illustrates a somewhat less registrable familiarity of investment dispute settlement with mediation as opposed to commercial arbitration between business entities.

To better understand whether there is a visible trend for more interest to ADR in the ISDS, the authors have reviewed recent rules and recommendations on ADR adopted by various bodies. Thus, since as early as 2012 various arbitral institutions and professional groups, including the ICSID, UNCITRAL and International Bar Association, have published at least five different guides and sets of rules for mediation of disputes between investors and foreign states (*Dumanova, 2022*).

Further, UNCITRAL Working Group III, a leading scientific and policy task force for reforming the global ISDS regime, in 2020 noted a growing interest of the states to explore ADR, including mediation and conciliation, as an addition or substitute to arbitration and national courts in resolving investment disputes (*UNCITRAL WG III, Note on ADR, 2020*). Among the perceived benefits of mediation, the note included its cost and time effectiveness compared to arbitration. It further noted that mediation may be better suited for preserving ongoing relations between states and investors while disputes are decided through mediation. These benefits conform with those argued in the scientific literature, which further emphasizes mediation's higher flexibility, allowing parties to retain more control over the process and, accordingly, its costs and duration (*Ubilova, pp. 99-101*).

At the same time, the same UNCITRAL policy paper noted that publicly available data showed only anecdotal evidence of the use of mediation or conciliation in the ISDS, with most data

points coming from the conciliation cases administered by the International Centre for Settlement of Investment Disputes (ICSID). This is not surprising, given confidential nature of mediation. Since the ICSID maintains one of the most comprehensive datasets on ISDS, the article will primarily focus on the review of ADR's role within ICSID's framework.

The ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of the Other States (the ICSID Convention). One of the most important multilateral instruments in the field of ISDS, the ICSID Convention is predominantly known for creating the ICSID, establishing its jurisdiction, setting out the framework of arbitral proceedings and establishing a specific regime for enforcement of ICSID arbitral awards. A less well-known feature of the ICSID Convention is that it also provides, in its Chapter III, for a conciliation procedure.

Conciliation under Chapter III of the ICSID Convention is performed by an *ad hoc* Conciliation Commission, which is constituted in a way very similar to an arbitral tribunal, namely with one member or uneven number of members and each party having a right to appoint its conciliator (Article 29). The Conciliation Commission is expected to take a quite active role in the procedure, by *inter alia* deciding the issue of its own competence (Article 32) and performing its duty to clarify the issues in dispute between the parties (Article 34). At the end of the conciliation procedure the Commission draws up a report either recording that the parties have reached an agreement or have failed to do so (Article 34). These functions are not necessarily intrinsic to mediation procedure and are distinctive to the ICSID conciliation (*Nitschke, 2021*).

Despite being in place since 1969, the ICSID conciliation procedure has not obtained the same level of popularity as ICSID arbitration. According to the ICSID case statistics, there have been only 15 conciliation proceedings registered with the ICSID as opposed to 1,058 arbitration proceedings (data as of 1 May 2025).

In part because of this, and as further indication of a growing appetite for ADR in the ISDS, in 2022 the ICSID adopted a set of brand-new Mediation Rules, which exist in parallel with the Conciliation Rules and provide for a more flexible and informal procedure. The Mediation Rules do not require the mediators to clarify the issues in dispute or recommend terms of settlement. They further allow parties to withdraw from mediation at any time. In addition, the Mediation Rules present much less stringent applicability requirements both in terms of parties – they are open to parties regardless of an ICSID member state being party to a dispute, – and the nature of the dispute submitted (*Titi, 2025*).

Importantly, it is not mandatory for mediation to be mentioned in the relevant bilateral investment treaty or a contract between the state and investor – the investor and the state would be free to agree on mediation under the ICSID Mediation Rules on an *ad hoc* basis. On balance, an analysis of the ICSID Mediation Rules, as well as other comparable rules for mediation of investment dispute, e.g. UNCITRAL Guidelines on Mediation of International Investment Disputes, confirm that they provide for a very flexible, informal procedure, that, unlike arbitration, depends primarily on the will of the parties to find a compromise and encourage them to do so (*UNCITRAL Mediation Guidelines, 2024*).

Thus, with the ICSID Mediation Rules the ICSID created a separate ADR procedure, which is not directly envisaged under the ICSID Convention. It can be included by the states into their international treaties on protections of investments or agreed by the parties to the dispute, namely a foreign investor and a host state, on an *ad hoc* basis.

Returning to the ICSID Conciliation, this article further reviews data on ICSID Conciliation cases as one of the best available datasets on use of ADR in the ISDS. To better understand the abovementioned discrepancy in numbers between ICSID arbitration (1,000+) and conciliation (15), this article reviews publicly available case details for 10 conciliation proceedings that ended with the issuance of a Conciliation Commission's report under Article 34 of the ICSID Convention (Table 1).

Table 1

No.	ICSID Case No.	Respondent party	Instrument invoked	Duration, days
1.	No. CONC/23/1	Guatemala	Bilateral investment treaty	364
2.	No. CONC/20/1	Papua New Guinea	Contract	261
3.	No. CONC/19/1	Cameroon	Contract	781
4.	No. CONC/18/1	Gabonese Republic	Contract	173
5.	No. CONC(AF)/12/2	CMS Energy Corporation	Contract	1,047
6.	No. CONC/11/1	Cameroon	Contract	631
7.	No. CONC/07/1	Central African Republic	Contract	366
8.	No. CONC/05/1	Republic of Togo	Contract	321
9.	No. CONC/94/1	Madagascar	Contract	767
10.	No. CONC/83/1	Trinidad and Tobago	Contract	824

An important caveat before reviewing this data is that one should keep in mind the differences between the ICSID Conciliation and Mediation explained above. Unfortunately, there is no publicly available data on the number, duration or other procedural details of ICSID Mediation proceedings, although it is clear from publicly available information – e.g. press releases of law firms and state authorities, – as well as from scholars in the field, that there has been some number of investor-state mediation proceedings (*Titi, 2025, p. 167*). With respect to the ICSID Mediation Rules, given that these were adopted only in 2022, even if the statistics were published by the ICSID, they might have been inconclusive due to short term of Rules' operation.

With this said, the authors can note the following points with respect to the statistics above.

First, in all cases but one the states acted as respondents and only in one the state acted as a claimant. Further, in all cases the respondent states were developing countries from Africa or Latin America. Both points are generally in line with the popular criticism of the ISDS as predominantly targeting developing states as respondents (*Beaumont, Future of ISDS, 2024*) (*UNCITRAL WG III, 2018*). This is in general not surprising to the authors, since it could be expected that investors predominantly come from developed, capital-exporting states.

The second point is quite a significant length of the proceedings. As the table above indicates, most cases lasted for more than a year, with an average duration of approximately 1.5 years (554 days), while at least three cases lasted for more than two years. This duration may be viewed as going against a common perception mentioned above that the ADR provides a "fast-track" dispute resolution. Still, the duration is considerably shorter than the average duration of investment arbitration, which according to a recent comprehensive study counts at above four years (*Hodgson, Empirical Study, 2021*). Furthermore, one must keep in mind that ICSID Conciliation proceedings are more rigid and formal than mediation, which may also contribute to somewhat longer duration.

The third point, or rather an observation, is that the reviewed ICSID Conciliation proceedings quite often involved prominent arbitrators acting as conciliators, thus further blurring the line between arbitration and conciliation. A notable example is Case No. CONC/23/1 *APM Terminals Management Barcelona, S.L.U. v. Republic of Guatemala* where Yves Derains acted as the head of the Conciliation Commission (*ICSID Case No. CONC/23/1*). This could have been expected, given that states often nominate the same individuals as arbitrators and conciliators to the respective lists of arbitrators and conciliators maintained by the ICSID. Furthermore, in most cases the parties

engaged major international law firms to represent them, implying that the conciliation proceedings might have resulted in significant legal costs.

Another important consideration from the data reviewed is the link between ADR procedures and the provisions of international treaties on protection of investment. ICSID conciliation data demonstrates that all but one of the cases reviewed arose out of an investment contract, and not under a bilateral investment treaty (BIT). This corresponds to an established doctrinal view that most 'old-generation' BITs did not provide for mediation or conciliation at all. Rather, the alternative dispute resolution options in them were limited to obligatory pre-arbitration negotiations during cooling-off period (*Ubilava, 2023, p. 5*). This leads to the next topic the authors seek to explore in this article, namely the place of the ADR procedures in the treaty and ISDS practice of Ukraine.

For the purposes of this article the authors conducted a survey of 65 BITs currently in force for Ukraine to establish to which extent ADR – be it mediation or conciliation – figures in the treaty practice of Ukraine. The findings are as follows.

First, none of the BITs reviewed directly exclude the possibility of or prohibit an investor and state from agreeing to submit their dispute to an amicable settlement procedure, including through mediation or conciliation.

Second, all Ukrainian BITs provide for a cooling-off period, most frequently of three or six months. Most BITs require investors and states to conduct 'negotiations' or 'consultations' during this period. At the same time, several BITs provide, instead, for 'amicable settlement' during this period, including BITs with Spain (1998), Panama (2003), United Arab Emirates (2003), Albania (2002), Saudi Arabia (2008), Oman (2002), Kuwait (2002) and Quatar (2018). The term 'amicable settlement' is broader than 'negotiations' and 'consultations' and can be constructed to include ADR procedures involving neutrals, such as mediation and conciliation. The BIT with Belgium and Luxembourg (1996) goes even further and provides that during the cooling-off period the investor and the state "shall endeavour to settle the dispute through negotiations, if necessary, by seeking expert advice from a third party". Quite curiously, the BIT with Egypt (1992) also provides for amicable settlement of investment disputes, but not between investor and the state, but between state parties to the BIT.

Third, several BITs directly provide for conciliation as one of the dispute settlement options. This category of BITs either refers to the ICSID Conciliation – BITs with Indonesia (1996), Jordan (2005) and Singapore (2006), – or to conciliation in general without reference to ICSID Conciliation – BITs with Israel (2010) and Belgium and Luxembourg (1996). Finally, only one BIT requires conciliation as a mandatory pre-condition to arbitration, namely the BIT with Brunei Darussalam (2004).

Fourth and finally, several BITs directly provide that an investor and the state may choose to start an amicable settlement procedure – which can be interpreted to include mediation or conciliation, – at any point in time, including after the dispute is submitted to arbitration. This category includes BITs with the Netherlands (1994), Denmark (1992), Uzbekistan (1993) and Vietnam (1994).

Several conclusions can be drawn from this analysis. Although no BIT contains a direct reference to mediation, neither does any BIT directly prohibit it or make it incompatible with the general dispute settlement regime under it. Parties still could agree on mediation in line with their general autonomy. Further, a limited number of BITs envisage amicable settlement, including potentially mediation and conciliation, during the cooling off period or at any time during the dispute. The latter category is closest to contemporaneous BIT practice, which often directly refers to amicable settlement at any time during a dispute. For instance, the Netherlands Model BIT provides at Article 17(1): "Any dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation. Such settlement may be agreed at any time, including after

proceedings under this Section have been commenced". Finally, only one BIT provides for mandatory conciliation as a pre-condition to adjudicative dispute resolution.

This can be compared to the categories proposed by recent study conducted by the ICSID and covering more than 900 BITs, free trade agreements and other relevant international treaties covering investor protections (*ICSID 2021 Study*). The study proposed five categories of dispute resolution clauses: directing to seek amicable settlement during cooling-off period; encouraging mediation during cooling-off period, expressly permitting mediation prior to arbitration; expressly permitting mediation at any point in time; and clauses mandating mediation prior to arbitration. It can be concluded that only several Ukrainian BITs fall into any of the categories proposed in the ICSID study.

Thus, Ukrainian BITs in general do not prohibit or, in limited instances, encourage mediation and conciliation. This approach seems expected given that most of the BITs reviewed were signed before 2010s and thus represent 'old generation' treaties, concluded when there was no upward trend on the use of mediation in the ISDS. Our review also emphasized a lack of consistent treaty practice by Ukraine, which has never developed or adopted a Model BIT, resulting in the variety of different substantive and procedural provisions across its BITs.

While modernisation of Ukrainian BITs is certainly an important policy objective, their current state in itself does not create serious obstacles to the ADR, including mediation. At the same time, the lack or positive provisions requiring or suggesting mediation means that mediation proceedings would be possible only based on an *ad hoc* agreement between an investor and a host state.

It is further of interest to see how this neutral stance towards amicable settlement procedures in treaty practice correlates with Ukraine's track record in disputes with foreign investors. According to UNCTAD, out of 33 recorded investment disputes against Ukraine (the actual number is most likely higher, since due to confidentiality some proceedings may not have been publicly recorded) four ended with settlements. One of them (*Gazprom v. Ukraine*) was part of a global settlement between Gazprom and Naftogaz. Three others were achieved in cases of *Laskaridis Shipping v. Ukraine*, *Lemire v. Ukraine (I)* and *Wetern NIS v. Ukraine (UNCTAD ISDS database)*. All three settlements were concluded during pending arbitral proceedings, with the latest of them in 2007. Interestingly, all three cases arose under two BITs – two under the BIT with the USA and one with Greece – neither of which provides for mediation or conciliation. While it cannot be ascertained from public domain whether any of these settlements was reached after mediation / conciliation, or following negotiations, the authors have not found any public reference of Ukraine's participation in such proceedings.

Thus, mediation does not seem to be a common practice in resolution of disputes with foreign investors by Ukraine. This situation can be attributed to the provisions of Ukraine's BITs only to a certain extent. Since they are often neutral on mediation and do not prohibit it, the lack of mediation in practice may rather signify parties – investors' and or state's – reluctance to submit dispute to mediation or conciliation. One also cannot exclude that reluctance to mediate may be caused by extra-legal circumstances, for instance political position with respect to certain investors, especially if they are from states conducting armed aggression against Ukraine.

While it is hard to gauge foreign investors' views on mediation, this aligns with a shared view of scholars that states are often reluctant to actively adopt mediation. First, mediation requires a higher degree of flexibility and commercial sensibility than arbitration. Reaching a settlement with foreign investor may have negative public perception and even lead to further investigations, especially after changes in political establishment. Second, in many states there is no single state body authorised to mediate with investors, or its authority to mediate may be significantly limited (*Titi, 2025, 167-168*).

However, at least the second perceived obstacle is not fully applicable to Ukraine. Presidential Decree No. 581/2002 is the main legal source setting out the rules for representing Ukraine before 'foreign' forums, which covers also disputes with foreign investors under the BITs. Apart from clearly establishing competent body – the Ministry of Justice of Ukraine, – the Decree clearly

establishes the Ministry's authority to participate in amicable settlement, pay the fees of a conciliator and sign (subject to the approval of the Cabinet of Ministers of Ukraine) a settlement agreement. One potential drawback of the Decree is that it seems to treat the conciliation or other amicable settlement as available only before the commencement of the formal arbitral or judicial proceedings. At the same time, it does not prohibit signing settlement agreement at any other point in time (as is confirmed by settlements achieved by Ukraine and referred to above).

In case of Ukraine, further factor that may influence the way Ukraine approaches disputes with foreign investors is the general lack of strong legal tradition of mediation in Ukraine, with Ukraine's first ever Law on Mediation being adopted only in 2021. In the authors' opinion, the development of state authorities' understanding of relevant amicable procedures and capacity to implement them seems to be a more achievable goal than amendment of Ukraine's BITs. Thus, based on the conclusions above (namely that Ukrainian BITs do not prohibit mediation) Ukrainian authorities could proactively propose to agree mediation to a foreign investment either during or after the cooling off period under a BIT. This could potentially increase the use of mediation and help manage state's exposure to costly arbitrations with the risk of unfavorable monetary awards.

Conclusions: Recent adoption of several ISDS mediation rules, including, most prominently, the 2022 ICSID Mediation Rules, attests to a growing interest for the ADR in the ISDS from relevant stakeholder, including states. This interest is expressed inter alia through the work of UNCITRAL Working Group III. In a similar way, leading sentiment in academia also favours wider adoption of ADR, including mediation and conciliation, as a solution against perceived drawbacks of the ISDS, including its costs and duration. This trend can further be traced in recent BITs, often providing for mandatory or voluntary mediation. Limited and anecdotal evidence of mediation, due to its confidential nature, does not allow for the same degree of empirical statistical studies as are available for investment arbitration to clearly assess mediations' benefits. However, even a small dataset of ICSID Conciliation cases reviewed in this article, despite the rigidity of this procedure, shows its shorter duration compared to arbitration.

Ukrainian BITs, while predominantly remaining ambivalent to the ADR, do not exclude it subject to an agreement between the parties to the dispute. Ukrainian authorities are specifically authorized to enter into ADR proceedings with foreign investors and conclude settlement agreements with them. However, Ukraine's track-record in investment disputes shows that ADR remains a de jure possible, but de facto neglected option. Changing this trend would require a more pro-active and commercially oriented approach from both investors and the state, without necessarily changing the existing network of Ukraine's BITs (a daunting task for a state in the middle of a war).

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