

GOVERNANCE IN MINING AREAS IN TANZANIA WITH SPECIAL REFERENCE TO LAND ISSUES

By Dr. Furaha Lugoe

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ABSTRACT

The economies of many countries such as the Gulf and Southern African States are to a considerable extent sustained by financial flows from extraction of mineral resources and fossil fuels. The discovery of such fortunes, in sufficiently viable quantities, can be a significant national blessing for effectively addressing development challenges. However, experience in other countries has shown that financial resources obtainable from mineral and fossil fuel extraction – the Extractive Industry, have not always assisted economic and social development. On the contrary, they have adversely affected political and hence socio-economic stability in some countries.

This paper examines the situation with gold mining in Tanzania. It notes that gold mining has had its ups and downs due to governance related issues. The paper asserts that policies and mind sets of the post independence era severely constrained investment in mineral exploration and extraction, resulting in the closure of existing mines without new openings for over 20 years. The paper also highlights the reality that a paradigm shift in favour of economic recovery and investment promotion has taken place, with artisanal and small miners (ASM) rejuvenating the mining of gold and Tanzanite in the 1980s and being joined by large scale miners (LSM) since 1998. The ugly experience of mining worldwide and on the continent has also been reflected in Tanzania. Significant disputes and conflicts have surfaced among mining industry stakeholders consisting of ASM, LSM, host communities and community based organizations, as well as local and central government authorities. The review of this paper includes an argument that the conflicts experienced in the mining industry in Tanzania, which have largely surfaced more acutely with respect to land use, cannot be wholly removed without hurting production. They may be mitigated to the level of stakeholder co-existence, though this may not be that easy due to differing interests of the stakeholders. Nonetheless, an attempt should be made, with the entry point at aligning the various policies and laws, and creating a suitable framework that links all sectors related to mineral exploration and extraction. All stakeholders will be losers if gold production ceases. In the same vein, all are jointly winners if production is made profitable in the common interest of everybody.

1.0 INTRODUCTION AND BACKGROUND

Mining reform in Tanzania is only two decades old. It started in earnest with economic recovery programmes that freed, in part, the major means of production from monopolistic state ownership, a practice commonly found in many developing countries in the post-independence policy frameworks. The Tanzania reforms were manifested by a new Mining Act that was legislated in 1998. A year later gold production was at an all time high of 388,000 ounces and in the new millennium it has consistently been over 1 million ounces per annum. Minerals now accounts for over 45 percent of the country's export (Economic Survey 2011) in which gold occupies a major share; and has increased its share of tax revenue (3.6%) and to GDP (3.2%). However, commercial mining by the large mining companies has often adversely affected artisanal small miners (ASM) that employ more people than the large scale miners (LSM). There have also been many problems with communities around the mines that remain unresolved to this day. Other challenges include those of human and resources management capacity, infrastructure and regulatory framework. It is against this background that it is seen fit to review the mining industry, amongst other industries, and in context of good governance principles as will be done in this paper.

2.0 GOVERNANCE PREVIEW

Governance in extractive industries is a broad term but it is essentially about processes of decision-making – who makes the decisions and on what basis – and the processes by which decisions are implemented, or not (Lugoe, 2010). In this case, discussion will be centered on this theme of decision making, in the context of extractive industries particularly gold, in Tanzania. While governance includes policies, institutions, processes and power, it is much more about the processes and politics than the actual content of policies and laws. In extractive industries, the processes of exploration and mining rights, the participation of stakeholders in these processes and redress to disputable issues and other forms of conflict will be examined.

Governance occurs at different administrative levels within Tanzania, and even at global level, and can be associated with different entities (e.g. nations, communities, corporations, households). In the national context, it is not confined to governments, but includes private sector and civil society actors. This paper shall reflect on governance involving several actors at different levels, key ones being people who get displaced by mining rights holders, small scale miners, large scale miners, local government at Village and District levels, Central Government involving policy makers and government operatives, Private Sector Service providers, Civil Society Organizations (CSO) including Community Based Organizations (CBO) and non- Governmental organizations (NGO). The conduct of governance is happening all the time, and is not necessarily prescribed by or confined to formal rules and regulations.

Most importantly, governance takes place in a specific context (e.g. physical, social, political, economic, historical, etc). In the case of the extractive industries in Tanzania, the social-economic context is overriding. The industry provides employment and hence income to citizens; the export earnings support the economy to improve social services and infrastructure; but these benefits must be weighed vis-à-vis the concerns for environmental protection and overall efficiency in land use. Governance also involves a large number of stakeholders, who can be categorized into groups and individuals, who are either influential in the decision-making processes or are affected by the decisions and laws. In the mining sector the main actors are the mining companies (big and small); the Government of Tanzania; the Communities at and around the mines, who could have owned properties prior to the opening of the mines. The latter could be culturally tied to the land and its environment.

Decisions once made and implemented can be expected to lead to specific outcomes or effects. Where decision-making processes lead to consistently good or positive outcomes, then the decision-making processes would typically be considered as good. On the other hand, weak or poor outcomes may be attributed to poor decision-making processes or poor governance. The current paper shows the aspects of mining that display weaknesses and those that may be regarded as strengths in governance.

2.1 Improving On Governance

Tanzania's development policy has given capital importance to good governance. When this has been found wanting, improvements have been contemplated. Indeed, there are a number of ways in which decision-making can be improved. These include developing better understanding of the governance context, which could involve mapping and collating existing knowledge or undertaking new situational analyses (e.g. case studies). This paper serves in part to contribute to governance in extractive industries and to a better understanding of gold mining and similar processes in Tanzania as case studies.

For certain aspects of the context, notably the environment, this also requires the development of better assessment and analytical tools. If however such new knowledge is to be translated into improved decision-making, then decision-makers have to be apprised of this knowledge, and understanding of its implications for their decisions. Tanzania's mining sector for example, has seen its ups and downs that led to its bottoming up during the command economy and resuscitation only after economic restructuring in the 1980s. The rejuvenated industry is only two decades old, but has already faced innumerable challenges. These have prompted a number of studies carried out by experts and CSOs on mining operations in order to improve decision making, more particularly pertaining to the subject of good governance in the mining sector that is the focus of the current paper.

2.2 Tenets of Good Governance

In discussing governance, the focus is on attaining good governance in the sector in line with the official policy. Good governance has eight major tenets namely; that it is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and is based on the rule of law. Good governance assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society (Lugoe, 2010). Unlike the general theme of the policy dialogue, transparency will not be addressed separately in this write-up but is treated as a part of good governance.

2.3 Why does Tanzania need Good Governance?

For Thousands of years, the desire to possess gold has driven people to extremes – such as fuelling wars and conquests, building empires and currencies, leveling mountains and forests. Gold's luster not only endures; fuelled by global uncertainty, it grows stronger. The price of gold which stood at \$271 an ounce on September 10, 2001 hit \$1023 in March 2008 and may surpass that threshold again. In 2007, demand outstripped mine production by 59 percent. Part of the challenge is that there is so little of it – only 161,000 tons of gold has been produced throughout human history with about half mined in the last 50 years" (Larmer, 2009). The laws of supply and demand are surely in operation than in any other product in setting prices.

3.0 GOVERNANCE IN TANZANIA'S MINING INDUSTRY

According to the recently conducted research on the Tanzanian mining sector, mining in Tanzania has the following five characteristics, related particularly to its potential contribution to the economy (ICMM, 2009):

- (a) Mining can readily become the main source of the country's foreign direct investment (FDI). If this happens the volume of domestic investment is also likely to be significantly increased;
- (b) Mining would continue to be a major foreign exchange earner by generating new forms of exports. These new exports can substantially reduce longstanding traditional exports in this role;
- (c) Mining can often contribute a share of government revenues that is high relative to its share of Gross Domestic Product. This is because large scale mining is a visible

and easily taxed activity compared with many more traditional activities including agriculture, the majority of small scale manufacturing and artisanal mining;

- (d) Mining, in its more modern forms, is unlikely to contribute a large proportion of a country's GDP. This is for the simple reason that it is a highly capital intensive activity. Its contribution to a country's Gross National Income (GNI) is likely to be even smaller because of the outflows of mining company dividends.
- (e) Modern mining cannot be expected to make a massive contribution to direct local employment levels. Again, this is mainly because of the high capital intensity of the activity and less so because of the choices as between expatriate and local employment as is often asserted.

The last two effects (d and e), respectively relating to contribution to GDP/GNI and employment, do not reflect the expectations of many in Government, non-Governmental Organizations and the communities in which the actual mining takes place. It is partly for this reason that mining operations do not often get the desired local support and often lead to conflicts.

In Tanzania conflicts between the communities and the mines have been largely surfacing more acutely with respect to land use. The conflicts have evolved at almost all mining sites since the re-emergence of the mining industry. The main reason for the state of affairs has been the displacement of people and the very low compensation level that have left many dissatisfied – affecting labour relations and security at the mines. Good governance at the mines must be established as the mines operate within prevailing neighborhoods, as will be discussed in next section.

These characteristics have always caused conflicts and disputes and have accentuated especially with regard to gold, and to some extent tanzanite and diamond mining in Tanzania. The conflicts occur in various phases of the mining operations, starting with mineral exploration to marketing. These conflicts involve communities and mining companies, small and large scale miners, mining companies and the Government, the Government and communities, mining companies and the environment. The issues causing conflict and discontent include: (i) land access, its acquisition and use; (ii) safety in and around mines; (iii) environmental and land degradation; (iv) value for money in compensation for loss and damage; (v) mining contracts including the aspects of royalties and taxation; (vi) corruption and the rule of law; (vii) the process of making and implementation of policies and laws; (viii) inadequate social corporate responsibility of mining companies, and the sharing of natural non-mineral resources such as water rights and forests that mining activities impinge upon.

3.1 Regulatory Framework for the Mining Sector:

Conflicts and disputes have also been encountered in the governance area of administering the regulatory framework for the Tanzanian mining sector. The framework that regulates the minerals sector in Tanzania is comprised primarily of the following key set ups:

The National Minerals Policy (NMP) of 1997 and the Mining Act of 1998 operationalizing, in part, the NMP. The Policy defines the sector vision for: (i) a well organized private sector, (ii) a mining industry in which key stakeholders are both large-scale and small artisanal miners; (iii) aspects regarding safety and environmental protection; (iv) sector contribution to the GDP in excess of 10 percent; (v) a well developed gemstone cutting and jewelry industry; and (vi) a sector that provides reliable employment.

The Mining Act of 1998 – which provides for: (i) security of tenure to investors; (ii) a smooth progression from prospecting to mining rights; (iii) streamlining procedures for obtaining mining licenses through a mineral titles register (MTR) ; (iv) a stabilizing fiscal package that includes basic rates for such items as royalties; and (v) standardized environmental protection and conservation guidelines. Prospecting and mining rights, like property rights, are exclusive to the rights holder and are geo-referenced to the land. The obligations of rights holder and those of the government are clearly stated. The obligations cover compensation, transferability of rights, mortgages, etc.

For instance under the Land Act (Cap 113), compensation involves paying full, fair and prompt compensation to any person whose right of occupancy or recognised long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State under this Act or is acquired under the Land Acquisition Act; provided that in assessing compensation land acquired in the manner provided for in this Act, the concept of opportunity shall be based on the following:-

- (i) market value of the real property;
- (ii) disturbance allowance;
- (iii) transport allowance;
- (iv) loss of profits or accommodation;
- (v) cost of acquiring or getting the subject land;
- (vi) any other cost loss or a capital expenditure incurred to the development of the subject land; and
- (vii) interest at market rate will be charged. (Section 3 (1) (g) of the Land Act).

Settlement of Disputes through Compensation: The Minerals Act consciously provides for a disputes and conflicts mechanism as is the Land Act and both have addressed issues of mitigation and resolution of the problem. These mechanisms include: arbitration, bipartisan negotiations and court hearings. In all three cases compensation for loss and damages is a

major element to a resolution. Negotiations for compensation often involve rights holders who are diverse in their interests such as farmers, herders, small miners and local and central Government authorities. Their negotiation skills are, to say the least, unable to match those of large scale miners, even when represented by Non-Governmental Organisations.

Mining companies are always prepared to negotiate as they must close the mining area for security reasons and are financially able to buy out any right of the poor villagers. On the other hand, the negotiation for compensation platform in Tanzania is not level. Compensation that is done in accordance with the Mining Act is only limited to damages according to the interest of the lawful occupier (i.e., replacement value). This is but a fraction of what would have been obtained if compensation was to be negotiated according to the fundamental principles of the Land Policy and Land Act (see Box No. 4). The land regulatory framework calls for consideration of opportunity cost in all negotiations for compensation. It is important to note that property that is liable for compensation is landed i.e., a surface right that has to be cleared prior to gaining mineral rights below the surface. The Land Act provisions should be followed in all such negotiations.

Mining Cadastre: The sector has developed a mining cadastre and a mining cadastre information management system (MCIMS) to operationalize the cadastre. This, in short, is a register of entries of rights holders and attributes of their rights supported by topographical maps, identity of holders and description of the rights granted to the mining concern. Unfortunately, the mining cadastre was not designed to expand the land cadastre and has hence several weaknesses.

4.0 CONFLICTS BETWEEN RIGHTS HOLDERS

Minerals are by definition not a part of land, as provided in the Land Act (Cap 113). Strangely nevertheless, one often has to penetrate or work the land to access the minerals. The Land Act does not define a "mineral land" among its three categories of general, village and reserve lands (see the Land Act (Cap 113) section 4 (4)) perhaps. The simple reason is that "mineral land" is not and cannot be known until discovered through mineral prospecting. Surprisingly, upon discovery of minerals on the land, the land turns into a "minerals land," overriding all categories of land except conservation areas in the reserved land category. This situation is the root cause of most conflicts between mining investors and communities, and constitutes a major conflict that is derived from disharmony between land and mineral policies and laws.

It may be pertinent to examine more closely the intricacies of two instruments of land management, namely the licenses for accessing land and the mining cadastre.

Licenses: Prospecting licenses are often granted for lands of large extent whilst mining activity takes place on a small portion of that land. The licenses cover crop and livestock farming lands, physical developments and communal resources. The grant of licenses is often unknown to those at the time occupying the land. Equally so, the boundaries of a minerals' rights holder are totally different from those of the property of the previous occupier, and are often unknown to him. Consequently, claims to land by the two groups (i.e. of the interested parties) often overlap. In addition, prospecting is a continuous process that often overlaps with actual mining in phased mining operations. It can unveil surprises in mineral layout direction and extent that are unexpected by communities surrounding the mines. Thus in essence it often covers properties and communal resources of villagers. As the definition of land stands, the discovery of new deposits and issuance of mining licenses almost automatically nullifies existing land rights claims.

The granting of mineral rights therefore calls for relocation of hitherto existing communities against their will. Often, some people remain on the land or hope their old land are still available for their exclusive use, when indeed has been expropriated through mineral rights granted under the Minerals Act. An example of this situation has been reported (Lissu, 2006) at the North Mara Gold Mine in Tarime District that Barrick Gold Corporation, viz. the operator of the mine *"has been taking by force villagers' lands it requires for its mining operations. This is done by simply dumping millions of tons of waste rock and rubble onto village lands without even the pretence of seeking owner's consent or payment of compensation as required by law."* *".... All this is done with the active participation of the district and administration and police."* Obviously such daylight acts supported by government must be legal under one or the other of the rights-granting laws.

Entries into Mining Cadastre: Mineral rights can be demarcated on the land surface but cannot be entered on a map that would indicate overlaps and gaps where these exist, as often they do. Mapping of rights claims is an essential part of both the property and mining cadastres where the claims are overlaid with other attributes on ownership. The problem of mapping is brought about by absence of appropriate base maps. Tanzania is not mapped at a scale (medium scale) that is suitable for property display. Existing base maps, of a national coverage, are provided at a small scale (1:50,000) and mostly outdated. This type of maps is too small to display individual rights claims. The defect needs a solution that is aimed at mapping village boundaries, land resource boundaries, mineral rights, mining rights, etc, all on a single map. In other words, information on land and property rights ought to be merged with minerals rights in a single common cadastral information system. In the absence of such mapping, mineral and mining rights inadvertently lead to land disputes and land use conflicts that were not intended by any of the parties (communities, miners, government). As a result all stakeholders are brought into a conflict situation with each other over rights claims. The defect has been worsened by not harmonizing the regulatory

framework, land and mineral cadastres, as well as not preparing the right tools (maps, etc) for the management of land and mineral cadastre from the outset.

4.1 Public Discontent over Contracts

Stakeholder concerns, such as those cited above, are on processes for issuing land and mining licenses, mineral rights and limitations, government revenue, mine safety and the environment, etc. have been addressed in new contracts between the government and mining investors and when occasions allow even in renegotiating old contracts.

Mining contracts are agreements that bring about mining investment in return for profits. The capital intensive mining industry often seeks to include statements in the contract that would enable the industry to recover capital investment. This means the government has to forego some of the expectations in tax revenues and royalties during this time. Conflicts between Government and its people including ASM and communities are often an outcome of the way the situation is handled as to forestall discontent.

Secrecy: It has been reported in the press that mining contracts are shrouded in secrecy and even parliament has not been apprised of the details thereof. Some of the contract statements are objectionable. Thus several clauses of such contracts have been the focus of this criticism. Firstly, Article 4.1.3 in the Tanzania government contract with Pangea Minerals for example, specifies that the mining company will make a fixed contribution of \$125,000 by December of each calendar *year of production* to the state-run national economic empowerment fund (EEF). The year of production has been defined as the time when production from the mine reaches a minimum of 20,000 ounces of gold contained in ore or concentrate, as the case may be, during the applicable calendar year. This effectively means that for each year that the gold mine declares production to be less than the stated amount, the government will get no contribution for its EEF.

In recent years conflict has arisen over mining contracts, forcing major mining companies to make concessions. In 2007 Barrick, AGA and Resolute agreed to pay annual levies of \$200,000 to local authorities and gave up their 15% tax allowances on unredeemed capital. Barrick also agreed voluntarily to a \$7million a year contribution to government for a five year period (www.minesandcommunities.org/article.php?a=9371).

Legal Reviews: Public discontent is putting pressure on the government to review the Mining Act. It is expected that following the Bomani report (2009) the royalty will be raised from 3 to 5 percent.

- Land acquisition was not made with the interest of the communities in mind, as discussed earlier. Mining operations are unfriendly to local communities and

mining companies always wish communities could be re-settled as far away from the mines as possible. The wish negates all about people's attachment to ancestral lands. Compensation is often at such low levels as to the compensation money to be used up without assisting people to re-settle in intended locations.

- Mine operations are not up to the level of safety and environmental standards expected of them by the Environmental Management Act. A telling example was the major spill of toxic waste from the Mara mining operations into areas surrounding the mine and on to the Thigithe and Mara rivers in May 2009. It proved harmful to people and domestic animals who unknowingly came into contact with the substance in the surrounding land and the contaminated river waters. With respect to the North Mara Gold Mine, Bitala et al report on safety and the environment cited the case of a family of five who got sick after eating fish from Thigithe River. The number of affected people was eventually believed to be over 40 with over 1350 livestock also dead. The mine operators admitted that the leakage occurred from tailing ponds flowing into the rivers, farms and pasture lands. Studies have since concluded that samples taken at the time had levels of heavy metals higher than tolerated under WHO or Tanzania standards (ibid.). The Norwegian University of Life Sciences jointly with the University of Dar Es Salaam found potential life threatening levels of arsenic toxicity around the North Mara mine. The water remained toxic for human consumption and grazing even four months later.

4.2 Cost of Doing Business and Corruption

Mining companies' major complaint to government is about the cost of doing business in Tanzania, asserting that many would attribute to the low level of technological development resources and human capacities. Mining companies claim that it is not possible to speed up things in Tanzania. It is lamented for instance that it takes over two years to process a prospecting license. Long stay in the country for foreign experienced staff is not assured either due to complications in processing residence permits. Government revenue derived from mining operations is not ploughed back into the communities surrounding mines, adding to complaints for lack of social services. On the other hand, there are complaints that mining companies are neglecting to fulfill their Corporate Social Responsibilities.

Finally there is also the issue of corruption. Mining companies are used to paying their way through to get things done. It has been noted that the public sector in Tanzania is not that transparent in their dealing with mining companies and services providers, thus kind of inviting kick backs. Transparency International's Corruption Perception Index for 2008 places Tanzania in the 102 spot out of 180 – the most corrupt. Ghana is fairing much better at 67th. In the 2011 Index Tanzania remained almost in a similar position at number 100.

Mining companies tend to be arrogant in their relationships with government and communities, maintaining the arrogance of top down approach even in discharging their Corporate Social Responsibility. They are willing to throw away money at problems, but are unwilling to cultivate working relationships with communities and local government authorities.

4.3 The Chaotic Nature of ASM

Artisanal Small Miners (ASM) seem to want to go anywhere they sense the occurrence of mineral fortunes – propelled only by their desires to earn livelihood, but often forgetting that a regulatory framework for mining exists in the country. Their major conflict with authorities is the invasion of impermissible areas such as rivers, national parks, forests, etc, where mineral rights cannot be granted. Also, their use of pollutants such as lead or mercury in rivers is a major health risk the government must control.

In areas like Mererani where mineral deposits have been found, it is easy for the government to issue licenses, as has been done, for small pieces of land (25m x 25m.) to small miners. But, since financial rewards come when mining is done at considerable depths (like about 100m or more) under the surface, ASM often take illegal shortcuts. Such mining often employs children who can work in tight spaces and penetrate tiny tunnels but the mines are not equipped to protect the tunnels against collapse.

5.0 CONCLUSIONS AND RECOMMENDATIONS

Governance in the gold mining industry is an area of serious concern throughout the world because of the conflicts among stakeholders of diverse interests who seem to lack an agreeable platform for decision making. Good governance in the mining processes could maintain stability and alleviate the dangers to mine workers and communities surrounding the mines. Good governance in the mining sector could see this gift of nature turned into a veritable productive sector instead of a “curse” as has occurred in many developing countries.

The sector stakeholders are the same everywhere and consist of government, miners both large and small and communities living around the mines. They have a variety of interests and are all affected differently by mining production; viz. : (i) The government has interest in seeing to it that FDI and exports are sustained; and royalties and taxes are paid accordingly, while keeping the mining areas safe and the environment clean. (ii) Mining companies are keen to increase production and exports at as low cost as possible to the mining operations, which often happens at the expense of the interests of government, the communities and small miners; (iii) Communities in areas where mining takes place need long-term jobs in the mines or in the ancillary services , and the social and community

services that be derived from the mines, but most importantly they need repossession or access to their ancestral lands that mines occupy and use; (iv) Artisanal small miners focus on short term strikes of mineral finds and can go all the way to add to environmental degradation by sifting through the mined rock and rubble, and other environmentally unfriendly operations; but they generate self employment to address income poverty, of course the hard way; (v) In the case gold and gemstones mines the issue of landfills in abandoned mine pits seems to have been left as "an orphan" - unattended, if it is forgotten in the mining contracts

Good governance should be able to reconcile these interests through a responsive regulatory framework for the mining industry that: (i) establishes and maintains institutions capable of addressing disputes and conflicts inherent therein; (ii) acknowledges the big contribution of ASM to employment and hence appropriately regulates their undertakings; Artisanal small miners generate far more jobs and put money in the pockets of rural people than large scale mining does; and (iii) addresses concerns of communities on land ownership and use, CSR of the mining companies and generally the way miner treats the community members, etc. Good governance requires that mining contracts should be well negotiated and made public through established institutions. Due preparations on fairness in contracts include resource and human capacity building that aims at strengthening the contract negotiation processes.

Good governance should seek to implement and improve upon the good objectives of the NMP and the Mining Act of 1998 by harmonizing these with the national land policy and Land Act (Cap 113). The minerals Act should also be harmonized with the environmental protection Act, particularly with regard to monitoring mining operations at the sites and containing toxic waste flows from mines. Areas of harmonization of the legal framework include: (i) Harmonization with regard to land ownership and compensation, mindful that the negotiation platform in compensation for loss and damages is not level; (ii) The land and property cadastre under the lands sector should be made to accommodate the minerals cadastre to avoid overlaps. In so doing, mapping should be given priority so that the handy tools of the cadastre can be made available. The land and mineral rights holders should not be pitted against one another on technicalities of mapping that are solvable; and (iii) Reviews of the legal framework should be participatory in order to accommodate the interests of the disadvantaged and vulnerable groups.

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