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DISPUTE SETTLEMENT IN THE SATELLITE BUSINESS

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ABSTRACT

The main objective of this presentation is to show the mechanisms available to States, International Organizations and corporations for dispute settlement. We try to answer the question if it is necessary a new treaty about it. A proposal will be made by the author in this connection.

INTRODUCTION

The Early Bird - or INTELSAT 1, launched on 6th April 1965, was the first geostationary commercial satellite. This scientific fact was the landmark from which a great increase of space commercial activity developed. Not only are States the main actors in the exploitation and use of outer space today but international organizations and private companies have an important role as well.

The Argentine Republic submitted to the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) the "Work Plan for implementation in connection with the item entitled Commercial Aspects of Space Activities"[i], which states that "the objectives of the work to be undertaken on this item would focus on identifying possible international legal conflicts that may arise from the pursuit of commercial activities concerned with the use of outer space and on elaborating the draft texts of the legal principles and rules that should govern such activities"[ii]

The main objective of this presentation is to show the mechanisms available to States, International Organizations and corporations for dispute settlement. We try to answer the question if it is necessary a new treaty about it. A proposal will be made by the author in this sense.

DISPUTES ARISING BETWEEN INTERNATIONAL SUBJECTS

International Law does not impose any obligation to settle disputes following a certain procedure, unless such procedure has been consented by both parties. According to the advisory opinion of the Permanent Court of International Justice in The Status of Eastern Carelia (23 July 1923) case, "It's well established in international law that no State can,

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without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration, or to any kind of pacific settlement"[iii].

International Law prescribes the peaceful settlement of disputes, pursuant to the principle set forth on Article 2, paragraph 3 of the Charter of the United Nations, that has been subsequently included on Article 33.

The UN General Assembly Resolution 2625 (XXV): Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations states that "International disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of means."

Pastor Ridruejo[iv] is of the view that the real impact of the principle of free choice of means to settle international disputes is quite significant. In a specific dispute, general International Law does not regulate any means by which the States shall settle their disputes, and no State shall be compelled by another State to submit their dispute to a specific means of settlement. It is an extreme consequence of the sovereign equality of States principle.

The limitation to the free choice of means is set forth in article 2, paragraph 3 of the Charter of the United Nations, whereby the use of force is prohibited.

In the field of space activities, we can refer to Article IX of the Outer Space Treaty, whereby a consultation procedure is implemented.

Bin Cheng[v] indicates that "the purpose which Article IX serves may be illustrated by the United States Project West Ford, which consisted in Launching into orbit a belt of tiny dipoles (needles) round the earth. In the first experiment, in October 1961, the needles did not disperse. The Second, launched on 12 May 1963, went as planned. The first announcement of this plan, about August 1960 created grave concern and brought a great deal of protest. In September 1961, the International Council of Scientific Union (ICSU) invited its Committee on Space Research (COSPAR) to examine any proposed experiments or other space activities that might have potential undesirable effects on Scientific activities and observations. In order to carry out this task, COSPAR established in May 1962 a Consultative Group on Potentially Harmful effects of Space Experiments. In its Report submitted in May 1964, the Consultative Group found inter alia that the actual experiments confirmed prior calculations that the specified belt would cause no harmful interference. But in view of initial uncertainties and the expressed fear that frequent launchings of far denser belts might be proposed, the problem was being kept under review. On the basis of this Report, COSPAR passed various resolutions calling on its members in future to give advance information on experiments of this sort and recommending measures to avoid contamination of celestial bodies. Since then, it would appear that the procedures of consultation through the COSPAR Consultative Group have been functioning satisfactorily", for this reason Bin Cheng considers that this probably explains why the two major space powers were content with the procedure of consultation in the article IX[vi].

Merrills[vii] explains that when a government anticipates that a decision or a proposed course of action may harm another state, discussions with the affected party can provide a way of heading off a dispute by creating an opportunity for adjustment and accommodation. The value of consultation is that it supplies this

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information at the most appropriate time. In relation to Article IX, Bockstiegel claims that such Article does not provide for any dispute settlement procedure[viii], and that is the reason why we believe that it is necessary to consider this issue carefully. Some of the provisions of The Convention on International Liability for Damages Caused by Space Objects of 1972 are worth studying.

A claim for compensation shall be presented to a launching State through **diplomatic channels** no later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable (Art. IX and X.1). If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence (Art. X. 2). The time limits specified in this article shall apply even if the full extent of the damage may not be known. In this event, however, the claimant State shall be entitled to revise the claim and submit additional documentation after the expiration of such time – limits until one year after the full extent of the damage is known (Art. X. 3).

Pursuant to Article XIV, "if no settlement of a claim is arrived at through diplomatic negotiations within one year from the date on which the claimant State notifies the launching State that it has been submitted the documentation of its claim, the parties concerned shall establish a **Claims Commission** at the request of either party. The compensation shall be determined in accordance with international law and the principles of justice and equity (Article XII)."

All these articles emphasize that "negotiation" is the first procedure arising therefrom. According to Shaw's precepts, it consists basically of discussions between the interested parties with a view to reconciling divergent opinions, or at least understanding the different positions maintained. It does not involve any third party..[ix]

As regards negotiation, the International Court of Justice on the North Sea Continental Shelf case ruled that "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition...they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case either of them insists upon its own position without contemplating any modification of it".[x]

Entering into negotiations is the basic means of dispute settlement, but it is still possible to resort to other procedures. Therefore, if the parties cannot reach an agreement through direct negotiations, the Convention on International Liability provides a conciliation procedure held before the Claims Commission.

Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961 defines conciliation as: "A method for the settlement of international disputes of any nature according to which a Commission set up by the parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the parties, with a

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view to its settlement, such aid as they may have requested.[xi]

The weakness of the Convention on International Liability is evidenced by Article XIX, paragraph 2, whereby:

"The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the commission shall render a final and recommendatory award, which the parties shall consider in good faith. The Commission shall state the reason for its decision or award"

Maureen Williams points out that the mere recommendatory nature of the Commission's awards and decisions shall be severely criticized. In view of the terms set forth by the Convention on International Liability, the unquestionable right of the damaged party to claim full compensation depends on the good will of States[xii]. But Williams is optimistic when she highlights the increasing role of international cooperation in these fields as a positive aspect.

We believe that if a State consents to the formalities and procedures of the Claims Commission, it is unlikely that such State will fail to observe the award, thus disregarding its unavoidable commitment to enter into negotiations in good faith.[xiii]

The London Conference of the International Law Association held in 2000 addressed, among other issues, dispute settlement according to Article XIX, paragraph 2. During that Conference, Professors Bin Cheng, Vladimir Kopal and Maureen Williams agreed on promoting a proposal for a unilateral declaration of States in order to recognize the decisions of the Claims Commission as binding, pursuant to Resolution 2777 adopted by United Nations General Assembly (XXVI).[xiv]

According to Professor Bockstiegel the binding effect of the award depends on the parties' agreement. If both parties agreed thereon before the procedure takes place, the role of the Commission shall be regarded as an ad-hoc arbitration procedure. If no agreement is reached or if the parties arrive at an agreement after the Commission has delivered its decision, the procedure shall be deemed a conciliation. Therefore, Professor Bockstiegel concludes that the Convention on International Liability only provides for the conciliation mechanism.[xv]

In consideration of the Bockstiegel's views, I believe that if the proposal of Professors Cheng, Kopal and Williams is accepted, the nature of the Commission of Claims as a means of dispute settlement would be altered. We would be shifting from a conciliation procedure to an ad-hoc arbitration procedure. Nevertheless, the solution proposed by the London Conference is highly recommendable.

The activities carried out by International Organizations are also provided for by the 1972 Convention on International Liability. Article XXII, which states:

"1. In this Convention, with the exception of Articles XXIV to XXVII, references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies"

The International

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Intergovernmental Organization and those of its members which are States Parties to the 1972 Convention on International Liability (Article 22, paragraph 3) shall be jointly liable for all damages.

Any claim for compensation against an International Organization shall be first presented to such organization. In the event the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, the claimant State may invoke the liability of the members which are States Parties to the Convention (Article 2, paragraph 3).

If the damage was caused to an International Organization and that organization has made a declaration in accordance with paragraph 1 of Article 22, the claim for compensation shall be presented by a State member of the organization which is a State Party to this Convention (Article 22, paragraph 4).

The 68th Conference of the International Law Association adopted the "Final Draft of the Revised Convention on the Settlement of Disputes Related to Space Activities". This Conference was held in Taipei, from May 24 to 30, 1998.[xvi]

This instrument derives from the ILA "Space Law Committee" where Professor Maureen Williams was Rapporteaur (now she is the Chairperson) and Professor Bockstiegel (from Germany) was then the Chairperson. This "Final Draft" is a revised and amended version of the 1984 Convention adopted by that institution in Paris.

The Convention, which is comprised of a preamble and 86 articles, was unanimously approved.

Article 1 states that "this Convention applies to all activities in outer space and all activities with effects in outer space, if such activities are carried out by states and international organizations, in accordance with Article 69 of this Convention, by nationals thereof or from the territory of a Contracting Party". Article 69 provides that "this Convention shall be open for signature by States, including partly self governing states which have internal and external competence in the matter, international intergovernmental organization."

The Convention makes a distinction between non-binding settlement procedures (Section II) and binding settlement procedures (Section III).

Under non-binding procedures, it provides for an obligation to exchange views (Article 3) and a conciliation procedure (Article 4).

Among the binding procedures,[xvii] the ILA instrument allows the parties to choose between:

a) the International Tribunal for Space Law, if and when such a Tribunal has been established in accordance with section V of this Convention

b) the International Court of Justice

c) arbitral tribunal

The arbitration procedure set forth under the binding settlement procedures of the ILA Convention is regulated by Section V (articles 24 to 35).

Pursuant to article 24, "any party to a dispute may submit the dispute to the arbitration procedures provided for in this Section by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and on the ground on which it is based. The arbitration procedures provided in the Section V are not applicable if the parties to the dispute, by arbitration agreement have submitted the dispute to another arbitration procedure, provided that other

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arbitration procedure entails binding decisions.

Article 34, which refers to the award, deserves special consideration. It provides that the award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.

The International Tribunal for Space Law is regulated under Section VI (articles 37 to 68).

In 1996, the International Court of Justice celebrated its 50th anniversary. Among the commemorative acts, a Discussion on different aspects of the Court role took place. One of its sessions was presided by Judge Vereshchtin and it addressed the issue of "Equipping the Court to deal with developing areas of international law: Space Law". In that session, Bockstiegel wondered if the International Court of Justice could be regarded as the most suitable means to settle disputes in relation to space activity, taking into consideration that in 1994 the Court established a Chamber for Environment affairs. He also posed the question whether a special Chamber can be created to hear space disputes[xviii]. Thus, the controversy was open.

Article 26 of the Statute of the International Court of Justice provides that:

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

Judge Schwebel clarified this article by making reference to its background, and explained that there are two types of chambers provided for by this regulation. The first type includes chambers for specific cases, which have already been implemented. These chambers were regulated by the Statute for the Permanent Court in relation to Transit, Communications and Labor but, as Judge Schwebel has noted, these chambers have never been used. When the Statute was redrafted in 1945, these specific references were deleted, the possibility of creating Chambers within the Court remained, which has been undoubtedly implemented. In relation to the Environment Chamber, Judge Schwebel concludes that there is no other chamber so constituted, but there is no reason whatsoever by which a Chamber on space affairs shall be formed.[xix]

Professor Alan Boyle questions the need for a Space Chamber in the International Court of Justice and emphasizes that no State has resorted to the Environment Chamber formed to hear such cases.[xx]

Bockstiegel tells us that since the 1978 institutionalization, Ad Hoc Chambers in the International Court of Justice have been resorted to in some cases. It is a procedure that allows the parties to select certain Judges to be members of the Chamber and hear the case submitted before them. This procedure, which has been used several times, places the court in a position similar to an arbitration procedure, since one of the main features of arbitration is that the parties can select their own judges to hear a specific case.[xxi]

Between a Chamber of the International Court of Justice and an ad

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hoc court, Bockstiegel prefers the latter, even though one does not exclude the other.[xxii]

As mentioned above, the ILA instrument regulated the International Tribunal on Space Law on Section VI, articles 37 to 68.

According to Williams, this possibility is based on the model given by the International Tribunal for the Law of the Sea, created by the Montego Bay Convention and situated in Hamburg.[xxiii]

Its jurisdiction is defined on Article 55: *"The Jurisdiction of the Tribunal comprises all disputes and applications submitted to in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal"* and article 56 states that *"If all the parties to a treaty already in force and concerning the subject – matter covered by this convention so agree, any disputes concerning the interpretation or application of such treaty may, in accordance with such agreement, be submitted to the Tribunal".*

Article 67 provides that the decision of the tribunal is final and shall be complied with by all the parties to the dispute.

DISPUTES ARISING BETWEEN CORPORATIONS

Initially, private activities can be performed in outer space, as provided for by Article VI of the Outer Space Treaty: "...the activities of *non governmental entities* in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty"; an also by Article IX of that legal document "...If a State Party to the treaty has reason to believe that an activity or experiment planned by it or *its nationals* in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other State Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment"

Malanczuk[xxiv] notes that there is an increasing trend in recognizing certain degrees of international personalities both for individuals and companies, but a complete international personality is indeed controversial. There is consensus on the fact that these persons cannot acquire territory as States do, nor appoint ambassadors or declare war. The International Law provides individuals and companies with access to certain international tribunals to assert their rights by means of treaties. Most of these tribunals are not available to individuals and companies, such as the International Court of Justice where, pursuant to article 34 of its Statute, only states may be parties in cases before the court. But there are some exceptions, as the International Bank for Reconstruction and Development, which implemented an international arbitration tribunal to hear disputes arising between States and nationals from other States. Likewise, at the Claims Court between the United States and Iran, both individuals and companies may have a valid legal claim under certain circumstances, etc.

Bockstiegel tells us that the basic option to settle disputes in private companies is either bringing the case before a domestic court or an arbitration tribunal. But, whereas domestic courts do not require any agreement between the parties to hear a specific case, arbitration requires that both parties have agreed to resort to that procedure by an arbitration agreement or an arbitration clause

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inserted into the contract. Private companies tend to resort to arbitration as a means to settle their disputes for commercial transactions, both at a domestic as well as international level.[xxv]

The Taipei Convention of the International Law Association contains an article deemed novel and that would allow companies to appear before an international tribunal:

"Article 10. Access

1. All the dispute settlement procedures specified in this convention shall be open to Contracting Parties

2. The dispute settlement procedures specified in this Convention shall be open *to entities other than States and international intergovernmental organizations*, unless the matter is submitted to the International Court of Justice in accordance with article 6"

CONCLUSIONS AND PROPOSAL

The Law shall face international reality and perform its tasks through feasible and operatives means or mechanisms. We should not discuss in depth the perfection of a regulation but its ability to address the needs and disputes that may arise, the main foundations of such regulation being principles that can be accepted by the States.

Since the 1967 Outer Space Treaty and the 1972 Convention on International Liability, more than thirty years have passed. *The Claims Commission is characterized by its "weakness" evidenced by the "recommendatory" nature of its awards. The proposal for an unilateral declaration of States based on the reciprocal recognition of the Commission's decision as provided for by Resolution 2777 (XXVI) adopted by the United Nations General Assembly is highly recommended. Encouraging states to resort to this means of dispute settlement seems to be a more realistic approach than embarking on a more complex amendment procedure. The political will is not the most appropriate means to carry out such task.* However, companies shall not be able to settle their controversies by these means, since only States and International Organizations can present their cases to the Claims Commission.

We are of the view that *the 1998 Final Draft of the Revised Convention adopted by the International Law Association of the original 1984 Convention adopted in Paris* is consistent with the times we are living in. It contains provisions for the progressive development of International Law, as evidenced by Article 10, paragraph 2, which refers to entities other than States as private companies.

Even though non-governmental entities can resort to international commercial arbitration, we believe that it would be more appropriate if companies could appear before the Space Tribunal established by the ILA.

The creation of a specific tribunal to hear such cases would give rise to case law. This fact would strengthen international relations, thus generating higher legal certainty.

After the exhaustive analysis made herein, we believe that we are now able to propose the following declaration:

"DECLARATION OF PRINCIPLES IN RELATION TO DISPUTE SETTLEMENT IN COMMERCIAL SPACE ACTIVITIES."

The General Assembly,

Taking into account that international cooperation should be for the betterment of mankind, procuring equal access to all States in order to fulfill their goal;

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Considering the great importance of commercial space activities performed on an international level;
Noting that not only States, International Organizations and other legal entities are the beneficiaries of commercial space activities, but also all the peoples of the world;
Considering that not only States and Private Organizations are involved, but also other non-governmental legal entities;
Recalling the 1967 Treaty on Principles Governing the Activities of States in the exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, the 1972 Convention on International Liability for Damage Caused by Space Objects, the 1974 Convention of Registration of Objects Launched into Outer Space, Resolution 2777 (XXVI) adopted by the United Nations General Assembly, Resolution 51/122 adopted in 1996 by the United Nations General Assemble entitled "Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, taking into Particular Account the Needs of Developing Countries."
Having in mind the Convention on Dispute Settlement related to Space Activity adopted by the International Law Association in 1998;
Noting the Work Plan submitted by the Argentine Republic to the United Nations Committee on the Peaceful Uses of Outer Space in 1999;
Believing in the need of a Declaration of Principles in Relation to Dispute Settlement in Commercial Space Activities

Has agreed the following:
Principle 1: This Declaration shall apply to all disputes in relation to commercial space activities.
Principle 2: The Parties shall settle their disputes on the basis of International Law and the principles of justice and equity pursuant to Article XII of the 1972 Convention on International Liability for Damage Caused by Space Objects.
Principle 3: If no settlement of a claim is arrived at by diplomatic means, the Parties concerned, pursuant to the principle of free choice of means, may select between the binding and non-binding procedures provided for by the Convention on the Settlement of Disputes Related to Space Activities adopted by the International Law Association in 1998.
Principle 4: If States and International Organizations resort to the procedure established by the 1972 Convention on International Liability on Damage Caused by Space Objects, it is recommended that a declaration be proposed in advance by which those States commit to observe the award in good faith and based on reciprocal interest.
Principle 5: States shall be encouraged to seriously consider the possibility of adopting an Agreement for the Settlement of Disputes Related to Space Commercial Activities.
Principle 6: For all purposes of the above mentioned principles, the Convention on the Settlement of Disputes in Relation to Space Activities adopted by the International Law Association in 1998 shall be taken into consideration.

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[i] United Nations. General Assembly. Committee on the Peaceful Uses of Outer Space. Report of the Legal Subcommittee on the work of its thirty –

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[ii] Ibidem

[iii] Annual Digest of Public International law Cases. Years 1923 to 1924. Edited by Sir John Fischer Williams and H. Lauterpacht. Longmns, Green and Co. London. 1933. Reprinted by Grotius Publications Ltd. Cambridge . 1981. Page 396.

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[viii] Shaw, Malcolm N.: "International Law". Fourth Edition. Cambridge University Press. Cambridge. UK. 1997. Page 721

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[x] ICJ Reports, 1969, Pp. 3, 47.

[xi] See Merrils, J. G.. "International Dispute Settlement". Third Edition. Cambridge University Press. UK. 1998.Page 62

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[xiii] Ibidem, Page 34

[xiv] Williams, Silvia Maureen: "Review of Space Law Treaties in View of Commercial Space Activities". International Law Association. London Conference. Space Law Committee. 2000.

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[xvi] See International Law Association. Report of the Sixty - Eight Conference. Taipei, Taiwan, Republic of China. Editors Professor A.H. A. Soons y Michael Byers. London. 1998. Pages 249

[xvii] Article 6.

[xviii] Diederiks-Verschoor, I. H. Ph. : "The Settlements of Disputes in Space: New Developments" in Journal of Space Law. Volume 26. N° 1. USA. 1998. Page 44.

[xix] Diederiks-Verschoor, I.H.Ph: "The Settlements of Disputes in Space: New Developments" in Journal of Space Law. Volume 26. N° 1. USA. 1998. Page 45.

[xx] See Contin Williams, Viviane (Reporter) "Committee on Space Law. Working Session" in International Law Association. Report of The Sixty-Eight Conference. Taipei, Taiwan, Republic of China. Edited by H. A Soons and Michael Byers. London. 1998. Page 275

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[xxiv] Malanczuk, Peter: "Akehurst's Modern Introduction to International Law". Seventh Revised Edition. Routledge. London. 1998. Page 100.

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