

The consultation closes on **Friday 31 January 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

**Note:** ClientEarth has answered only the questions flagged as red below (e.g. questions 15(a) and 39).

Answers should be submitted by PDF or word document to [CJCLitigationFundingReview@judiciary.uk](mailto:CJCLitigationFundingReview@judiciary.uk). If you have any questions about the consultation or submission process, please contact [CJC@judiciary.uk](mailto:CJC@judiciary.uk).

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

**You must fill in the following and submit this sheet with your response:**

Your response is (public/anonymous/confidential):	Public
First name:	Emma
Last name:	O'Brien
Location:	London
Role:	Lawyer (Accountable Corporations)
Job title:	Lawyer
Organisation:	ClientEarth
Are you responding on behalf of your organisation?	Yes
Your email address:	<div style="background-color: black; width: 150px; height: 1.2em; display: inline-block;"></div>

#### Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

The full list of consultation questions is below:

- Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.
- All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.
- It is not necessary to answer all the questions.

Questions concerning *‘whether and how, and if required, by whom, third party funding should be regulated’* and the relationship between third party funding and litigation costs.

1. To what extent, if any, does third party funding currently secure effective access to justice?<sup>1</sup>
2. To what extent does third party funding promote equality of arms between parties to litigation?
3. Are there other benefits of third party funding? If so, what are they?
4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?<sup>2</sup> If not, what improvements could be made to it?
5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:
  - a. The nature and seriousness of the risk and harm that occurs or might occur;
  - b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;<sup>3</sup>
  - c. For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.
6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?
  - a. If not, why not?
  - b. If so, which types of dispute and/or form of proceedings<sup>4</sup> should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?<sup>5</sup>
  - c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual

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<sup>1</sup> When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.

<sup>2</sup> This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

<sup>3</sup> Please give full details of each possible mechanism and explain how each would work (including who any potential ‘regulator’ or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.

<sup>4</sup> Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.

<sup>5</sup> Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

- litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?
7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?
  8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:
    - a. What impact, if any, have the level of litigation costs had on the development of third party funding?
    - b. What impact, if any, does third party funding have on the level of litigation costs?
    - c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?
    - d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?<sup>6</sup>
    - e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
      - i. If so, why?
      - ii. If not, why not?
  9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.
  10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

**Questions concerning ‘whether and, if so to what extent a funder’s return on any third party funding agreement should be subject to a cap.’**

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?
12. Should a funder’s return on any third party funding arrangement be subject to controls, such as a cap?
  - a. If so, why?
  - b. If not, why not?
13. If a cap should be applied to a funder’s return:
  - a. What level should it be set at and why?
  - b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?
  - c. At which stage in proceedings should the cap be set?
  - d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?
  - e. Should there be differential caps and, if so, in what context and on what basis?

**Questions concerning how third party funding ‘should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.’**

14. What are the advantages or drawbacks of third party funding?  
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
15. What are the alternatives to third party funding?

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<sup>6</sup> Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

- a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?  
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

Reflecting ClientEarth's experience and expertise as an environmental law organisation partially funded by philanthropic funding (a form of pure funding), ClientEarth would like to highlight to the CJC certain significant distinct characteristics of philanthropic funding which we believe are relevant to this consultation. Please refer to ClientEarth's response to question 39 below.

- b. Can other forms of litigation funding complement third party funding?  
Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.
- c. If so, when and how?
16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?
17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?
18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?
19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?
20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?
21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?
22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

**Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'**

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?
24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?

25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?
26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?
27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?

**Questions concerning provision to protect claimants.**

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?
29. What effect do different funding mechanisms have on the settlement of proceedings?
30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?
31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?
32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?
33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?
34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?
35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.

**Questions concerning the encouragement of litigation.**

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:
  - a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?
  - b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?
  - c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.
37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.
38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

**General Issues**

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?<sup>7</sup>

ClientEarth is an international environmental law organisation, with a focus on the triple planetary crisis of climate change, pollution and biodiversity.<sup>8</sup> The organisation is a company limited by guarantee, and is registered as a charity in England and Wales.<sup>9</sup> ClientEarth's charitable objectives include the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit and the advancement of the administration of justice in connection with the environment.<sup>10</sup> The organisation works on a broad range of environmental policy and legal matters, as demonstrated by the variety of issues covered in ClientEarth's most recent annual report.<sup>11</sup>

As part of ClientEarth's work towards its charitable objectives, the organisation pursues both contentious and non-contentious legal actions to strengthen climate accountability, including litigation in the courts of England and Wales. This litigation spans a broad spectrum in this jurisdiction, from judicial review cases to private cases against corporations.<sup>12</sup>

As with all of ClientEarth's work, these cases are generally funded by donations and philanthropic funding, which falls under the category of 'pure funders' (i.e. the funders do not stand to gain financially).<sup>13</sup> The litigation funding framework in England and Wales is therefore of direct relevance to ClientEarth as an organisation, and to the administration of justice in connection with the environment.

ClientEarth's consultation response is intended to raise the issue of philanthropic funding as a distinctive form of pure funding, focusing on two topics relevant to the funding of ClientEarth's work as a legal environmental non-governmental organisation ("NGO") which we believe merit consideration by the CJC in its review of litigation funding, namely: (i) philanthropic litigation funding as a separate subcategory of 'pure funding', and (ii) cost capping. In particular, we refer to the section of the CJC's Interim Report on 'pure funding' (paragraphs 7.30-7.33),<sup>14</sup> in which the Working Party

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<sup>7</sup> Please note that the Working Party is not considering civil legal aid.

<sup>8</sup> United Nations Framework Convention on Climate Change, 'What is the Triple Planetary Crisis?' (13 April 2022), accessible [here](#).

<sup>9</sup> With company number 02863827 and charity number 1053988, office is at 34 Drayton Park, London, N5 1PB and registered address at First Floor, 10 Queen Street Place, London, England, EC4R 1BE. See ClientEarth entry on United Kingdom Charity Register, accessible [here](#).

<sup>10</sup> Article 4 of ClientEarth's Articles of Association provide that the "Charitable objects" of ClientEarth UK are "(1) to promote and encourage the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit; (2) to advance the education of the public in all matters relating to the law, practice and administration of justice in connection with the environment; (3) to relieve poverty through the provision of legal services to those who cannot otherwise afford them; (4) to promote, assist, undertake and commission research into the law, practice and administration of justice in connection with the environment and matters relating thereto, including the impact, direct or indirect, of any human activity on the environment and to disseminate the useful results of such research."

<sup>11</sup> ClientEarth, "2023 Annual Report" (20 August 2024), accessible [here](#).

<sup>12</sup> For example, in 2023 ClientEarth brought judicial review proceedings, alongside Friends of the Earth and Good Law Project, against the Secretary of State for Energy Security and Net Zero. In early 2024, the Court handed down judgment in which it agreed with ClientEarth's arguments that the Carbon Budget Delivery Plan (which set out the government's decarbonisation strategy) did not meet the legal requirements in the Climate Change Act 2008. In 2023, ClientEarth took legal action against Shell's Board of Directors in the High Court, arguing that the company's failure to adopt and implement a climate strategy aligned with the Paris Agreement constitutes a breach of its legal obligations under the company law of England and Wales. ClientEarth has also litigated against the FCA, in respect of its duties to consider climate-related financial risk in the approval of a fossil fuel company's application to list on the London Stock Exchange.

<sup>13</sup> As defined – albeit in the context of family funding – in *Hamilton v Al-Fayed No. 2* [2002] EWCA Civ 665 as being "being those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course" (paragraph 40).

<sup>14</sup> Civil Justice Council, 'Review of Litigation Funding: Interim Report and Consultation' (October 2024), accessible [here](#).



noted that it “is particularly interested in receiving evidence concerning the incidence of pure funding, its benefits, and drawbacks”.

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### (i) Philanthropic litigation funding

As the Council will be aware, pure funding is an essential part of civil litigation in England and Wales. It furthers the overriding objective under Civil Procedure Rule 1.1, namely:

“(2) Dealing with a case **justly and at proportionate cost** includes, so far as is practicable –

(a) ensuring that the **parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;**

(c) dealing with the case in ways which are proportionate –

[...]

(iv) to the **financial position of each party;**

(d) ensuring that it is dealt with **expeditiously and fairly...**” (emphasis added)

The overriding objective is designed to ensure access to justice, allowing claims to be brought in the public interest which would not otherwise be viable, due to prohibitive costs.<sup>15</sup> Pure funding is an essential tool to enable claimants with legitimate claims to achieve access to justice by taking legal action on an equal footing against much more well-resourced defendants. Without such funding, claims which cannot obtain commercial funding (for example because they do not seek a monetary remedy, or one of a sufficient scale) either do not happen or are reliant on *pro bono* barristers, *pro bono* solicitors and the *gratis* provision of (any) expert evidence – in practice putting claimants on an unequal footing with defendants. Similarly to other forms of third party funding, pure funding has become increasingly important as the availability of legal aid has become more restricted.

In light of this, there is a clear and pressing need for clarity around philanthropic funding as a form of pure funding. This is the case with all litigation funding; however, it is necessary to consider philanthropic funding as a discrete category, and to deal with it accordingly.

Philanthropic funding from entities set up with charitable objectives exists to further the public interest. Such funding paradigmatically seeks to redress financial imbalances to ensure that “*the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence*”,<sup>16</sup> i.e. in furtherance of the overriding objective. Philanthropic funding does not involve any commercial incentives, nor is it based on personal bonds with the claimant(s). Philanthropic funders do not stand to gain financially from litigation they fund but they are potentially exposed to significant third party costs orders, particularly in a jurisdiction like England and Wales where a burdensome adverse costs regime applies. As it currently stands, the costs regime in England and Wales permits defendants to exploit unclear adverse costs risk to create a “chilling effect” on public interest litigation supported by philanthropic funders and non-profits. The live risk is exemplified by the \$9 million in legal costs awarded to fossil fuel producer Santos against the Environmental Defenders Office, Australia's biggest environmental law charity.<sup>17</sup> The status quo has the potential to lead to tactical use of third party costs orders by well-resourced defendants to prevent matters being brought to Court. There need to be clear guidelines and protections in place to ensure

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<sup>15</sup> White Book commentary confirms that the overriding objective was intended to address the lack of equality between the powerful, wealthy litigant and the under-resourced litigant and to ensure “*a level playing field between litigants of unequal financial or other resources*”. See “Access to Justice” Reports: Final Report, pp.2 and 146 and Interim Report, p.26, cited in White Book (2014), at p.3235.

<sup>16</sup> Civil Procedure Rules, Part 1.1(2)(a).

<sup>17</sup> ABC News, ‘Environmental law charity may be forced to shut after court costs’ (30 January 2025), accessible [here](#).

that philanthropic funders do not become the subject of SLAPPs (Strategic Litigation Against Public Participation) or ‘lawfare’ on costs.

The need to protect access to justice in this way is reflected in caselaw, for example in *Hawking v Secretary of State*,<sup>18</sup> a judicial review case financed by crowdfunding, where Cheema-Grubb J considered the test for granting a costs capping order (“CCO”) under section 88(6) of the Criminal Justice and Courts Act 2015. Noting that the case involved a “*public-spirited*” claim brought by “*responsible*” individuals, the judge granted a CCO so that the claimants would not be exposed to open-ended financial liability, finding that the certainty provided by a CCO was critical for enabling such individuals to take a public interest case forward. This illustrates the need for certainty in relation to the potential financial exposure of pure funders, which ClientEarth submits would benefit from clarification by the CJC.

Beyond judicial review cases, there is a general presumption against costs orders being made against pure funders.<sup>19</sup> Reinforcing this presumption, the High Court has made clear that the discretion to order a pure funder who is not party to litigation to pay costs will not normally be executed, unless the funder’s influence goes “*beyond the mere funding of litigation*” (in that the funder exercises real control over the conduct of the litigation – a threshold that was exceeded in the case of *Laser Trust v CFL Finance Ltd*).<sup>20</sup>

However, the costs implications of philanthropic funding remain largely untested by the Courts and have not been clarified in legislation, regulation or judicial guidance. Of particular concern is the question of whether a philanthropic funder or (individual) who does not stand to gain financially from a case could be held liable for the other side’s costs if the funded party loses, and the question of the applicability of wasted costs orders in litigation funded by philanthropic funding. There remains ambiguity, too, around the question of whether philanthropic funding which furthers stated charitable or public interest objectives of a funder could expose the funder to adverse cost risk, on the basis that the funder shares its charitable objectives with those of the case.

ClientEarth recognises the merits of a case-by-case approach to costs in cases which are enabled by pure funding, given the range of claims and parties that can be supported by such funding. However, the Council’s Review of Litigation Funding offers a valuable opportunity to clearly differentiate between commercial funders and philanthropic funders, and – crucially – to provide some guidance for philanthropic funders. As well as being welcomed by funders and public interest legal NGOs, clarifying the parameters and implications of philanthropic funding would save court time and enhance efficiency, thereby furthering the overriding objective.

## **(ii) Cost capping**

As explained in section (i) above, the ability and willingness of the Courts to grant CCOs can have a potentially significant impact on the financial liability of a public interest claimant and their ability to commence a claim. The prospect of the certainty provided by a CCO can also enable support from a philanthropic (pure) funder to ensure equality of arms and greater clarity on costs capping would undoubtedly assist the community of public interest claimants.

In particular, ClientEarth considers that the issue of which claims benefit from the default costs caps afforded to ‘Aarhus Convention claims’ under Civil Procedure Rule 46 would benefit from the attention of the CJC. ClientEarth is firmly of the view ([as is Wildlife and Countryside Link](#), of which ClientEarth is a member) that private law nuisance claims that both affect the environment on which we all depend,

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<sup>18</sup> *Stephen Hawking and others v Secretary of State for Health & Social Care and National Health Service Commissioning Board* [2018] EWHC 989 (Admin).

<sup>19</sup> See e.g. in *Dymocks Francise Systems (NSW) PTY Ltd v Todd* [2004] UK PC 39; [2004] 1 WLR 2807 at paragraph 25; *Jackson and others v Thakrar and others* [2007] EWHC 626 (TCC) at paragraph 36; *Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB) at paragraph 18(iii).

<sup>20</sup> [2021] EWHC 1404 (Ch), at paragraph 10.



and confer significant environmental benefit, fall within Article 9(4) of the Aarhus Convention and should therefore benefit from the reciprocal costs caps.

We also take the view that costs protection under the law in this jurisdiction should extend beyond private nuisance claims to encompass any claim brought by a member of the public against a private actor or public authority which is related to the environment. This would include private law claims in public nuisance, claims in the tort of negligence for environmental harm caused by breach of duty of care by a private actor and injunction proceedings against environmental protestors. It is clear that Article 9(3) of the Convention envisaged the inclusion of private environmental law claims within its scope, given its express wording.

ClientEarth takes the view that the lack of Aarhus costs protections for the types of claims listed above continues to put the United Kingdom in breach of its obligations under the Aarhus Convention. This state of affairs has a chilling effect on the public interest litigation that would otherwise be enabled by philanthropic funders, as the fundamental lack of certainty over cost exposure makes a whole category of claims brought in the name of public interest less attractive, inhibiting access to justice and undermining the overriding objective.

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