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The future of renewable energy arbitration in the Middle East

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Summary

IN SUMMARY

Some of the world's largest renewable energy projects are presently being implemented in the Middle East region. This is likely to give rise to future arbitration disputes that must be addressed in a manner that both identifies and adapts to the particularities of that region.

DISCUSSION POINTS

- The Middle East is moving firmly towards decarbonisation
- There are significant renewable energy projects in the pipeline
- Particular circumstances affecting renewable energy projects in the region make it likely that significant international arbitration disputes will arise in the coming years
- Specific legal considerations that are of particular importance to renewable energy project agreements governed by Middle Eastern laws must be kept in mind by relevant parties

REFERENCED IN THIS ARTICLE

- *MT Højgaard A/S (Respondent) v E.On Climate & Renewables UK Robin Rigg East Limited and another (Appellants)* [2017] UKSC 59

INTRODUCTION

The world is collectively moving towards decarbonisation; 194 signatories (193 states plus the European Union) have adopted the Paris Agreement, which entered into force on 4 November 2016.[1] The Paris Agreement is a legally binding international treaty on climate change and its goal is to limit global warming to 1.5 degrees Celsius above 'pre-industrial levels' (using the years 1850–1900 as a baseline for comparison).[2]

In addition, a growing coalition of more than 70 countries have set 'net-zero' targets, namely, reducing carbon emissions to such an extent that any excess emission can be reabsorbed from the atmosphere through photosynthesis, oceans and manufactured carbon capture tools.[3] The United States, China and the European Union have all committed to net-zero targets, which translates to approximately 76 per cent of all global emissions.[4] In addition, the United Kingdom – through primary legislation – has committed to reducing its greenhouse gas emissions by 100 per cent by 2050.[5] Various countries in the Middle East have also adopted a net-zero strategy. For example, Jordan and Israel aim to achieve net zero by 2050.[6] Saudi Arabia and Kuwait, two of the world's biggest crude oil exporters, aim to achieve net zero by 2060.[7] That said, many net-zero targets have been criticised for lacking sufficient specificity, transparency and achievability. In fact, the Climate Action Tracker has stipulated that no countries are currently on track to limit their carbon emissions in accordance with their obligations under the Paris Agreement.[8]

Notably, the race to net zero is not limited to state participation; there are numerous other initiatives whereby private organisations and institutions have committed to achieving net zero. For example, more than 3,000 businesses and financial institutions are working with the Science-Based Targets Initiative, a partnership between, inter alia, the United Nations

Global Compact and the World Wide Fund for Nature. The Initiative assists companies in reducing their carbon emissions through establishing best-practices in target-setting, providing resources and guidance, and assessing and approving companies' targets.[9]

As a result of these various initiatives, the world is uniformly moving towards sustainable energy production. Aside from ecological motivations, the financial incentives are clear. In a stagnating global economy, worldwide installed offshore wind capacity increased by 21GW to 56GW between 2021 and 2022 (underpinned by US$46 billion of financial investment).-[10] More broadly, the global renewable energy market is set to experience a compound annual growth rate (CAGR) of between 8.5 per cent and 9.6 per cent.[11] Accordingly, the global market size is expected to grow from US$1,030.95 billion in 2022 to US$1,998.03 billion by 2023. However, the projected CAGR may be set to increase further because critics have noted the prospective investment is insufficient to limit global warming to 1.5 degrees Celsius below pre-industrial levels.[12] For example, the International Institute for Applied Systems Analysis has stated that, to meet the proposed targets, the international annual investment in clean energy will need to be in the region of US$1 trillion alongside billions of dollars in further investment in energy transmission, storage and other infrastructure.[13] The International Energy Agency suggested the annualised figure ought to be closer to US$4 trillion.[14] Although these figures are simply estimates predicated on economic and climate modelling, they allow us to reasonably conclude that investment in clean energy is likely to increase.

There is a clear opportunity – and monetary incentive – for states and private entities to capitalise on future investments in renewable energy projects. Despite the Middle East's reputation as an oil and gas giant, the region presents extensive opportunities in the renewables sector. In fact, the Middle East's market is set to sustain a CAGR of approximately 13.43 per cent – nearly double the global average.[15] As discussed below, it is therefore unsurprising that the Middle East has received vast international investments in their renewable energy projects (primarily relating to wind and solar).

The opportunities for growth in the renewables sector, however, are coupled with, at times, volatile governmental regimes and unstable regulatory frameworks, which can increase the risks of undertaking such projects. Regime change or instability can bring sudden changes to a regulatory framework, which brings with it the risk of dispute.[16] Immature and rapidly evolving technologies can also provide grounds for disputes. For those embarking on projects in this area, it is also important to be cognisant of the existing legal regimes and the expectations that parties operating under project agreements subject to the laws of Middle Eastern jurisdictions will have in relation to issues such as good faith, contractual interpretation, notice and limitation periods, all of which impact the dispute frameworks for these projects.

The risks notwithstanding, there is a tremendous opportunity for the Middle East region to take part in the global shift towards renewable energy (described as 'energy transition'), particularly as the Middle East has historically positioned itself at the forefront of traditional energy generation (ie, oil and gas). The increasing appetite for clean energy globally indicates that the tide finally seems to be turning, helping to 'clean up' the region.

As such, in this article, we discuss the clean energy targets of Qatar, Jordan, Kuwait, Israel, Saudi Arabia and Egypt. In addition, we review how each country is attempting to implement such targets. Finally, we analyse how the selected countries' pipeline of projects may be

susceptible to arbitration risks, and predict what arbitration trends are likely to be seen in the Middle East's future.

THE MIDDLE EAST'S TARGETS AND PIPELINE OF PROJECTS

High demand, improving technology and an abundant supply of sunlight mean the outlook for renewable energy projects in the region is bright. Ambitious clean energy targets and an accelerating interest in preparing for the post-petrol age mean that renewable energy project contract awards are eclipsing those for conventional power in the historical heartland of the oil and gas industry.

Qatar

Renewable Strategy

As part of the 'Qatar National Vision 2030', the Qatari government intends to produce 20 per cent of the country's electricity from renewable sources by 2030.[17] To achieve this goal, the government aims to increase Qatar's solar capacity to 2–4GW by 2030, rising to over 5GW by 2035.[18] The country's first large-scale solar plant, the 800MW Al Kharsaah photovoltaic (PV) project was completed by Total, Marubeni and Siraj Energy at a cost of US$462.3 million in October 2022,[19] just in time to support the nation's pledge to host a carbon-neutral World Cup.[20]

Pipeline

In August 2022, Samsung C&T Corp was awarded a contract worth US$630.33 million for the engineering, procurement and construction of two PV plants with an aggregate power generation capacity of 875MW.[21] The plants in Mesaieed Industrial City and Ras Laffan Industrial City will have a capacity of 417MW and 458MW, respectively, once complete. Upon the projects' completion (estimated for 2024), Qatar's renewable energy production capacity will be 1.68GW.[22] However, this is still far lower than the energy production capacity of certain countries. For example, in 2021, China's installed renewable energy capacity was 1,020GW (although the vast disparity in population size is to be taken into account).[23]

Jordan

Renewable Strategy

Jordan is considered a leader in renewable energy adoption in the region.[24] As of December 2022, more than 20 per cent of Jordan's electricity was produced from renewable sources.[25] The Jordanian government's 'Master Strategy for the Energy Sector 2020–2030' seeks to further the country's renewable capabilities, aiming to have renewable sources produce 31 per cent of Jordan's total energy capacity by 2030.[26]

Pipeline

Notwithstanding its renewable energy goals, in January 2019, the Jordanian government imposed a limitation on the approval of renewable projects of a capacity greater than 1MW due to concerns regarding the capability of its energy grid and oversupply of electricity in the market.[27] In addition:

- while the 554MW Attarat oil shale-fired power station and open cast oil shale mine (believed to be Jordan's largest-ever foreign investment at US$2.1 billion)[28] was recently completed, the commercial operation is suspended pending the completion

of arbitration proceedings arising from the government's allegation against the owner of the power plant of 'grave deception' in the electricity tariff to be paid;[29] and

- Jordan is only three years into its 15-year, US$10 billion natural gas supply deal with Israel; as such, an oversupply of electricity production will likely disincentivise the adoption of new renewable projects.[30]

Still, the ending in mid-2022 of the restriction on the approval of renewable projects should allow for new opportunities in the renewables space.[31] Indeed, Masdar signed a memorandum of understanding with the Jordanian government in November 2022 to develop renewable energy projects with a capacity of up to 2GW.[32] Jordan signed a further memorandum of understanding with Israel in November 2022, pursuant to which Jordan will trade electricity generated from new PV plants (with an aggregate capacity of 600MW) in return for desalinated water.[33]

Kuwait

Renewable Strategy

Like other countries such as Saudi Arabia, Kuwait is seeking to diversify its economy, which is highly dependent on oil.[34] Against this backdrop, and increased market volatility, Kuwait is aiming to diversify its energy mix, with the intention that renewables will comprise 15 per cent by 2030.[35] However, as of October 2022, Kuwait's aggregate energy production from renewable sources was only 0.3 per cent, leading commentators to argue that increased resources should be funnelled into developing the country's renewable energy sector.[36]

Pipeline

Kuwait has been criticised for a lack of engagement with renewable projects.[37] However, certain projects are currently being considered. For example, a private consortium of investors has requested governmental approval to build a 5GW solar project worth US$3.5 billion in Northern Kuwait,[38] with the intention that the energy produced be sold to the government.[39] In addition, construction by the government of the US$60 million Subiya Water Storage Solar PV Plant is expected to commence this year.[40]

Israel

Renewable Strategy

The Israeli government aims to produce 20 per cent of its energy from renewable sources by 2025, rising to 30 per cent in 2030.[41] The Israeli Ministry of Environmental Protection has also called for an increase of the 2030 target to 40 per cent.[42]

The aim is for 90 per cent of the 30 per cent goal to be produced from solar with wind, biomass and water comprising the remaining 10 per cent.[43] Reaching the 2030 goal will require the provision of 17GW of renewable energy infrastructure and 3.5GW of storage, a significant uplift from Israel's February 2022 capacity of 3.5GW and 1.5GW, respectively.[44]

Pipeline

The emphasis placed by the Israeli government on solar energy is supported by the country's many current and future renewable projects. In January 2021, the government announced the result of a tender, awarding 608.95MW of solar projects to seven bidders (including Doral Renewable Energy Resources (allocated 200MW) and SolGreen (95.6MW)) at a tariff of approximately US$0.054/kWh.[45] In December 2021, a subsequent tender awarded 814MW

of further solar projects at an average price of US$0.0541/kWh to six separate entities, including Prime Energy (475MW) and Doral Energy (100MW).[46] Other future projects include a 300MW solar project (including a 210MWh energy storage facility) allocated to Shikun & Binui at a price of US$0.027/kWh[47] and the installation of 41 wind turbines in the Northern Golan Heights by Energix Renewable Energies Ltd.[48] In addition, an 800MW renewable energy storage centre at the Gilboa industrial park in the Jezreel Valley is awaiting approval.-[49]

Saudi Arabia

Renewable Strategy

Saudi Arabia aims to produce 50 per cent of the country's power from renewable sources by 2030. As such, they have identified a number of projects to increase their renewable energy capacity from 1GW to the requisite 58.7GW. It is currently projected that 40GW of power will be derived from solar PV, with the remaining 16GW being generated from wind.-[50] Furthermore, in October 2021, Saudi Crown Prince Mohammed bin Salman announced Saudi Arabia's intention to achieve carbon neutrality by 2060.[51]

In January 2023, Saudi Arabia announced plans to invest over US$265 billion on the development of renewable energy projects, including an intention to become the leading exporter of hydrogen.[52]

Pipeline

At the end of 2022, arrangements were finalised for the development and construction of the largest solar plant in the Middle East. It is estimated that the project will have the ability to generate sufficient electricity to satisfy the needs of 350,000 homes a year.[53] The 2.1GW capacity site, based in Al Shuaibah, Makkah province, will be jointly owned by Water and Electricity Holding Company (Badeel), a branch of the country's Public Investment Fund, Saudi Arabia's sovereign wealth fund and ACWA Power.[54] The project is expected to begin commercial operations in the final quarter of 2025.[55]

Additionally, Saudi Power Procurement Co (Principal Buyer) – a state-owned company responsible for competitive tendering of renewable and conventional energy projects[56] – has recently floated five renewable energy projects with the capability of generating 3,300MW of energy.[57] Of the five projects, two will be wind projects and the remaining three will be solar projects. The wind projects will have a combined capacity of 1,800MW and will be based in Yanbu (700MW), Al-Ghat (600MW) and Waad-al Shamal (500MW). The solar projects will have a combined capacity of 1,100MW and will be based in Al-Henakiyah (1,100MW) and Tubarjal (400MW). Although Saudi Power Procurement Co has not concluded its tender process, it is likely that the projects will be awarded to various privately owned foreign contractors. Finally, the 1,500MW Sudair solar power plant is being developed by the Saudi Public Investment Fund at a cost of US$950 million.[58]

Egypt

Renewable Strategy

Under its Integrated Sustainable Energy Strategy, the Egyptian government set itself the ambitious goal of producing 42 per cent of its electricity from renewable sources by 2035.[59] The 42 per cent is comprised of 22 per cent PV, 14 per cent wind, 4 per cent concentrating solar power and 2 per cent hydropower. Despite hosting the 1.8GW Benban complex, Africa's biggest solar power plant,[60] in November 2022, it was estimated that Egypt will fall 15 per

cent short of its 2035 target.[61] The contributing factors cited included the country's reliance on its vast gas reserves, insufficient private investment and substandard infrastructure.[62]

Pipeline

Masdar, Infinity Power, Hassan Allam Utilities and the Egyptian government entered into a memorandum of understanding at the 2022 United Nations Climate Change Conference (which was held in Egypt) for the development and construction of a 10GW onshore wind project.[63] Once complete, the project will be one of the largest wind farms in the world.[64] This announcement came shortly after it was disclosed that ACWA Power had executed a memorandum of understanding with the Egyptian government to build a 10GW wind farm.-[65] Additionally, Abydos Solar Power Company (a subsidiary of AMEA Power) is expected to finish the construction of the 500MW Abydos Solar Power Plant during 2024.[66]

THE POTENTIAL FOR RENEWABLE ENERGY DISPUTES IN THE MIDDLE EAST

As ever-increasing capital investment flows into renewable energy projects in the region (as discussed above) it is trite, but nonetheless true, to posit that the scope for disputes in the sector will expand. However, the Middle East region has not yet experienced the surge of renewable energy-related investor state arbitrations affecting states in other regions such as Spain, Italy and Romania. This can be attributed to the low adoption of the Energy Charter Treaty in the region and the relatively late introduction of renewable energy projects. The particular circumstances affecting renewable energy projects in the region, however, make it likely that significant disputes will arise in the coming years. Such factors include the following.

Political Instability

The Middle East has long suffered from political instability.[67] The conflict in Yemen[68] and revolutionary uprisings in Iran[69] are recent examples of threats to the region's security. Such unstable environments inevitably exacerbate the risk of arbitral disputes.

First, in the 'traditional' energy sector, private companies have sought to enforce their contractual rights via arbitration when countries have experienced political turmoil. For example, three Indian oil companies successfully enforced an arbitration award against Yemen following a dispute arising out of the Arab Spring.[70] The companies asserted events of force majeure and terminated the relevant agreements (which the state contested) on the basis that they were unable to perform their contractual obligations due to ongoing protests threatening the project's security.[71] Similarly, since the Gaddafi regime was overthrown in 2011, Libya has been faced with a number of arbitrations involving its oil and gas sector, including a US$900 million ICC claim brought by an Indonesian energy company for disruption caused to its oil exploration and drilling project due to instability,[72] and a billion US dollar claim brought by an Emirati investor under the investment agreement of the Organisation of Islamic Cooperation for 'progressive loss' leading to the expropriation of Africa's biggest refinery.[73]

Second, governmental entities have historically implemented subsidy programmes to attract and support the significant initial financial investment required to bring renewable energy projects online.[74] Where a subsequent regime revokes subsidies granted by the previous government, disputes may arise between investors and that new regime. By way of example, having historically provided generous incentives for renewable energy projects, Spain has faced numerous claims from investors under the Energy Charter Treaty for,

inter alia, breaches of the 'fair and equitable treatment standard' following the revocation of subsidies.[75] Egypt could face a similar fate as, in 2022, the country introduced a grid integration fee for large solar power plants, which could render renewable energy projects unfeasible in comparison to conventional energy sources.[76]

Finally, political instability may also affect supply chains and thereby impact renewable energy projects, as the absence of safe and efficient transport links hinders the delivery of critical infrastructure. In addition, access to the grid through which a project's energy is sold onwards may also be hampered by political considerations. For example, plans to export 250MW of surplus Jordanian electricity production to Lebanon, which has suffered from severe power shortages, has been hampered by the imposition of US sanctions on Syria (as the exported electricity would need to pass through Syrian transmission lines to reach Lebanon).[77]

Nature Of Projects

The complexity and size of renewable energy projects requires the involvement and harmonisation of multiple parties to achieve completion in accordance with the parties' respective contractual obligations.[78] Owing to the number of parties typically involved in a large-scale renewable energy project, a matrix of contracts is required. The types of contractual relationships often encountered include, inter alia, those between:

- the employer or owner and the contractor (under the main construction agreement);
- the buyer and seller (under the power purchase agreement); and
- parties providing significant initial financial investment (by way of joint venture agreements and other financing arrangements).[79]

In the first and second case above, disputes may arise regarding timely completion of projects or poor performance (and thereby trigger back-to-back disputes).[80] In the latter case, disputes may arise from a failure to meet funding obligations. In addition, as with most large construction projects, interface risk from contracts that are not back-to-back may result in additional disputes.

Construction-related Disputes

The infrastructure required to furnish the Middle East's renewable energy projects is often of considerable size and breadth. For example, 'Phase 2' of the Mohammed bin Rashid Al Maktoum Solar Park in Dubai (the world's largest single-site solar park) required the installation of 2.3 million PV solar panels.[81] The requisite time and resources required to construct such large-scale projects provides ample opportunity for disputes to arise. Indeed, the likelihood of such disputes is further compounded by the fact that Middle East is, according to the HKA's annual CRUX Insight Report:

> the world's most challenging region for realising construction projects, with delays averaging 22.5 months or 83% of schedule duration. The average sum in dispute ($154 million) was more than a third of project expenditure (36% of CAPEX).[82]

The root causes of these statistics are believed to arise from the region's relatively infant construction industry.[83] Construction disputes are frequently due to:

- differing interpretations of ambiguous or conflicting contractual provisions;
- disorderly scope of work modifications; and
- delays arising from, inter alia, late payments and approvals.[84]

Disputed Territories

Competing claims to land on which projects are to be built may lead to disputes. For example, the Israeli government's development of a wind farm in the Golan Heights has been opposed by members of the local Syrian population.[85] In 2017, solar panels in a Dutch-funded solar power plant in the West Bank were confiscated and destroyed by the Israeli army.[86] In a region with active border disputes, the potential exists for the land on which a project is situated to be claimed by a neighbouring state.[87]

Weather

Owing to the Middle East's emphasis on solar projects and the region's favourable climate, one might consider that weather conditions are unlikely to be a major source of disputes. However, an increasing number of sandstorms are afflicting the region, causing losses of around US$13 billion a year.[88] Sandstorms can afflict the smooth operation of solar projects in a number of ways, including:

- dust covering panels, which, if unchecked, can lead to operational issues;
- reduced solar radiation reaching panels; and
- short-circuiting electrical transmission infrastructure from the combination of dust particles and water.[89]

Liability for resulting losses could therefore lead to disputes where the allocation of risk of severe weather is not clearly set out in party agreements.[90]

Technology

Owing to the relatively nascent status of the renewable energy industry, new technologies can be unreliable.[91] This can often lead to a disconnect between the expected and actual performance and longevity of projects, which, in turn, more frequently forms the basis of disputes. The outcome of the English Supreme Court case, *MT Højgaard A/S (Respondent) v E.On Climate & Renewables UK Robin Rigg East Limited and another (Appellants) [2017]* UKSC 59, is instructive. While MT Højgaard A/S ultimately turned on an issue of contractual interpretation under English law (which may not be applicable to the Middle East), the factual matrix is instructive as to the issues that can arise when employing novel technology.[92]

In MT Højgaard A/S, the foundations of 60 offshore wind turbines at the Robin Rigg wind farms in the Solway Firth built by the contractor (MTH) had been constructed in accordance with an agreed international standard: J101. J101 is published by an independent classification and certification agency – Det Norske Veritas – and provides, inter alia, an equation to be used when constructing the foundations of wind turbines (the Equation). MTH completed the construction of the wind turbines in February 2009. However, in the following months, an error with the Equation was discovered at another wind farm in the Netherlands also constructed in accordance with J101 – one of the values included in the Equation was incorrect by a factor of 10. The effect of the error was that the axial capacity of the grouted connections in the turbines' foundations was significantly overestimated, leading to failed connections.[93] In 2010, the foundations of the turbines at the Robin Rigg wind

farms constructed by MTH began to fail, as they had at the Dutch wind farm. The error in the Equation is believed to have caused deficiencies in 14 UK offshore wind farms.[94] Such issues are expected to be commonplace, particularly where newly developed technologies are not suitably adapted to climatic conditions in the Middle East.

LEGAL FRAMEWORK

The issues described above are expected to give rise to an increase in disputes, many of which will be the subject of arbitration proceedings due to the international nature of the parties involved in implementing renewable energy projects in the Middle East. While international arbitration proceedings generally follow a common framework, certain legal considerations are of particular importance to renewable energy project agreements governed by Middle Eastern laws. These include the following.

- An all-encompassing duty of good faith. There is an overarching obligation to perform contracts in good faith even if good faith is not specifically mentioned in the contract. For example, article 246 UAE Civil Code provides that '(1) The contract must be performed in accordance with its contents and in a manner consistent with the requirement of good faith. (2) The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction.' The meaning of the term 'good faith' is not defined, although the assessment of whether a party has acted in good faith is a question of fact. A related concept is that of abuse of right, where a party's exercise of a legal right is prohibited if it will, inter alia, result in harm to the other party that is disproportionate to the benefit gained.
- Liquidated damages can be adjusted by a court (or tribunal) to become equal to the actual loss suffered. For example, article 390 of the UAE Civil Code provides that '(1) The contracting parties may fix the compensation in advance by providing for it in the contract or by later agreement under the law; (2) The court may, on the application of either party, adjust the agreed amount of compensation so it is equal to the loss. Any agreement to the contrary shall be void.' Certain jurisdictions such as Qatar only permit the revision of the amount of liquidated damages downwards, but not upwards.
- An adjustment of the contract price can be imposed if performance is rendered onerous by exceptional events (different from force majeure). If an unexpected rise in the cost of material renders the performance of a lump sum contract unduly onerous, but not impossible, then the contractor can apply to a court or tribunal for the amendment of the contract price. For example, article 249 of the UAE Civil Code states: 'If exceptional events of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes onerous for the obligor so as to threaten him with grave loss, it shall be permissible for the judge [or arbitral tribunal], in accordance with the circumstances and after weighing up the interests of each party, to reduce the onerous obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void.' However, there are strict requirements for this to occur. Similar provisions exist elsewhere in the region, although in certain jurisdictions, the court may only order the parties to renegotiate the agreement.
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Sharia law. The preceding legal concepts are common to civil codes across the region,[95] with some variations. Saudi Arabia has not implemented a civil code and relies on Sharia principles, which, in practice, often replicate the civil code traditions of neighbouring countries.[96] There are, however, certain specificities pertaining to the direct application of Sharia law in Saudi Arabia, the most distinctive of which is the non-enforcement of contractual clauses that entail the payment of interest.[97] Claims for loss of profit are also generally not enforceable under Saudi law.[98]

CONCLUSION

The pipeline of renewable energy projects currently being implemented across the Middle East is likely to give rise to a significant number of disputes down the line. Such disputes could arise due to reasons that are common to construction or renewable energy projects in general, but also due to reasons that are specific to the Middle Eastern context. These disputes will need to be managed in a manner that is sensitive to the legal, political and geographical particularities of the region.

Endnotes

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