



## INVESTOR-STATE ARBITRATION PROCEDURES under the ASEAN Comprehensive Investment Agreement (“ACIA”)

*By L-Martin Desautels, managing partner, Alex Larkin, senior adviser  
and Jeanne Perreault, legal adviser*

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This paper focuses on investor-state dispute resolution procedures provided for by the ACIA, first providing an overview of the situation of arbitration under investment laws in the ASEAN region and continuing with a discussion of the ACIA and certain of its key provisions. The paper will then briefly explain the protections offered to foreign investors under the ACIA as well as the mandatory procedures for the submission of a claim under the ACIA.

Many large-scale foreign investment projects involve agreements wherein a State actor is one party to the agreement, with one or more investors also being parties. Such projects may include infrastructure, power plants, and land concessions, as well as specific licensing such as telecommunications licensing, mining licensing, etc. In such agreements, the State actor party typically undertakes certain obligations to ensure that the investor parties are enabled to carry out the contemplated project with the support of the host State.

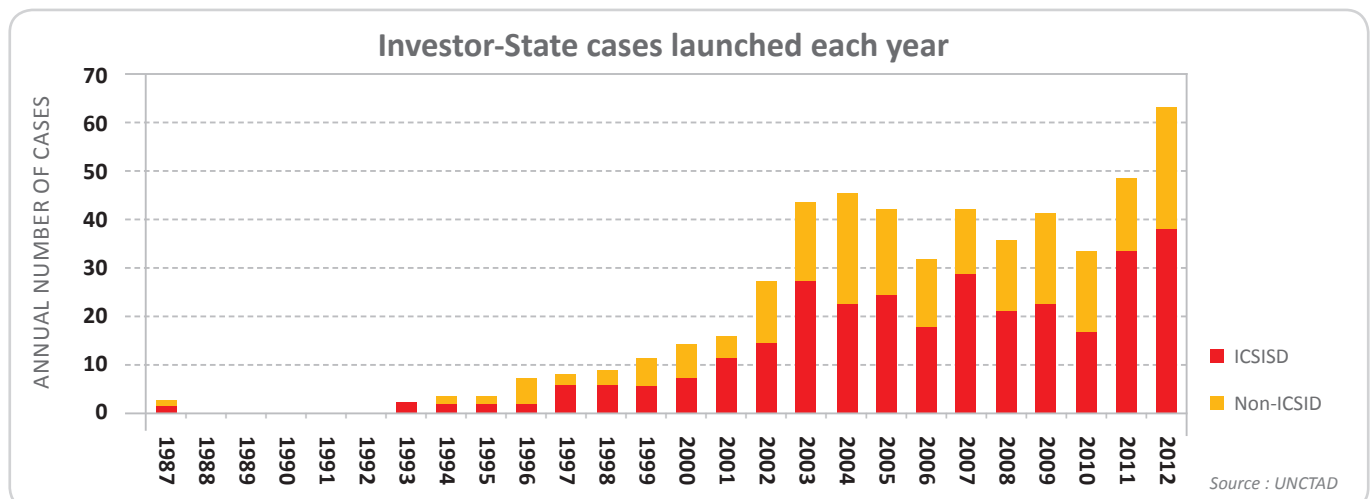
When entering into such agreements, foreign investors must consider the dispute resolution mechanisms available to them in the event the State actor party, or another party to the agreement, should fail to meet their obligations under the agreement. Invariably, there is cause for apprehension as to whether local courts and even local arbitration bodies are capable of hearing such disputes with true impartiality.

Globally, under investment law, arbitration is often considered the primary option for foreign investors wishing to pursue claims against a host State. Provisions on investor-State dispute settlement mechanisms are incorporated within most international investment treaties and bilateral investment agreements.

Specifically regarding the ACIA, it offers an additional protection to investors from any ASEAN Member States contracting with an ASEAN Member State by providing a dispute resolution mechanism in favor of the foreign investor, who has the option to use it or not. If the investor chooses to benefit from this protection, the Member State will have no choice but to comply as the Member State is deemed to have accepted such mechanism when it signed the ACIA. This additional protection is available to the investors even if no dispute settlement has been agreed between ASEAN Member and the ASEAN Investor and it would cover a wide range of investments.

The opportunity to select arbitration is seen as an important element of investment promotion and protection and the number of new cases is on the rise, as shown in TABLE 1 below. In 2012, 58 new known investor-State dispute settlement (“ISDS”) cases were initiated, bringing the total number of known cases to 514. This is the highest number of submitted ISDS claims recorded in any one year and it illustrates that foreign investors prefer to submit disputes to an international arbitral body rather than using traditional proceedings before local courts.<sup>1</sup>

TABLE 1: Source UNCTAD (United Nations Conference on Trade and Development)



## Why investors choose arbitration?

There are many explanations supporting the increase of investment disputes being submitted to international arbitration, in preference to local courts, including cultural differences, language issues, and perception of transparency, among others. The traditional litigation process is also generally viewed as being slow and inefficient and the proceedings are usually public, which may be perceived as prejudicial to some investors who prefer to exercise a certain amount of control over the publicity surrounding litigation procedures.

In investor-State disputes, international arbitration can also be seen as being less prone to political influence and more impartial than local courts. Arbitration is commonly considered to be faster, less formal and more confidential. Further, the parties may select the language of the arbitration proceedings, the governing law and arbitration rules to be applied to the proceedings, and perhaps most importantly, select the arbitrator(s) who will hear the matter.

Selection of arbitrators presents a significant advantage over court action, as the parties have the opportunity to appoint arbitrators who have experience and expertise in the specific area of law or commerce which gives rise to the dispute, whereas local courts typically appoint a judge on a rotational basis, who quite often will have little or no expertise in the specific area of the dispute.

The ASEAN member states are aware of the necessity of offering foreign investors a competitive level of protection in order to provide foreign investors with a certain level of comfort with respect to their investments. The next section of this paper will introduce ASEAN and will present the ACIA, which is often considered the agreement having the most important impact on foreign direct investment ("FDI") and foreign investors among the ASEAN member States. Finally, the arbitration proceedings provided for by the ACIA will be explained.

## ASEAN and ACIA: attracting FDI within the region

ASEAN, the Association of Southeast Asian Nations, is a regional organization which aims to accelerate social progress, cultural development and economic growth. It was founded in 1967 and now counts 10 members: Brunei Darussalam, Cambodia, Indonesia, the Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam (the "Member States"). ASEAN is comprised of three pillars: the ASEAN Political Security Community ("APSC"), the ASEAN Socio-Cultural Community ("ASCC") and the ASEAN Economic Community ("AEC"), each having a blueprint for its implementation. Specifically regarding the AEC, its goal is to transform ASEAN into a single market, highly competitive economic region and achieve

regional economic integration by 2015. Several measures have been put in place towards this objective and the entry into force, in March 2012, of the ACIA is considered one of the most important. The ACIA focuses on the promotion of the ASEAN region as an integrated, favorable and safe area for foreign investors. Its purpose is to increase investor confidence within ASEAN. The ACIA's objective is the progressive liberalization of the investment regimes of the Member States in many sectors such as: manufacturing, agriculture, fishery, forestry, mining and quarrying, services incidental to those sectors as well as any other sectors as may be agreed by the Member States.<sup>2</sup>

## Overview of the protections contained in the ACIA

The ACIA offers a range of protections for entitled investments which are ensured by a number of obligations imposed on Member States. These include the obligation to provide fair and equitable treatment, national and most-favored nation treatment, as well as

full protection and security and the obligation to offer protection from expropriation.

We have summarized these obligations / protections in TABLE 2 below:

TABLE 2: ACIA - Protections for foreign investors

Articles 5 & 6	Member States must treat investors and investments from other Member States no less favorably than domestic investors and investments (article 5) from any other Member State or non-Member State (article 6)	Article 12	Member States shall accord to investors, concerning their covered investments which suffered loss due to armed conflict, civil strife or emergency, non-discriminatory treatment with respect to restitution, compensation
Article 8	Juridical person may not be required to appoint senior management of a particular nationality	Article 13	Capital, profits, dividends, and other transfers related to covered investments can be freely moved into and out of each Member State. Although a Member State may prevent or delay a transfer through the application of its laws and regulations (such as taxation, bankruptcy, etc.)
Article 11	Member States shall provide to investors fair and equitable treatment and full protection and security.	Article 14	Covered investment shall not be expropriated or nationalized without fair compensation and due process

## To whom and to what ACIA benefits apply?

The ACIA applies to specific investment sectors such as: manufacturing, agriculture, fishery, forestry, mining and quarrying, services incidental to these sectors as well as any other sector as agreed by all the Member States.

In order to benefit from the protections set out in the ACIA, an investment must be a "Covered Investment" as defined in Article 4 (a) of the ACIA. Specifically, a Covered Investment is an investment made by an investor of one Member State in the territory of another Member State which have been admitted to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of the Member State.

To qualify as an "Investment", the investment must fall under the definition provided in Article 4 (c) of the ACIA which states: "every kind of asset, owned or controlled by an investor", including but not limited to: movable and immovable property, shares, stocks, intellectual property rights, claims of money, etc. A list of assets which may be considered as "investments" under the ACIA is provided in TABLE 3.

ACIA benefits apply to investors from Member States, including both natural and juridical persons, and extends its protection to investors from outside ASEAN who set up a juridical entity in any

of the Member States, provided, however, that such entity must carry out substantial business activities in the ASEAN Member State. A juridical entity which is established in a Member State, but does not carry out substantial business activities in that Member State, can be denied the protections of the ACIA in the event that such juridical entity invests in another Member State<sup>3</sup>.

Benefits of the ACIA can also be denied if the investor is a juridical person of a Member State but is controlled by an investor of a non-Member State. According to Article 19 (3) of the ACIA, "a juridical person is "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions." These measures exist to deter the use of mere shell companies and to deter "Treaty Shopping" which consists of the use of a treaty contrary to its object or purpose. For example, the establishment of a business entity by an investor from outside ASEAN, in an ASEAN Member State, solely for the purpose of enjoying the protections provided by the ACIA, which benefits would otherwise not be available, would not be consistent with the intended purpose of the ACIA, which is to promote investment among investors of the Member States.

TABLE 3: Types of investments and examples in reference to article 4 (c) ACIA<sup>4</sup>

Types of investment	Examples
Movable and immovable property and property rights.	Machinery, factory building, leases, liens, mortgages, charges.
Shares, stocks, bonds and debentures.	Shares, bonds held in a company or corporation.
Intellectual property rights and goodwill.	Patents, registered trademarks, geographical indications, trade secrets, industrial designs, copyrights.
Claims to money or to any contractual performance related to a business.	Profit sharing agreement, partnership agreement.
Rights under contracts, including turnkey, construction, management, production or revenue sharing contracts.	Turnkey construction agreement, project management, production sharing agreement.
Business concessions required to conduct economic activities and having financial value conferred by law or under a contract, Including any concessions to search, cultivate, extract or exploit natural resources	Expressway build operate and transfer concession including the rights to collect toll, mining contract.

## Cause of action

Section B of the ACIA<sup>5</sup> concerns investment disputes between an investor and a Member State. It provides the options available to investors related to the settlement of litigation matters and mandatory proceedings. An investor wishing to submit a claim under the ACIA must have incurred a loss or damage as a result of a violation of their rights arising under Articles 5, 6, 8, 11, 12, 13 or 14 of the ACIA<sup>6</sup>. These articles have already been summarized in TABLE 2 above.

Some of the articles listed above concern the liberalization of investments by according national treatment and most-favored nation treatment to investors from Member States<sup>7</sup>. The ACIA recognizes, however, that not all Member States agree to let these sectors open without any restrictions whatsoever. As such, Article 9 of ACIA provides that

liberalization shall not apply to an existing measure or a renewal maintained by a Member State and notified to the ASEAN Secretariat. This is an exception that all investors should be aware of since it prevents them from receiving protection in some particular cases. For example, Cambodia does not grant national treatment to land ownership and Myanmar asserted a reservation regarding national treatment in any newspaper business. The list of reservations made by each Member States is available on the ASEAN website<sup>8</sup>.

It should be noted that Section B of the ACIA does not apply "to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Agreement."<sup>9</sup>

## Initiating dispute resolution procedures

The ACIA encourages dispute resolution through conciliation which may begin at any time and be terminated at the request of one of the parties. Conciliation can be continued during arbitration<sup>10</sup>.

The ACIA requires parties to an investment dispute to try to resolve the dispute by consultation and negotiation, prior to initiating a claim whether under local courts or arbitration. Such consultations or negotiations shall be initiated by a written request by the disputing investor to the Member State and should commence within 30 days of receipt of said request.<sup>11</sup>

If the dispute has not been resolved within 180 days of the receipt by the Member State of the request for consultations, the investors may submit their claim under host State courts or under arbitration. This paper focuses on arbitration procedures, and does not discuss or address the option of an investor selecting court action in the event of a dispute. However, it should be noted that Article 33 (1)(a) of the ACIA does permit the parties to submit their claim to the courts or arbitration tribunals of the disputing Member State.



## Arbitration procedures under ACIA

### Where and how?

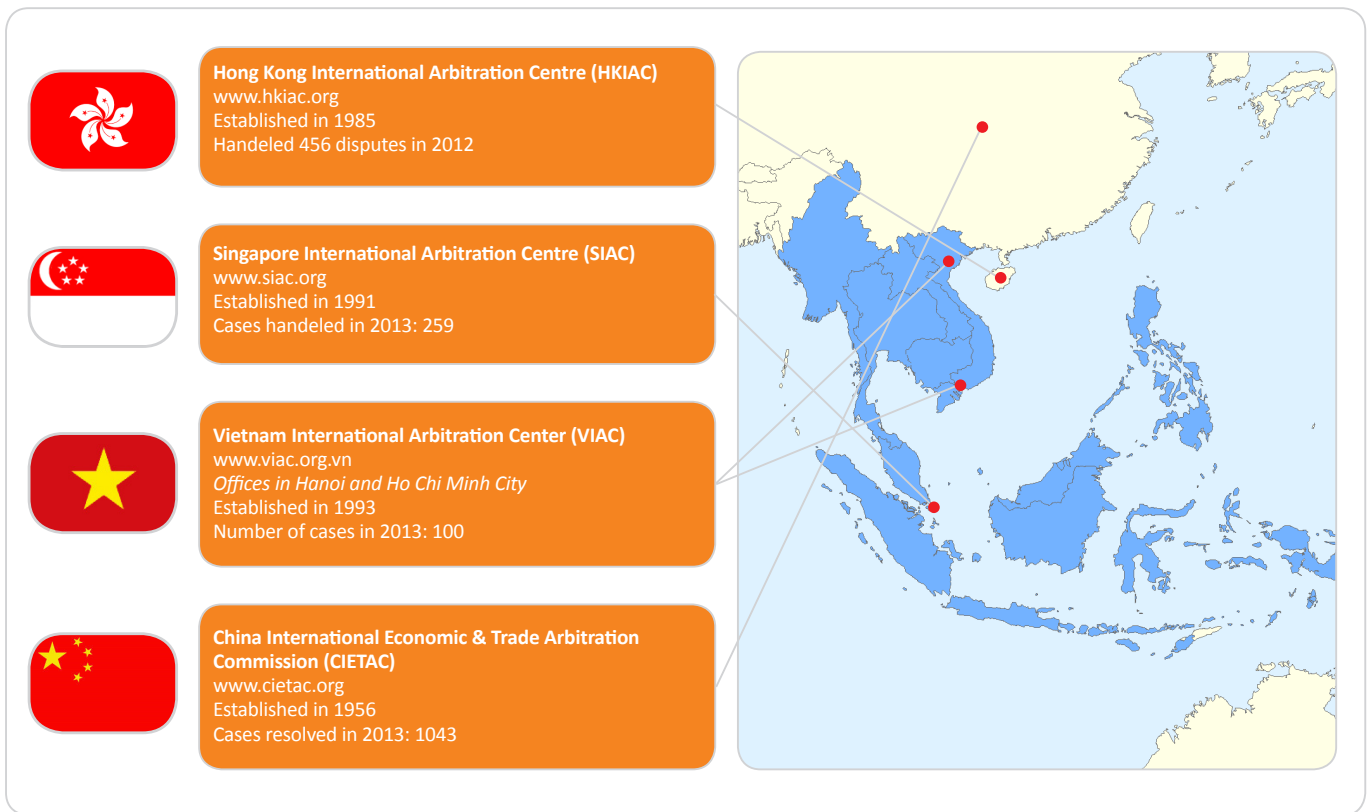
Article 33 (1) of the ACIA explains the choices offered to an investor in terms of which institutions they may submit a claim and under

what instruments under the ACIA. These options are summarized in TABLE 4 below:

TABLE 4: Institutions/centers under which an investor may submit a claim under the ACIA

International Center for Settlement of Investment Disputes Convention (ICSID Convention) and the ICSID rules of procedure for arbitration proceedings	Both the disputing Member State and the non-disputing Member State must be parties of the ICSID Convention. The ICSID Convention entered in force in 1966 and as of April 2006, 143 countries have ratified it. Currently, Lao PDR, Vietnam and Myanmar are not parties to the ICSID Convention. Thailand signed it, but it is not yet in force. <sup>12</sup>
ICSID additional facility rules	Apply if either the disputing Member State or the non-disputing Member State is a party to the ICSID Convention.
United Nations Commission on International Trade Law (UNCITRAL) arbitration rules	For investor-state arbitration, these rules include the UNCITRAL Rules on Transparency.
Regional center for arbitration at Kuala Lumpur	<a href="http://klrca.org">http://klrca.org</a> Established in 1978 and its awards are enforceable in 149 countries.
Any other arbitration institutions agreed to by the parties	Please refer to TABLE 5 which presents well-established arbitration centers in Asia.

TABLE 5: Arbitration centers in Asia



### Applicable rules

Article 33 (3) of ACIA provides that the arbitration rules applicable to the institution and/or under the rules selected by the parties, and in particular by the party submitting a claim, shall govern the arbitration proceedings, except to the extent modified by the ACIA. The rules will generally depend on the choice made by the parties to the dispute as to the institution or the center under which the dispute is submitted, as summarized in Table 4 above. In case of conflict of rules, the ACIA rules of arbitration will prevail.

### Submission of the claim

The submission of the claim must occur within three years of the time the investor became aware, or reasonably should have become aware, of a breach of an obligation by the Member State party, which causes loss or damage to the investor. At least 90 days prior to the submission of the claim, the investor shall provide the Member State with a notice of arbitration, which must be accompanied by a waiver of their right to initiate or continue the proceedings before the courts. Both the notice and the waiver must be in writing<sup>1</sup>. A claim is deemed submitted to arbitration when the investor's notice of request for arbitration is received under the applicable arbitration rules.<sup>14</sup>

### Selection of arbitrators

Unless the parties agree otherwise, the tribunal shall comprise three arbitrators: one appointed by each of the parties and a third one, who shall be the presiding arbitrator, which will be decided by agreement of both parties. The parties are responsible for the cost for the arbitrator they appoint and the parties share the cost of the presiding arbitrator equally. If the tribunal has not been constituted within 75 days from the date of submission of a claim, one party can request the appointed authority to appoint one or more arbitrators. Decision on the claim is reached by a majority of arbitrators and shall be binding.<sup>15</sup>

### Conduct of the arbitration proceedings

If issues related to jurisdiction or admissibility are raised, the tribunal shall decide such preliminary objections before proceeding to the merits of the dispute. A Member State wishing to raise an objection that a claim is manifestly without merit or outside the jurisdiction or competence of the tribunal shall proceed to raise such objection within 30 days of the constitution of the tribunal<sup>16</sup>. The place of arbitration shall be in a State that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>17</sup>

Agreements which give rise to investment disputes, entered into between an investor and a state, may contain arbitration provisions which contradict provisions of the ACIA. Such a situation would not, generally, prevent the investor from using the dispute resolution mechanism provided by the ACIA. Many arbitral awards make a distinction between international commercial arbitration (contract) and treaty arbitration (ACIA) because they have different legal bases. The first concerns the breach of a contract and the second one, a sovereign act of a state. Consequently, generally, a dispute that is purely contract-related would have to be brought before the forum agreed in the contract and a dispute arising from the interpretation of the treaty can be submitted in accordance with the mechanisms provided by that treaty.

That said, the reality is more complicated because in some cases, a contract breach may also constitute a treaty breach, for example where an ASEAN Member State agreed by contract to maintain the regulatory framework that applies to an investment, failure to maintain such regulatory framework may constitute a breach of the contract in that particular case and may also constitute a failure to comply with treaty obligations (such as the ACIA). It is critically important to evaluate investor-state disputes on a case-by-case basis in order to determine whether such dispute falls within a breach of contract regime, treaty regime, what the applicable dispute resolutions may be, governing law, etc. Accordingly, investors finding themselves in such a situation should seek professional advice before taking action.

### Award and enforcement

The parties may settle the dispute at any time of the procedures and before the issuance of the arbitration award. If a tribunal makes a final award against one of the parties, the tribunal may only award monetary damages or restitution of property, in which case the Member State may pay monetary damages in lieu of restitution. A tribunal may also award costs and attorney's fees but may not award punitive damages<sup>18</sup>. The disputing party may not seek enforcement of a final award until a minimum delay of 90 or 120 days, depending on which institution the

proceedings have been conducted under and if revision or annulment proceedings have been completed by one of the parties. Following the ACIA, each Member State shall provide for the enforcement of an award in its territory<sup>19</sup>. The award may also be enforced in any state which is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention is in force in all ASEAN member states<sup>20</sup>. TABLE 6 shows a schematic version of the dispute resolution proceedings.

#### Example of recourse

An investor from an ASEAN Member State was granted a license, by another ASEAN Member State, to carry a particular business activity on its territory as a foreign investor. Such license was later canceled without cause and without an appropriate compensation by the host state. The investment contract signed by the parties does not provide a dispute resolution mechanism. However, in some cases, the withdrawal of a license may constitute a violation of the host state obligations under the ACIA and allows the ASEAN investor to benefit from the investor-state arbitration procedures provided in the ACIA.

TABLE 6: Summary of dispute resolution proceedings under ACIA



## Conclusion

In summary, ASEAN Member States wish to attract foreign investments from investors within the ASEAN region and achieve liberalization of many investment sectors among the Member States. The enhanced protection to investors and their investments in the region is seen as an important factor to achieve these goals. By agreeing to the ACIA, the Member States agreed in advance to follow the dispute settlement procedures provided in the ACIA, and to ensure the investor protections

provided therein. Although the ACIA illustrates a strong and true commitment of the Member States in the promotion and the protection of investments in their respective nations, the treaty does contain several limitations. It is important for investors to seek advice from well-established and experienced professionals to take full advantage of the protections they can benefit from and to understand the limitations of the ACIA and dispute resolution mechanisms generally.

#### REFERENCES:

- 1 - United Nations Conference on Trade and Development, World Investment Report 2013
- 2 - Articles 1 and 3 of the ACIA
- 3 - Article 19 of the ACIA
- 4 - ACIA - Guidebook for Businesses and Investors, ASEAN Secretariat, March 2013
- 5 - Article 28 and seq. of the ACIA
- 6 - Article 32 ACIA of the ACIA
- 7 - Article 5 and 6 of the ACIA

- 8 - <http://www.asean.org/communities/asean-economic-community/item/asean-comprehensive-investment-agreement-reservation-list>
- 9 - Article 29 (3) of the ACIA
- 10 - Article 30 of the ACIA
- 11 - Article 31 of the ACIA
- 12 - International Center for Settlement of Investment Disputes, as of November 1, 2013.
- 13 - Articles 33 and 34 of the ACIA
- 14 - Article 33 (2) of the ACIA

- 15 - Article 35 of the ACIA
- 16 - Article 36 of the ACIA
- 17 - The list of such States is available on the UNCITRAL website: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)
- 18 - Article 41 of the ACIA
- 19 - Article 41 (9) of the ACIA
- 20 - [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)



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