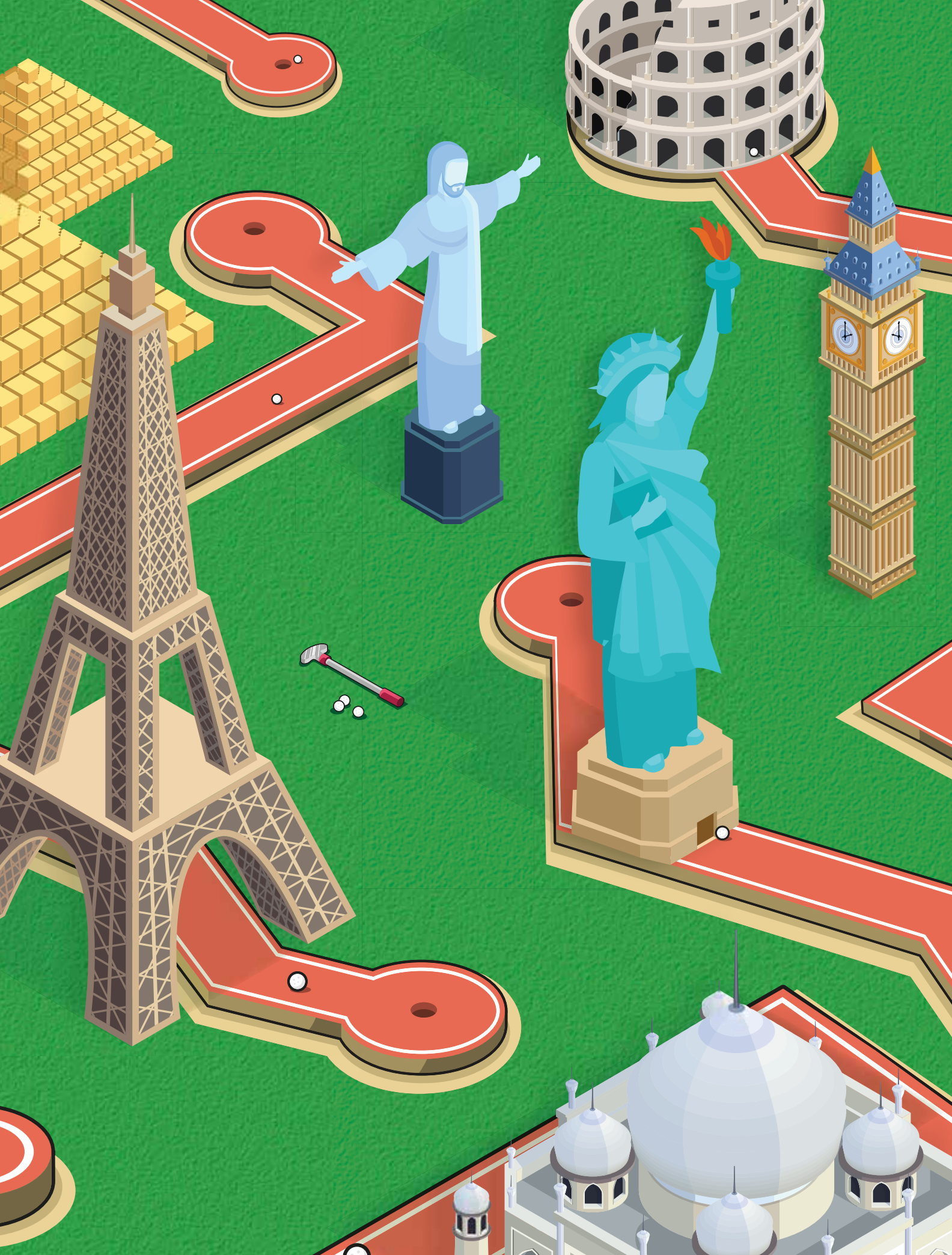

CHEAT SHEET

- *Tailoring a policy.* It is vital that your dispute resolution strategy is tailored to your company's commercial needs to mitigate the risk of obstructing company objectives.
- *Arbitration haven.* International arbitration offers a neutral forum to minimize the risk of litigation in the other party's home court – thus minimizing the risks of political influence and corruption.
- *After the fact.* It's essential to determine the root cause of the dispute after it's happened. In many parts of the world, especially where the line between business and government is difficult to discern, private controversies may be driven by external, political, economic, or regulatory forces.
- *Tips and tricks.* To manage cross-border litigation risks, you should (1) carefully incorporate international arbitration, (2) manage brand risk, (3) consider investment treaties and trade agreements, (4) view each dispute multi-dimensionally, and (5) take into account both global and local considerations.

Strategically Managing Your Company's

Cross-Border Litigation Risks

By Javier Rubinstein Over the past several years, authorities in numerous countries around the world have been conducting dawn raids, arriving unannounced, seizing documents, and detaining employees. I lived through similar experiences during my tenure as general counsel, and know what it feels like. Having spent much of my career as a litigation and arbitration lawyer, my immediate instinct in such instances is to go down the path I know best, and seek all available litigation or arbitration remedies.

With time, however, I came to learn that litigation or arbitration are often inefficient ways to solve such problems. In many instances, the goal of protecting the business is not best served by hitting back or winning a legal battle, but rather by using alternative solutions that lie outside of the courtroom. It was only after that realization sank in that I truly understood the difference between being an external counsel and being a general counsel.

The solutions to cross-border legal problems do not always lie with seeking legal relief. Rather, one needs to think multidimensionally about the legal challenges that global organizations face, and also holistically about potential solutions — which may not be legally driven at all. External counsel do what they are asked to do. Litigators litigate, and are trained to win the battles they are asked to fight. The goal of the general counsel is both broader and more nuanced, requiring the ability to understand the nature of a potential problem, how to solve it in a manner consistent with the organization's business objectives, and which tools will maximize efficiency. In cross-border situations, this often means deploying solutions that are not taught in law school.

During my 10 years as global general counsel of PricewaterhouseCoopers (PwC), I had the fascinating and sometimes frustrating opportunity to participate in disputes literally all over the world. As I reflect on that experience, particularly now that I am back in private practice, perhaps the greatest insight is that the key to effective cross-border dispute resolution is to think strategically and proactively about the company's approach to dispute resolution. Below are some specific thoughts and suggestions on how to accomplish that, along with some practical strategies on how to manage cross-border litigation risks around the world.

Constructing an effective cross-border dispute resolution strategy

Most general counsel are quite comfortable managing their domestic litigation risks, both because they understand how the process works and because the risks they face are reasonably predictable. However, when companies start to invest or trade abroad, the litigation landscape becomes much more uncertain and difficult to manage. In practice, litigation processes around the world are quite different. Litigation risks are often impacted by political, regulatory, economic, procedural, and other local factors that one might not encounter at home. So how does one manage such risks, particularly in a company that has dealings all over the world? To answer that complex question, one needs to tackle the issue strategically. Consider the types of disputes that are most likely to arise and then evaluate which of those are most likely to threaten the company's business. It's critical to consider whom the disputes would likely involve and the impact that such disputes might have on the company and its operations. In the end, an effective dispute resolution strategy must be aligned to the company's business strategy if it is to succeed.

To determine what the company's cross-border dispute resolution strategy should consist of, I find that it's easiest to focus first on the litigation risks involving contractual counterparties, and then look separately at litigation risks involving third parties.

Cross-border litigation risks involving contractual counter-parties

Anticipating potential disputes with contractual counter-parties is generally straightforward. The key is to figure out what type of dispute resolution process would optimally serve the best interests of the company, legally and commercially, for resolving the likely disputes. This is especially important for companies that face counter-party risks all over the world involving vastly different legal systems. Determining what the right process should be depends on a number of factors, including:

- How quickly do you need your disputes to be resolved?
- Is litigation cost an issue?
- How much discovery would you need?
- Where would your company most likely need to enforce a favorable arbitral award or court judgment?
- Are potential disputes likely to be complex or require industry expertise?
- Would such disputes likely involve third parties?
- Are the amounts in controversy likely to be large or small from your company's point of view?
- Is your company likely to be a plaintiff or a defendant?
- Is your company comfortable litigating a dispute in the courts of your counter-party's home country? Will your counter-party be willing to litigate in the United States?
- Is your company concerned about the reputational impact of a public court dispute that could otherwise be mitigated by a confidential arbitration process?

Whatever the answers are to these questions, it is vital that your dispute resolution strategy is tailored to your company's commercial needs and provides the tools necessary to resolve the dispute quickly and effectively.

While there is no one-size-fits-all answer to what an optimal dispute resolution strategy should consist of, I have come away from my experience

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as general counsel firmly convinced that international arbitration generally provides the most effective solution for resolving cross-border disputes. That is because, in my humble opinion, there are only a handful of countries where the courts are well-suited to handle cross-border commercial disputes, due in part to:

- Chronic delays that can lead to litigation taking 15 – 20 years and even longer to conclude in some countries;
- Judges and juries often do not have commercial experience or time to be able to properly and reliably resolve complex disputes;
- The lack of an independent judiciary in some countries makes courts susceptible to political influence, which can be especially disconcerting for a company facing the prospect of litigation in the home country of a contractual counter-party;
- Chronic corruption and lack of transparency; and,
- Difficulty enforcing judgments in other countries because many countries (including the United States) have not ratified the Hague Convention on the Recognition and Enforcement of Foreign Judgments.

A properly constructed international arbitration process solves many, if not all, of these problems, for the following reasons:

- International arbitration offers a **neutral forum** that avoids the risk of litigation in the other party's home court, thus mitigating the risks of political influence and corruption;
- Parties are free to select **experienced arbitrators** who are best-suited to understand and resolve their particular dispute, including arbitrators familiar with relevant commercial customs, legal structures, and trade usages.
- **Arbitral awards are more readily enforceable** than court judgments since the New York Convention has been ratified by 156 countries, while the Hague Convention on Recognition and Enforcement of Foreign Judgments has been ratified by fewer countries. As a result, enforcement of court judgments is far less predictable than enforcement of arbitral awards. Further, countries around the world are continuing to modernize their arbitration laws to streamline enforcement of foreign arbitral awards.
- Arbitration rules and procedures are **more flexible** than rules of judicial procedure. Parties can adapt arbitral procedures to suit their needs, including discovery limitations, expedited timelines, and other measures to improve efficiency and reduce cost.
- **Increased speed and reduced cost:** Arbitration is not as fast and inexpensive as it used to be; however, in my view it continues to be significantly faster and less expensive than litigation in most countries. For instance, a typical ICC arbitration from initial filing to award generally takes about 18 months. It is rarely possible to achieve a final resolution within that time in the national courts, particularly when it includes appeals. Arbitral institutions also offer expedited arbitration options that can lead to even quicker outcomes.

Despite the many benefits, though, international arbitration is not a panacea. For international arbitration to serve a company's needs, the arbitration agreement needs to be thoughtfully constructed and should reflect the company's broader dispute resolution strategy.

Cross-border litigation risks involving governmental parties

Above and beyond contractual counter-party risks, companies investing overseas also need to consider litigation risks that arise from third parties — primarily governments and other state actors who can potentially interfere with and adversely affect the viability of their cross-border investments. Examples of such conduct include:

- Expropriation of physical assets, expressly or via a *de facto* taking;
- Denials of justice in countries with undeveloped judicial systems and/or those facing rule of law challenges;
- Unfair or discriminatory regulatory processes such as licensing, permitting, or tariff reviews; and,
- Drastically increased and unfair forms of taxation.

Investment treaties and trade agreements can provide significant protections against such risks. They can also provide valuable substantive protections to foreign investors against expropriation, unfair and inequitable treatment, differential treatment based on nationality, and breaches of a state's contractual obligations vis-à-vis a private investor. These protections have been interpreted to protect investors' property from seizure or arbitrary government conduct, and even from breaches of contract. Today, there are over 3,000 investment treaties and trade agreements that confer such rights to investors.

While there is no one-size-fits-all answer to what an optimal dispute resolution strategy should consist of, I have come away from my experience as general counsel firmly convinced that international arbitration generally provides the most effective solution for resolving cross-border disputes.

Investment treaties and trade agreements also provide neutral dispute resolution mechanisms that enable an investor from one country to bring a claim directly against the government of the country in which they have invested, typically through international arbitration. Absent such mechanisms, a foreign investor would likely have no legal recourse against the host government, both because of sovereign immunity and because the courts in many countries would not provide a neutral forum for hearing such claims. Unlike commercial arbitration, investment arbitration does not require an advance agreement between the disputing parties. Rather, the availability of protection depends on whether a relevant treaty in force covers the investment.

Even if your company is reluctant to lodge investment treaty claims against a government, perhaps out of fear of retribution, treaty protections can be valuable because your right to bring a claim can provide a strong basis from which to negotiate an early resolution. Most investment arbitrations are public, which also provides an additional incentive for governments to settle early.

The ability to leverage investment treaties and trade agreements as part of your dispute resolution strategy depends on how your company chooses to structure its investments at the outset, which in turn may impact which treaties and trade agreements are potentially available to protect your company. In making such decisions, it is important to recognize that not all treaties and trade agreements include the same levels of protection. For instance:

- **Not all treaties provide the same levels of protections** (i.e., against unpaid expropriation, unfair and inequitable treatment, and the umbrella clause for contract protection). Even small differences in treaty language can create important differences in the scope of the substantive protections.
- **Some treaties limit the ability of investors to arbitrate against the state.** The most common limitation is a denial of benefits clause, which can require that a company either has a business headquarters or performs "substantial activity" in the nation of incorporation. Another common limitation is to require that an investment be of certain duration or economic importance in order to receive investment protection.
- **Some treaties come with strings attached.** Some treaties explicitly confer rights upon nation-states to assert counterclaims against the investor in international arbitration. Others allow the nation-state to establish performance requirements, which can require that investors divert a portion of their business to local contractors, or otherwise contribute to the development of the domestic economy.

Given the diversity of treaty options, it is crucial that general counsel consider both the *existence* as well as the *scope* of the available treaties.

Strategically solving cross-border disputes after they've arisen

Taking a strategic approach can be just as important after a dispute has arisen. For instance, I find it helpful to start by trying to figure out what the root cause of a particular dispute is. After all, one can't solve a problem they don't understand. In-house counsel would be wise to follow the proverb, "If I had an hour to solve a problem, I'd spend 55 minutes thinking about the problem and five minutes thinking about solutions." In many parts of the world, especially where the line between business and government is difficult to discern, seemingly private controversies may in fact be driven by external political, economic, or regulatory forces. Disputes rarely occur in a vacuum.

Knowing a problem's root cause is critically important to finding the right solution. For example, if a problem is politically driven (e.g., has its origins in legislative, regulatory, or licensing decisions by the local government), litigation may not solve your problem. The solution may instead be to engage with the relevant government officials who are the real cause of the problem. In such instances, external counsel may be of limited value on their own; instead, you may need political experts who better understand the problem and can help you to find a proper political or policy-based solution. Indeed, where government intervention is the root cause, litigation might well be counter-productive by prompting key decision makers to harden their position. Even if you win your litigation, you could still end up losing the war by motivating key outside actors to undermine your company's business in other ways.

In short, when a dispute arises, make sure you understand the root cause of the problem you are facing, and then deploy the right resources to find the solution to the particular problem — whether legally driven or otherwise. It is also equally important to define the desired outcome upfront once you have assessed the source of the problem. This may save time and resources; for example, you may well decide after conducting this assessment that it is more efficient to propose a settlement early on.

My top five tips for effectively managing cross-border disputes

There is no one-size-fits-all strategy for resolving cross-border disputes, particularly since different companies will have different approaches, interests, and objectives. Regardless of whatever strategy you choose, it is critical that it be developed, and outside the confines of a particular dispute to enable the company's leadership to conduct a dispassionate assessment of the strategy.

Otherwise, the company will be left with no choice but to adopt a reactive ad hoc approach to each dispute that may leave the company unhappy with the outcome.

With that, I'll leave you with my top five tips for managing cross-border litigation risks:

1. **First,** carefully incorporate international arbitration into your organization's strategy for mitigating cross-border legal risks vis-à-vis private parties. Make sure that you construct an arbitral solution that meets your particular needs, including speed, cost, and enforceability of awards. Also, ensure that the arbitration clause for a given contract fits the transaction you are negotiating and the counter-parties you are dealing with, including the choice of rules and the seat of arbitration. Don't just cut and paste the arbitration clause from your last deal.
2. **Second,** if you go down the litigation route, it's important to manage brand risk and the expectations of your company executives while the litigation is pending. Dispute resolution in the national courts of many countries can be a lengthy and grueling process, particularly in countries with less developed judicial systems and aggressive media.
3. **Third,** where your company is involved in cross-border investment activity, particularly in higher risk countries, consider whether your investments would benefit from protection of investment treaties or trade agreements. There are thousands of relevant treaties in place today, which differ significantly in their terms and in the protections they provide. Such protections may be especially important depending on the level of political risk in the country you are considering for investment. Even if you negotiate a commercial arbitration clause in your contract, your company can potentially benefit from having multiple forms of protection in place.
4. **Fourth,** look at each cross-border dispute multidimensionally in order to formulate your resolution strategy. Analyze the dispute from legal, political, and regulatory angles. Think holistically about how best to solve your problem, as not every legal problem can or should be solved through litigation or arbitration. Make sure your strategy takes into account local realities, and that you have reliable facts and the right advice from which to base your assessment. Get the right advisors who understand the local environment but can also think outside the box. This is key and may require some extensive due diligence on local/in-country counsel in order to ensure you have the most appropriate advisors.
5. **Fifth,** the world is a small place. What happens in one country can have immediate consequences somewhere else. While problems of the past could be resolved based on local considerations alone, that is no longer the case in today's digital world . Your strategy should take into account both global and local considerations, including how the resolution of a particular dispute in one country could have collateral consequences somewhere across the globe. You don't want to win the battle and lose the war. Whether you are a plaintiff or a defendant, the dispute resolution process should serve your company's broader commercial needs.

Serving as general counsel of a multinational organization was both challenging and rewarding. I have learned valuable lessons that I will carry with me in my return to private practice. While the world is surely a complex place, the legal risks of operating around the world can be properly managed if they are treated as a strategic commercial imperative and are given the right level of proactive senior attention. **ACC**

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