Devolution and Indonesia's New Basic Forestry Law

Eva Wollenberg and Hariadi Kartodihardjo

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I. INTRODUCTION

On September 14, the Indonesian People's Consultative Assembly approved a major piece of new legislation--the new forestry law.[3] This law updated the previous Basic Forestry Law of May 1967, UU NO. 5 1967. Although healthy debate has emerged about whether the overall spirit of the law has changed, one area where there has been notable change is in the new provisions for *masyarakat hukum adat*, or customary communities, and in the promotion of community involvement in the forest management. Taken together with the Ministerial Decree 677 (Forestry) of October last year, the law signals a significant shift in increased state support for the devolution of forest management and forest benefits to local communities.

In this paper we provide a preliminary analysis of the new law. Our comments focus on the institutional requirements for devolution at the ground level and the two institutions through which devolution is to be channelled according to the law, *masyarakat hukum adat* and the co-operatives. The aim of the analysis is to suggest that before we can rely on either of these two institutions to promote devolution,[4] there needs to be a broader base of civil society organisational capacity and systematic support within government.

As this analysis was prepared only two weeks after the law was signed, there has been little opportunity for public discussion of the law. The analysis presented here is therefore an initial interpretation. The subsequent implementing regulations (*peraturan pemerintah*) will provide more detail, as will the practice of the law. The comments we present here are offered therefore in the spirit of initiating debate, rather than resolving it.

We review first the content of the law, and then discuss the nature of the two institutions -- *masyarakat hukum adat* and co-operatives—and their suitability as the means for implementing devolution. We conclude with several suggestions for action to further strengthen devolution consistent with the principles of empowerment and equity stated by the law.

II. THE LAW

In this section we discuss the excerpts of the law and its accompanying interpretation that pertain to *masayrakat hukum adat* and *hutan adat*, or customary forest. For a more detailed understanding of the law relevant to local communities, the reader is referred to the attachment at the end of this paper. The attachment summarizes relevant parts of the law and the interpretation in a table prepared by Diah Y. Raharjo, Ford Foundation, Jakarta.

[1] Researcher, Programme on Local People, Devolution and Adaptive Co-Management of Forests, Center for International Forestry Research, L.Wollenberg@cgiar.org
[2] Lecturer, Faculty of Forestry, Institut Pertanian Bogor, Hariadi@indo.net.id
[3] *Rancang Undang-Undang No. 41 Republik 1999 Indonesia Tentang Kehutanan*. The law was signed by President Habibie on 30 September, 1999.
[4] Devolution is defined here as the transfer of power to sub-national entities such as local government or *adat* communities. It is distinct from decentralisation, which involves a transfer in the locus of action, but not in power or authority. Deconcentration is a transfer in the locus of action within the same organization (Goldman 1998). In the Indonesian context and language, devolution (*devolusi*), decentralization (*desentralisasi*) and deconcentration (*dekonsentrasi*) have specific connotations. Devolution is not commonly used. Instead, decentralisation is used to refer to transfers of power, and deconcentration to transfers of activity, without increased power or authority. The term autonomy (*otonomi*) is often associated with desentralisasi.

A. *Adat Communities and Forests*

According to the law, customary forest or *hutan adat* is defined as state forest (*hutan negara*) in the area of a customary community (*wilayah masyarakat hukum adat*). The creation of *hutan adat* is the single most important innovation of the new law for devolution, as it marks the first time in Indonesian legal history that a national law supports the transfer of territorially-based rights on state forest land to an *adat* institution.

Beyond this innovation, the capacity of the law to achieve devolution must be understood in terms of how the law enables the state to retain strategic control over these customary forests. First, the law classifies *hutan adat* as state forest. The interpretation accompanying the law explains that state forest lands are those that do not have legally pre-existing private rights associated with them, as allocated in the Basic Agrarian Law of 1960. The interpretation further explains that this classification is derived from the principle of the unified State[5] that makes the State the organisation of authority over its citizens. These justifications are consistent with previous forest law that has historically been at odds with the Basic Agrarian Law. The Agrarian Law allocated private agricultural lands according to the principle that that cultivated lands best serve production needs when they are under the control of those managing and using them. This principle is now widely applied in local forest management (Ostrom 1998), and has been one of the driving forces behind devolution policies in other countries (Lynch and Talbott 1995). Furthermore, many customary "forests" are in fact cyclical agricultural and horticultural systems. These lands might have qualified for registration as agricultural land in the 1960s had swidden agriculture then been better understood.

A second way in which the new forestry law ensures that the state maintains strategic control is that it gives the state the power to recognise and revoke the status of *masyarakat hukum adat*, and therefore of *hutan adat*. This power is vested in local government through regulations (*peraturan daerah*) that remain to be determined, and according to criteria determined by national government. According to the new law, the criteria for recognizing *masyarakat hukum adat* are:

1. The community constitutes an association
2. There is an *adat* institution
3. There is a clear *adat* area
4. Legal judiciary institutions exist, and their decisions are obeyed

Rights to *hutan adat* are not automatic or in perpetuity in the law. They do not address more deep-seated concerns of customary communities about their rights to a place of ancestral and cultural heritage. They do not provide secure tenure. The rights given in the new law are in this way distinct from those associated with customary communities in other countries, such as the Ancestral Domain Claims in the Philippines or the indigenous *comunidades* of Mexico.

Third, the law states that *hak masyarakat hukum adat* will be given as long as it does not conflict with national priorities. While the need for flexibility is important, legal provisions such as these have been invoked in the past to limit customary communities' claims.

Fourth, the current definition of *hutan adat* could be interpreted to allow the state to claim customary forest anywhere, including on private land (Kartodihardjo 1999). The law is unclear on this point, but does suggest that compensation would be paid to those whose lands are turned over. Depending on how the law is implemented, if all customary forests were to become state forest, the law could create perverse incentives for customary communities to deforest their land to keep it out of state forest and retain control over it.

Fifth, the new law places the burden of proof upon customary communities for applying for *adat* rights. The law is based on the premise that state control of forest land has been legitimate. This premise has been questioned however by customary communities who feel they still have historical claims to their land (Florus et al. 1994). Historically, customary communities controlled much of Indonesia's forest lands through *adat* institutions. During the Dutch period, forest lands and labor in Dutch-controlled Java and some parts of Lampung were treated as the jurisdiction of the Forestry Department (Hay et al. 2000). *Adat* in areas not controlled by the Dutch was nevertheless respected as legitimate. After independence, Indonesia's Basic Agrarian Law acknowledged customary historical claims again by respecting *adat* areas as private land. However, with the onset of the New Order regime, and the rise

[5] *Negara Kesatuan Republik Indonesia*

of a lucrative timber industry in the outer islands, the state claimed forest lands as its own and *adat* practices lost their legitimacy. Areas assigned to logging companies were automatically made into state forest and the Directorate of Forestry designated about three-quarters of the country as state forest land in the mid-1970s (Fay et al. 2000). The principles and interests of the state in that period differ substantially from those that exist now and bear reexamination.

Thus, the new law can be applauded for its pioneering efforts to devolve control of customary forest lands to communities. The law also gives government several avenues to maintain its own control. Who actually makes decisions about forest management will depend largely on how the law is implemented.

B. Rights on Hutan Adat and non-Hutan Adat Lands

We can also look at the functions and use rights permitted on different types of forest lands (Table 1). Each tenure and function category is associated with permitted users or managers:

1. State forest for conservation or protection, managed by the state
2. State forest for production, managed by private enterprise, cooperatives, state owned enterprise, under the supervision of the state.
3. State forest with customary forest for conservation, protection and production, managed by customary communities
4. State forest for special purposes, managed by customary communities, research centers, educational institutions, social and religious institutions
5. Private forest for conservation, protection, production, managed by the owner

The Table shows that the types of uses and users permitted are very similar on *hutan adat* as they are on non-*hutan* adat. The same functions are applied to *hutan adat* as non-*hutan adat* lands: *lindung* (protection), *konservasi* (conservation) and *produksi* (production). The same types of users can apply for permission to use production forest on *hutan adat* and *non-adat* forest: individuals, co-operatives, private companies or the state companies such as Inhutani. Notably, co-operatives can be managed by local communities, but they can do this on *hutan adat* as well as non-*adat* forests. The interpretation document suggests that communities can be given permission directly for use rights on production forest as well, however, it is not clear if this refers to any community or specifically *masyarakat hukum adat*. The status of *hutan adat* appears to confer few new rights. Anyone with official use rights is also subject to taxation for forest products removed. The central government is responsible for determining the level and distribution of use rights.

Table 1. **Forest Function, Status and Utilization based on UU No. 41/1999 on Forestry**

FOREST FUNCTION	FOREST STATUS			USE OPTIONS	
	STATE FOREST		PRIVATE FOREST	PERMITTED ENTERPRISE USE OF THE AREA	FOREST CONVERSION
	NON CUSTOMARY FOREST	CUSTOMARY FOREST			
CONSERVATION FOREST	To be used for biodiversity conservation. Other uses possible, except in nature reserves, core zones and forest zones in national parks. Article 24	Customary communities can use for conservation and protection purposes where these uses do not conflict with the designated functions and law. Article 37	The owner can use the forest for conservation and protection purposes as long as these uses do not conflict with the designated functions. Article 36	None	Cannot be converted to non forestry use

PROTECTION FOREST	To be used for environmental services and NTFP extraction. Article 26		If changed to state forest, the government will compensate owners. Article 36		Can be converted to non forestry use (mining, etc.)
PRODUCTION FOREST	To be used for environmental services, timber and NTFP extraction. Article 28	Customary communities can use the customary forest for daily subsistence purposes. Article 67 Customary communities can undertake other uses as long as these uses do not conflict with the designated function and law. Article 37. If forest products are traded, the customary community has to pay forest taxes. Article 37	Forest use is managed by the owner.	Can be granted to • Individual • Co-operatives • Private companies • State companies • (BUMN, BUMD)[6]	Can be converted to non forestry use (mining, etc.)
SPECIAL PURPOSE FOREST	To be used for research, development, education, training, religious or culture functions. Article 8	Forests with special purpose are not necessarily customary forests, but customary communities can manage forest with special purpose. Article 34	Not specified	Not specified	Not specified
URBAN FOREST	Public urban areas designated as forest by the government. Article 9	Not relevant	Not relevant	Not specified	Not specified

[6] *Badan Usaha Milik Negara/Daerah*

The table also shows that special purpose areas can be designated on both land types for religious, cultural, educational or research purposes, and, in support of devolution, *masyarakat hukum adat* can have rights to manage these areas. Given the precedent of the special purpose designation (*Kawasan dengan Tujuan Istimewa*) for communities managing the damar agroforests in Krui, Sumatra (SK47 Kpts-II 1998) (Fay and Sirait 1999), it is feasible that the special purpose designation could be used to extend rights to communities ineligible for *masyarakat hukum adat* status.

From Table 1, we can see that only two sets of rights are uniquely associated with *masyarakat hukum adat*. These are the rights: (1) to use of the forest to meet daily consumptive needs and (2) to undertake forest management activities according to customary rules (as long as these do not conflict with state laws). The new law strengthens these rights, which had been available to customary communities through decrees rather than laws. SK Menteri 251 1993 which granted use rights to nontimber forest products and timber for consumptive use, is such an example. Some rights have not been actualized because they were interpreted to be in conflict with national priorities. In other cases local people were simply not aware of or able to claim the rights.

According to the law, the most lucrative rights--those to enterprise--are to be given to co-operatives or companies. On the one hand, the availability of enterprise rights to co-operatives is a major milestone towards devolution, especially since local communities can form co-operatives. On the other hand, by relying on co-operatives, the law creates a firm division between two kinds of institutions: those for enterprise-oriented use of the forest and those for customary use rights to local communities. Presumably *adat* communities must form co-operatives if they want to use the forest for cash income generation (although this is not clear in the law, as communities technically may be able to receive rights directly). Looking at how institutions for local forest management have been organized in other countries, e.g. Forest Users' Groups (Nepal), Forest Protection Committees (India), Ejidos in Mexico or Farmers' Associations (Philippines) where the rights to income are usually integrated with subsistence rights, one might question the necessity of such a division. The burden of forming, registering and monitoring two institutions among local communities, let alone ensuring co-ordination between the two may prove to be ambitious. The administrative burden of dealing with one local institution alone has proven to be sufficiently challenging in most countries (Fox 1993).

The degree of genuine devolution will depend on the extent co-operatives are formed primarily by local communities and primarily benefit these communities. The current popular impression of co-operatives would need to be more positive for the co-operatives to be considered credible and legitimate institutions for devolution. According to the vision of co-operatives promoted during this reform period, many different groups, including the employees of timber companies can form local co-operatives. The implementing regulations of the new law should provide guarantees that local co-operatives represent or benefit local communities. The current law further stipulates that government and private companies should work with local co-operatives. This is with the intention of distributing forest benefits to local communities. The nature of this work, however, is not specified, other than that the companies should assist local co-operatives to become more professional. There is no provision that suggests the form of the collaboration or how it would increase material benefits to local communities. Anecdotal evidence from a number of sites in Kalimantan indicates that the collaboration is being used to the concessionaires at the expense of communities.

Aside from the rights associated with *hutan adat, masyarakat hukum adat* and co-operatives, the law also includes progressive provisions about people in forest management that could be supportive of customary communities. These include that: (1) determination of the forest area is to take into account local culture, economy and institutions, including *adat* institutions. (2) Monitoring is the responsibility of government, individuals and society (*masyarakat*). (3) Society has the right to know about forest management and to monitor it. (4) If communities suffer pollution or deforestation that affects their lives, government forest agencies are responsible to act on behalf of the communities' needs. (5) NGOs can support local people's efforts in reforestation, or forest rehabilitation (note not in forest management). (6) A Forestry Watch Forum (*Forum Pemerhati Kehutanan*) composed of central government and local government partners is to work to formulate and manage the perceptions, aspirations and innovations of communities as input to forest policy. Scattered throughout the law are references to the effect that forests should be managed according to principles of social equity, empowerment of *adat* communities, fairness, prosperity and sustainability. Among these provisions, the creation of the Forest Watch Forum and permission granted to NGOs as support organizations are significant measures potentially important for further strengthening devolution.

In sum, the new law potentially strengthens the rights of *masyarakat hukum adat* on forest land by creating legal entitlements for these groups on *hutan adat* and special purpose zones. *Masyarakat hukum adat* have rights to use the forest for daily consumption needs and to manage the forest according to their customary law, as long as these do not conflict with national law. Through co-operatives, *masyarakat hukum adat* as well as other groups can now acquire enterprise management rights. The state retains hegemony in ways that enable little to change from the current distribution of control between the center and local managers.

Despite this strengthening and partial expansion of rights, vagueness in some parts of the law could work against the transfer of authority to customary communities. For example, who has priority rights of enterprise on *hutan adat*? Use rights on *hutan adat* are presently not exclusive. Without exclusive rights, there is always insecurity and the risk of competition with (and losing to) more powerful groups.

Similarly, what are the permitted uses of *hutan adat*? If swidden farming is the major source of livelihood and means of meeting daily needs, yet forest burning is prohibited by law, how will customary communities meet their needs? Is it reasonable to assume that these groups should not practice swidden, especially when it is an integral and sustainable part of their economy and culture? To the extent the permitted functions and uses of *hutan adat* reflect the functions and land uses required by customary communities, the more they will fulfill these communities needs and provide incentives for good management. Yet the functions and uses in government guidelines reflect an approach to management very different in style and purpose from that of customary communities. The scale and distribution of management units in *hutan adat* tend to be smaller and determined by more limited transport networks. Local people are more likely to shift land uses in *hutan adat* according to changes in their needs and external conditions like markets, rather than assign permanent land uses to fixed units of land (Leach and Fairhead 1993). *Hutan adat* is likely to have a higher mix of planted trees and more modified wildlife populations and managed for more diverse products. If *hutan adat* is retained as state land, serious adaptation will be required of past management regimes to accommodate these very different systems.

The institutional relations among the *masyarakat hukum adat*, co-operatives and the government or private companies required to work with the co-operatives also needs further clarification. Where all three exist, how will decisions be made equitably and fairly? Can neutral power relations and equitable distribution of benefits can exist under such arrangements (Edmunds and Wollenberg 1999)? Despite the intentions of the law, will the relationship among these groups develop to be one of competition for scarce financial or natural resources? What elements of accountability exist on the part of the co-operatives and companies to the customary communities?

As with any good law, there is much room for interpretation in the new Forestry Law of 1999. The degree to which devolution occurs to *masyarakat hukum adat* will depend on how the law is implemented. In the next section we discuss the institutional factors that will play a major role in influencing this implementation.

III. The Role of Local Institutions

The viability of the law's provisions for devolution to *masyarakat hukum adat* should be stronger to the extent there are correspondingly strong local institutions to support the law. Institutional support from local civil society is necessary for implementation. Institutional support across sectors of civil society (e.g. the media, universities) and government can provide the checks and balances necessary to guard the intent of the law. Here we highlight the needs for institutional development in *masyarakat hukum adat* and co-operatives to foster more robust devolution.

A. *Masyarakat hukum adat*

Just as local governments can be highly variable, customary communities similarly vary in the strength of their leadership, quality of decision-making and extent of democratic practice (Chapter 12). The criteria for selecting legally-recognized *masyarakat hukum adat* should identify the stronger among these groups. The law could however be strengthened to address possible conflicts of interest within customary communities.

For example, *adat* leaders in many communities are currently struggling with how to position their identity *vis-à-vis* government and assure their legitimacy among a range of constituencies. Many customary leaders serve as village government leaders *(Kepala Desa)* and as such are Golkar members. Others are appointed as *adat* heads (*Ketua Adat*) within existing government apparatuses that have little or nothing to do with traditional *adat* leadership. Others have developed alliances with local timber or mining companies, police or traders and received associated demonstrations of gratitude from these groups. Community members usually begrudge these arrangements and are consequently not always sure whose interests their leader represents. Also, in many communities, there has been a shift in the factors influencing who holds power in the community. Inherited power and traditional titles are becoming less important determinants of influence compared to education and economic success.

Adat systems are not necessarily more democratic, equitable or transparent than many local governments. There are ample instances of hierarchical decision-making, feudal-style tribute payments and gender inequities in many customary societies around the world (Ribot 19xx). Conflict across neighboring *adat* areas is common. If devolution is to be meaningful to a significant proportion of the population, not just to the elite of local communities, is there a responsibility on the part of the government to promote democratic values among these groups, even if they are not strictly consistent with traditional practice? This is a question that is not easily answered, but it does suggest the need to give more attention to the "living" and fluid nature of customary systems.

B. *Co-operatives*

Co-operatives in Indonesia have not historically been linked to forest management or customary communities' needs. This may change if the government's vision of co-operatives as the unit of economic organisation at the village level is successfully implemented over the next several years. For the time being however, problems will persist. In many villages, there is no co-operative and never has been. Few people at the village level know how to create a co-operative, let alone, what a co-operative's function is supposed to be. (Where co-operatives do exist, the official state *Kooperasi Unit Desa* (KUD) has a less than positive reputation for effectiveness).There is evidence from some communities in East Kalimantan that the ministerial decree for community forestry (SK 677) is being used by concessionaires to form co-operatives to organise labour for timber harvesting. Unless there is better legal literacy among communities about the functions of the new co-operatives and a shared understanding about these functions among different stakeholders, their uses are liable to be misinterpreted to the detriment of local communities.

As noted above, one potential for misuse of co-operatives, is that they can be formed by anyone. There is no indication of how the people organised in co-operatives will relate to forest user groups, be accountable to local communities or work collaboratively with *adat* institutions. Also, the cooperatives' orientation is enterprise, not forest management. Co-operatives may not be well-placed to make balanced decisions about the trade-offs between profitability and sustainable management. We know that in some other countries, co-operatives have had mixed success in forest management (Tree Growers Co-operative of India, 1999).

IV. Devolution: From Policy to Practice

So what do these attributes of the law and the local institutions it will depend on imply for the practice of devolution? Although more precise implications will only become clear after the implementing regulations are issued, according to the new law, the territorial rights to *hutan adat* are not exclusively tied to any use or beneficiary. *Adat* systems and cooperatives will be empowered to manage forests, but will need stronger checks and balances to ensure their congruence with the interests of a broad range of local communities members and accountability to them. Because of the potential for government intervention to maintain control over customary forests, the degree of devolution achieved will depend largely on the vision and values of the government officials responsible for the implementation of the law.

With the decentralization of implementing regulations about what constitutes *hutan adat*, implementation will vary by region, and not necessarily in consistent ways. In provinces where timber values are still high, we can expect to see higher levels of red tape, more state-driven regulation and

more burdensome criteria for recognizing *hutan adat* in efforts to reduce the claims of customary communities. We can also expect higher frequencies of permission granted for enterprise use of *hutan adat* by noncustomary groups. Similarly, the organizational capacities and influence of customary communities themselves varies tremendously by region. A customary group in Papua is less likely to even know about the rights associated with the new law, compared to say farmers in Lampung. Valuable forests in Kalimantan, Sumatra and Irian Jaya for instance are thus likely to stay in the hands of noncustomary groups, unless customary groups are well organize and probably assisted by third parties. What provisions can the implementing regulations make to protect the intent of the law?

These conditions point to critical uncertainties in the law that could be improved to achieve devolution. The approach to devolution in the new law raises general questions about what the key points of legal leverage are for achieving real transfers of authority in countries such as Indonesia where local people must compete with government and private industry for valuable forest resources. Under these circumstances it would appear that the real gain to be had from a devolution law is *to create legal possibilities for communities to manage with more certainty, to gain secure access to valuable economic benefits and to overcome conflicts with more powerful groups.* The existing law takes steps in this direction. The implementing regulations could help to some degree to strengthen this aspect of the law. At present however, rights to *hutan adat* can be revoked by the government, economic benefits are delinked from *adat* institutions and there are no protections for communities to pursue their interests if these conflict with those of more powerful people. As it is difficult for policy to control all these things on the ground anyway, especially under frontier forest conditions (Kaimowitz *et al.* 1999), there is still the opportunity for the implementing regulations and complementary policies to strengthen both government and civil institutions' capacity to implement the devolution aspects of the current law.

The delegitimation of *adat* under the past law raises the question of how implementation of the new law will effectively recognize, strengthen and legitimize existing *adat* systems of management. Whether *adat* institutions continue to manage forests sustainably under current pressures is an open question that can be assessed on a site by site basis. We know *adat* management is strong in some places (Michon and de Foresta 1995, Lubis 1996, Eghenter and Sellato 1999), and in others *has* been displaced by state management (Padoch and Peluso 1996). In yet others the concept of *adat* rights have been used to regain control over resources (Zerner). Will the new forestry law allow recognition and empowerment of existing *adat* systems, or will it seek to bring these lands under a regime of state forest management that destroy their meaning and effectiveness? The existing law may burden the adat systems through additional registration, regulations and reporting that weaken these systems. Checks must be put in place to ensure that opportunists do not seek to take advantage of the law to invent *adat* systems or take control over legitimate *adat* areas.

The challenge is therefore how to ensure the legitimacy of *hutan adat* and create the local institutional capacities, transparency and checks and balances that increase the security of *adat* communities' rights and better channel benefits to them. Measures in the current law such as the Forest Watch Forum and role of NGOs as support organizations make important strides in this direction. Future policy makers will have to work hard to foster an era that embraces local diversity and innovation. Devolution will work better to the extent customary management systems are themselves treated as valuable resources and given the security to develop their own initiatives. This is not to say that local communities should be given rein to destroy forests. On the contrary, there need to be systems for co-ordination among stakeholders to establish management objectives and monitor progress. But, such co-ordination requires strong local institutions and a clear and secure distribution of rights across groups.

Five actions are therefore required to enhance the impact of the current law on devolution. All involve strengthening civil society at the ground level and upward, as well as improving the relationship between civil society and the state. These actions are to

(1) Build local institutional capacities, especially to improve the responsiveness and accountability of co-operatives, *adat* institutions and other local forest management entities to the interests of customary communities and to make them more democratic in creating a shared agenda towards sustainable forest management,
(2) Improve the security of rights to customary communities to enable local innovation and incentives for sustainable management over the long-term,
(3) Enhance information flows and accountability regarding equity and sustainable management, by relying more on civil society organizations, including the media and NGOs,

(4) Develop inter-institutional arrangements that protect the priority rights of customary communities to *hutan adat*, with checks through civil society organizations for protecting customary communities' interests against those of more powerful groups.
(5) Work out institutional arrangements by which valuable economic benefits can go directly to customary communities.

These measures, each by itself a challenge, would strengthen devolution in the new law to help it meet its own intended purpose of giving rights to customary communities to "achieve empowerment within the context of improving their prosperity" (Article 67). The new forestry law sets out an impressive vision for the role of communities and especially customary communities. The task now is how to ensure that vision is achieved.

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