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STATUS OF CADASTRAL SURVEYS AND LAND REGISTRATION SERVICES IN ZAMBIA

(Submitted by the Government of Zambia)

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STATUS OF CADASTRAL SURVEYS AND LAND REGISTRATION SERVICES IN ZAMBIA

by

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Introduction

Before getting to the gist of the matter of this subject, it would be of assistance to the Seminar if I made a brief mention from the outset of the types of land in Zambia. Land in Zambia is still divided into four main categories (a colonial heritage):

(i)	State Land	(11,726,500 acres)
(ii)	Trust Land	(107,362,500 acres)
(iii)	Reserve Land	(33,656,000 acres)
(iv)	Western Province	(31,231,000 acres)

The above categories can be in two main divisions - land held on "statutory tenure" (State Land) and land held on "customary tenure" (Reserves, Trust Lands and Western Province). Government does not exercise any control over the occupation and use of land and the system of tenure on which the land is held in customary tenure.

I would not like to bore the Seminar by giving a detailed account of how these categories came about as this does not lie within the scope of this paper.

There were various Orders in Council dating as far back as 17th October, 1900, culminating in the Northern Rhodesia Orders in Council, 1911, which replaced other Orders and divided the rest of the land into two categories :

(i) Barotseland (now Western Province); and

(ii) The reste of the land :

both to be ruled by the British South Africa Company.

Northern Rhodesia Orders in Council, 1924, revoked previous Orders of 1911, and the administration of the Country was removed from the B.S.A. Company and entrusted to a Governor, appointed by the British Sovereign. The 1924 Order in Council was amended from time to time and ultimately revoked in 1962 by the Northern Rhodesia (Constitution) Order in Council. It was supplemented in Orders in Council establishing Crown Land, Native Reserves and Native Trust Land, which Orders, as amended from time to time, are still in operation. The provision dividing Barotseland from the remainder of the Country for the purpose of land administration were extended by the Barotse Agreement of 1964, shortly before Independence. This Agreement was later abrogated by the Constitution (Amendement) Act No. 5 of 1969. Barotseland (hereafter referred to as Western Province), has not yet been positively integrated into the rest of the country.

At the time of my writing this paper, legislation is being drafted to bring Western Province into line with the rest of the Provinces by the Western Province (Miscellaneous Provisions) Bill, 1970, which will convert the Province from its unique category to a Reserve and all future dealings with the Western Province will be on the same pattern with the rest of the Provinces. The Litunga will no longer have power to alienate land. Such powers will be vested in the President.

(2) On Zambia's becoming an Independent Republic, it was necessary to (a) divest the British Sovereign of all rights in or in relation to Crown Lands or other immovable property in Northern Rhodesia, (b) to divest the Governor of Northern Rhodesia of all powers conferred upon him by the Orders in Council and to confer them upon the President; and (c) to divest the Secretary of State of all authorities to give instructions, directions or approvals as to the exercise of powers under those Orders.

The Zambia (State Lands and Native Reserves) Order, 1964 transferred to and vested in the President of the Republic of Zambia:

(a) all rights in or in relation to Crown Lands or other immovable property in Northern Rhodesia that were vested in the British Sovereign immediatley before Independence; and

(b) all Native Reserves that were vested in the Secretary of State, immediately before Independence.

The Order provided that any estate, right or interest in or over any land or immovable property which:

(a) the Governor or any other officier or authoriry of the Government of Northern Rhodesia had prior to Independence created, granted, recognized or otherwise acknowledged in exercicse of any powers conferred by the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council; or

(b) was recognized or otherwise acknowledged by those Orders as an estate, right or interest of any person other than the British Sovereign or the Secretary of State;

should continue to have the same validity as they had before Independence. Powers in relation to Crown Land and Native Reserves formerly exercisable by the Governor conferred upon the President and all references to instructions, directions or approvals of the Secretary of State deleted from the Orders in Council relating to Crown Lands and Native Reserves.

The Zambia (Trust Land) Order 1964 transferred to and vested in the President of the Republic of Zambia all Native Trust Land that was vested in the Secretary of State immediately before Independence. It provided that any estate, right or interest in or over any land which the Governor or any other officer or authority of the Government of Northern Rhodesia had prior to Independence created, granted, recognized or otherwise acknowledged under the

Northern Rhodesia (Native Trust Land) Orders in Council should continue to have the same validity as they had before Independence. Powers in relation to Native Trust Land formerly exercised by the Governor were conferred upon the President and all references to instructions, directions and approvals of the Secretary of State deleted from the Order relating to Native Trust Land.

The Zambia (Gwembe District) Order 1964 conferred upon the President the powers formerly exercisable by the Governor of Northern Rhodesia under the Northern Rhodesia (Gwembe District) Order 1959 and refernce to the directions or approval of the Secretary of State deleted from that Order. It provided that estates, rights and interests created, granted, recognized or otherwise acknowledged under that Order should continue to have the same validity after Independence as they had before.

Terminology

The name Crown Land, Native Reserves and Native Trust Land have been changed to State Land, Reserves and Trust Land respectively and the Barotse Protectorate has been renamed the Western Province. The Orders in Council are now known as the Zambia (State Land and Reserves) Orders 1928 to 1964, the Zambia (Trust Land) Orders 1947 to 1964 and the Zambia (Gwembe District) Orders, 1959 and 1964.

Although the word "native" is no longer used in the legislation of Zambia and the word "African" used instead, it still appears in the Orders in Council either alone or in the phrase "natives of Zambia". The only definition of the word in the Orders is contained in the Trust Land Orders where "native" is defined as meaning "any member of the aboriginal tribes or races of Africa and includes any person having the blood of any such tribe or race". In interpreting the State Lands and Reserves Orders, at least since 1947, the word has been understood to have the same meaning as in the Trust Land Orders.

As a result of the provisions of the several Orders in Council, land in Zambia is now either:

(a)	Western Province:	Action is in hand to bring this into Category (b) below.
(b)	Reserves:	Land set aside for the sole and exclusive use of the Africans of Zambia.
(c)	Trust Land:	Land to be administered and controlled by the President for the use or common benefit direct or indirect, of the Africans of Zambia.
(d)	State Land:	The 6 per cent I have previously discussed.

CADASTRE

(3) So much now for the history of Zambia, and now let us turn to the gist of this Seminar. "Cadastre" is a French noun for which there is no English equivalent. The latter language, with its endemic peculiarity, employs only an adjective "Cadastral" which means "of or showing the extent, value and ownership of land". We will not be much concerned here with the valuation of land. However, it is because our land is increasingly attracting value that we are gathered here at all.

Where land is as freely available as the air we breathe, it has little or no value and, consequently, its extent and ownership is of no great concern in the economic context. This sort of situation still applies in many parts of Africa, even today but its incidence is receding and will continue to do so by virtue of the pressure, exerted by increasing population. In addition, modern methods of using land require ever increasing inputs of capital which tend to spur the general and spontaneous trend in Africa towards individual ownership of land. It is this latter aspect - capital input - which has resulted in the application of cadastral systems to our urban areas whilst our rural areas have lagged sadly behind. Where land pressure is still not very great in a rural area the absence of cadastre has not materially worsened the condition of the occupants of that land, but where the pressure on land is considerable, the absence of cadastre is often severely felt, not least in the sociological and political fields. Any nation which claims - as most developing countries do - that their major objective is to correct the imbalance between the prosperity of the urban and rural areas, simply cannot afford to overlook "Cadastre". The urban entrepreneur - be it a co-operative society, individual or limited liability company - has security of tenure which it can sell mortgage, lease or otherwise deal with but, generally speaking, his rural counterpart in many parts of Africa has not. Thus today, we still see heavy injections of capital being made into urban complexes which, but for the absence of cadastre, could more beneficially have been put into rural areas.

Land Registration - State Land

In Zambia today we still suffer from the pre-Independence policy of dividing the country into land available for non-Africans (6 per cent of the land area) and the land set aside for the exclusive use of Africans (94 per cent of the land i.e. the balance). The 6 per cent comprises the line of rail (which runs North to South), all townships and a few scattered pockets of farming land. To this negligible portion has been applied a land registration system deriving from the English land statutes prior to 1911 to which have been "tacked on" the following local Ordinances based on the Torrens System (A system of registration of title to land introduced into the legal system of South Australia in 1858):

(i) The Lands and Deeds Registry Ordinance (Cap. 84);

(ii) The Lands and Deeds Registry (Amendment) Ordinance (Cap.85); and

(iii) The Land Survey Ordinance (Cap. 88).

Generally speaking, Caps 3[illegible] and 85 require land to be described by reference to diagrams attached to any lease or agreement for a lease creating a term exceeding fourteen years. A sketch plan may be used when a lesser term is created. A Diagram is defined in Cap. 88 as

> "a document containing geometrical, numerical and verbal representations or one or more parcels of land, the boundaries of which have been surveyed by a land surveyor, and which document has been signed by such surveyor or which has been certified by a Government surveyor as having been compiled from approved records or surveys carried out by one or more land surveyors."

A "land surveyor" means a person holding a licence and Cap. 88 lays down stringent qualifications to be met by an applicant for such a licence. Admittedly, standards are very high and the Survey Department has, over the years, built up a system of survey and examination of records which would be difficult to surpass. Nevertheless, there have been criticisms on the score of hypersophistication and we should, perhaps, bear in mind the words of an East African Royal Commission in this context:

> "The means of carrying out cadastral survey and the degree of accuracy required are matters for determination after taking expert advice. In view, however, of the tendency to demand unduly high standards of accuracy we would suggest that the advice on which decisions are taken should be tendered in the light of the purpose to be achieved and should not be based on perfectionist survey considerations".

The Land Survey Ordinance must be amended since it still discriminates against other licensed surveyors except those from South Africa, Australia, Canada, New Zeland and Rhodesia.

However, we also need to be very aware that, to let people into possession, or to give title, without plans or inadequate plans of land, would only be to postpone the day when adequate plans must be obtained and, in the meantime, create unnecessary difficulties arising from litigation and/or fraud.

I have said that our land registration system (applicable to 6 per cent of Zambia, the State Land areas) derives from English land statutes prior to 1911. In other words, we are still obliged to work to a system which has been abandoned in its country of origin! It is cumbrous, archaic and expensive.

There is no difference in conveyancing costs between registered and unregistered land. It would reduce costs considerably if there was legislation passed to the effect that a certificate of title was sufficient to convey property without going behind the curtain. A certificate per se would reveal encumbrances. The same would not be said in regard with Provisional Certificate of Title. Conveyancers would have still to peer behind this curtain.

Grants of land and dealings with land are, under the existing law, effected by means of documents which are drawn in compliance with the formalities required by the English law as applied in Zambia. The validity, subject to the requirement of registration under Cap. 84 of the documents and their effect is governed by the rules and technicalities of English conveyancing law and practice.

The Lands and Deeds Registry Ordinance (Cap. 84) first came into operation on the 1st November, 1914. It provides that documents granting or dealing with an estate or interest in land should be registered in the registry established under the Ordinance. If not so registered within the time prescribed they become null and void. The purpose of the Ordinance is to secure publicity for documents relating to land. Registration does not cure any defects in a document nor confer upon it any effect or validity other than that of not becoming null and void for lack of registration. As an instrument a registered document stands or falls on its own merits.

On the 1st May, 1944, the Lands and Deeds Registry (Amendment) Ordinance (Cap. 85) came into operation. That Ordinance provides for the issue of Provisional Certificates and Certificates of Title to persons holding freehold land and to lessees holding directly under leases of land from the President. Certificates of Title are conclusive evidence of title notwithstanding the existence of any other person or any estate or interest which but for the Ordinance might held to be paramount or to have priority. The holder of a Certificate of Title, except in the case of fraud, holds the land comprised herein, subject to any incumbrances, liens, estates or interests whatsoever except:

(i) the estate or interest of any person claiming the same land under a current prior Certificate of Tile;

(ii) so far as regards the omission or misdescription of any right of way or other easement created in or existing upon the land; and

(iii) so far as regards any portion of land that may be erroneously included in the Certificate by wrong description of parcels or of boundaries.

Provisional Certificates of Title have the same effect as Certificates of Title except that the Court might at any time upon the claim of any person claiming a better title cancel or amend the Provisional Certificate.

Where the title to land was originally granted before the commencement of Cap. 85 a Provisional Certificate of Title must be issued in the first place, but that certificate may, after the expiration of six years from issue, be replaced by a Certificate of Title. In the case of original grants of State Land made after the commencement of the Ordinance, Certificates of Title are issued to the grantee or a transferee from him without any prior Provisional Certificate.

Provisional Certificates and Certificates of Title cannot be issued in respect of sub-leases granted by lessees of lease-hold land, including sub-leases granted by Local Urban Authorities or of leases and sub-leases of free-hold land. The introduction of the Head Lease system of grants of State Land to Local Urban Authorities has resulted in a growing number of titles to land being issued by those Local Urban Authorities for which Certificates of Title cannot be obtained.

Purchasers and mortgagees of land comprised in Certificates of Title are protected by the Ordinance from the consequences of notice of trusts and unregistered interests and against any liability should the title of the vendor or mortgagor be affected by fraud or error or a void or voidable instrument. In all other cases, including cases where a Provisional Certificate of Title has been issued, there is no such protection and it is incumbent upon purchasers and mortgagees to investigate the title offered, make searches in the register and, should such investigation disclose the possibility of equities affecting the title, to make enquiries as to those equities. If the original grant of title was made some time ago, these enquiries and investigations may necessitate a perusal of many documents, which enquiries and investigations are repeated every time the property is sold or mortgaged.

No provision is made in Caps. 84 or 85 for compensating persons who suffer loss as a result of fraud or of mistake or error in the registry or on a Certificate or Provisional Certificate of Title. This is where it should be recommended that Caps. 84 and 85 should be amended accordingly.

The rules governing the form and effect of documents used in granting and transferring title are complex. Failure to comply with them may result in defective documents being used. Any such defect may continue to affect the title land until cured notwithstanding that the document has been registered.

It has been recognized for some time that the Ordinances are defective in content and wording. Some of the provisions complicate rather than simplify dealings in land. That there has been practically no litigation as to their effect is to some extent due to the dislike to persons to litigate and to the fact that the ownership of land in Zambia by individuals is of comparatively recent origin. The older existing titles become, the more questions will arise and the greater the possibility of litigation becoming necessary to resolve doubts.

It was the intention of Cap. 85 to remove uncertainty arising under the system of conveyancing by deeds and to simplify and cheapen dealings in land. That intention has been carried out to a limited extend and for a limited number of titles only. It is still necessary for purchasers and mortgagees of land to undertake inconclusive, expensive and constantly repeated examinations of the documents of title. Even where this investigation is curtailed by the issue of a Certificate of Title, there always remains the possibility that the Certificate may not be conclusive owing to some circumstances not easily ascertainable. There is no provision for compensation for loss due to fraud, error or mistake in the registry or the existence of two current Certificates of Title. Land may be charged or transferred under statutory provisions without any reference thereto appearing in the register. Title may be defective as a result of the accidental omission to insert technical words in a document. Considerable amendment of the existing Ordinances would be necessary to produce a satisfactory system of land transfer which would be reliable, speedy and suited to the needs of the community.

The complications, expenses and delays in dealing with land in Zambia arise out of the system of conveyancing by deeds. In many of the countries of the Commonwealth where the legal system is derived from English law, including several countries in Africa, that system has been or is being superseded by a system based on registration of title. Cap. 85 has some of the features of a system of land transfer in which the practices and ideas of private conveyancing and registration of title are combined.

The application of the English land law of 1911 to land in Zambia stems from the Northern Rhodesia Orders in Council. Those Orders, by providing that the law be applied should be the law of England at a particular date, namely the 17th August, 1911, have had the effect of "freezing" the development of the law to that date. A consequence of doing so has been that the far reaching reforms of the English law which crystallized in the 1925 property legislation have been excluded from operation in Zambia.

The main difficulties which arise under the applied English land law result from:

(i) the multiplicity of legal estates and interests in land which may be created by landowners, all able to subsist at the same time, either successively or concurrently;

(ii) the equitable doctrines under which purchasers are affected by any equitable interests of which they have express notice or would have noticed if they made all proper enquiries, unless those interests can be overreached by the conveyance;

(iii) the difference between the law governing freehold property and the law governing leasehold property (Freehold estates are treated as real property and leasehold estates as personal property);

(iv) obsolete rules and useless technicalities (the need to convey land "to the use of" a purchaser and to insert words of limitation such as "in fee simple");

(v) the vesting of legal estates in infants;

(vi) the ability to create beneficial legal estates in individed shares (each of which has to be investigated and dealt with on a transfer of the entire land);

(vii) the absence of provision for the registration of equitable interests in land.

Cap. 85 to some extent ameliorated the position in Zambia by introducing a system under which certificates of title can be issued and by making amendments to the substantive law. Unfortunately, the improvements made by that Ordinance are not of general application. They mainly apply to estates in land for which certificates of title have been issued. Although intended to provide a system for the registration of title, the Ordinance did not provide for a comprehensive system and lacks many essential provisions. The amendments to

substantive law, while removing some of the difficulties of the English land law have created other difficulties and new anomalies.

It is a disadvantage of the present situation that most of the statute law is contained in British Acts, enacted over a period of centuries, which are not readily available in Zambia and which contain provisions inapplicable here, and that all the textbooks and other books of reference used by lawyers and others concerned in the administration and teaching of the law are out of print and difficult to obtain. Considerable advantages would accrue if the statutory land law were consolidated and contained in the legislation of Zambia.

The ideal system of land law is one in which the transfer of land is simple and cheap and which is adapted to the needs of the country. The land to be dealt with, together with the encumbrances to which it is subject, and the person or persons who are entitled to deal with it must be readily ascertained. If this degree of simplicity in the title is attained, the formalities required for dealing with the land in any desired manner can be correspondingly simple and expeditious and cheapness will follow. It is generally accepted that a system of transfer based on the registration of title is the system which most nearly satisfies the ideal conditions. In Zambia where all unalienated land is vested in the President circumstances are favourable for the introduction of a system of registration of title.

Many African countries have introduced registration of title. The systems adopted all differ in some respects, but the principles applied are the same. Although Cap. 85 contains some of the elements of a system of registration of title, to a major extent, the present system of transfer of State Land is a system of conveyancing by private deeds, with compulsory registration of the deeds. If a complete system of registration of title had been introduced in 1943, when the Ordinance was enacted, many of the problems now to be overcome would not have arisen. At that time, relatively few grants of land had been made and the ever increasing number of land transations which have taken place during the past 20 years would not have complicated the task.

En England, in 1878, the Select Committee on Land Titles and Transfer stated that "to legislate for registration of title without, as a preliminary step, simplifying the titles to be registered is to begin at the wrong end". This statement applies in Zambia with the same force as it applied in England and to introduce registration of title without first simplifying the statutory land law would not produce the simple and cheap system of transfer of land which is to be desired.

Land Registration - Trust and Reserve Land

For the benefit of the Nation and people living in Reserve and Trust Land areas the President may grant Rights of Occupancy on both Reserve and Trust Land to Natives and non-Natives and demand a rental for use of any land so granted. For mining purposes the initial period of tenure is normally fourteen years with an option to extend it to 99 years on completion of Survey and upon payment of the survey and diagram fees.

Mission Stations are granted an initial period of 14 years with an option to extend it to 33 years on completion of survey and upon payment of survey and diagram fees. A five year Right of Occupancy may be granted to any applicant over an area of not more than five acres in extent. A renewal clause may be inserted in the document or the applicant may apply for a renewal of his Right of Occupancy on the expiry of the existing term. The cadastral system does not apply to Reserve and Trust Land as I said earlier. Rarely will one find a building society willing to finance any project to an individual who holds a five year Right of Occupancy. The sad effects of the system were aptly given in a circular of 2nd July, 1964 (three months before Independence) by the Minister of Lands and Natural Resources, Mr. S. Kalulu as follows:

" We who are familiar with our land rights under customary law find difficulty in understanding the rather complex land system which operates in the Crown land areas and is applied to leases and rights of occupancy in Native Reserves and Native Trust Land but what we most recognize is that this system and the security it offers is acceptable by people from all over the world, i.e. the people who have come or are now willing to come and assist in the development of our country by erecting factories, mines, schools, etc.

These people attach a great deal of importance to what is termed security of tenure. This means that they wish to be assured, by the issue of a formal agreement or lease, that they can enjoy the use of the land allocated to them and in which they wish to sink their capital in the form of buildings and other development, for a period which is at least as long as the expected useful life of such development. Another point is that developers cannot obtain advances from Banks and Buildings Societies unless a title for at least 14 years can be offered as security.

In the Crown land areas this security is afforded by long term leases, generally for a period of 99 years, but in Native Reserve and Native Trust Land the period is shorter. I have noted however that some Native Authorities have recommended such short periods as 4 years when the development warrants security of tenure for at least 33 years.

It must be realized that on the expiry of the agreement the land, the buildings and everything attached to the land revert to the landlord i.e. the Government. Therefore, when only short term contracts are offered the tenants feel it is intended that they should cease to use the land at the end of the contract and they are not encouraged to undertake expensive development. Regarding Mission sites, whether we agree with the religious teachings of the Missions or not, we must agree that our country owes a great deal to the medical and educational facilities provided by these institutions.

I wish to assure you that your recommendations will always be given careful consideration but if you recommend a period which does not afford adequate security I hope you will not be offended if, in the interests of good land administration and progressive development, the title issued is for a longer period that you recommend".

Such anomalies can best be dealt with by declaring all land to be State Land.

SUMMARY

The status of cadastral surveys and land registration services in Zambia is badly in need for revision. The Government is very aware of the position and reports of Commissions are being studied with a view to modernization and simplification.

Many causes have contributed to the present position among which may be listed the following:

1. The fact that the basic land law is cumbrous, archaic and expensive. In areas where the registration system applies tenure derives from the English land statutes prior to 1911 and two local Ordinances based on the Torrens system.

2. The pre-Independence policy (enforced by Orders in Council) of dividing the country into land available for economic development by non-Africans and land for the sole use of Africans and the tendency to concentrate survey and registration services on the first category.

3. The inflexibility of the services i.e. their inability to offer any means whereby the vast areas of land under customary tenure might be brought within the scope of the survey and registration laws and provided with individual registered title.

4. The inherent complexities of the English land law. As stated the basic land law is archaic but it is a matter for conjecture whether modernization on the lines of English 1925 legislation would be the ideal remedy. It may well be argued that the Zambian conveyancer of the future will have received his basic training in English Land Law and that his text books and precedents will be from the same source but one wonders whether this imposes unnecessary scholarship and artificiality and whether it would not be possible to evolve a system with much simpler origins more appropriate to the needs of African countries.

5. The high cost of conveyancing and survey. The costs of conveyancing are a natural consequence of the archaic system under which we work. Legal documents must of necessity be extremely lengthy as there are no statutory forms or covenants. The costs may be appropriate when dealing with large residential properties but are far too onerous when the title to small holdings is involved.

Survey costs in Zambia are high but it must be said that over the years there has been built up a system of survey and examination of records which is second to none and any deterioration in the system would have an adverse effect on the country's economy. It is generally agreed, however, that in order to meet the country's demand for individual title in the rural areas some more general and less costly survey system must be considered as a preliminary. General boundaries and aerial photography have been suggested and under consideration.

The following is a summary of the main problems and the suggestions which are being considered to meet them.

Problem	Suggestions
1. Archaic land law.	(a) That the law be modernized on the basis of post-1925 English land law; or (b) The adoption of a model Ordinance for Africa.
2. To provide individual title in place of customary tenure.	(1) To apply the provisions of registered title more generally (2) To abolish the existing Orders in Council and give the Government new powers of disposition under a Land Administration Act. (3) To make the laws governing natural resources, town and country planning, forests, game and fauna conservation of more general application and to apply the law of compulsory acquisition to all the land. (4) To convert all types of land to State Land and the cadastral system and the Town and Country Planning Ordinance will automatically apply.
3. High cost of conveyancing.	3. The law applicable to land held on statutory tenure should be amended, simplified, and enacted as part of the legislation of Zambia so as to form the basic land law.
4. Waste of agricultural lands.	4. Legislation has already been introduced whereby the State is empowered to take without compensation any undeveloped or unutilized land belonging to an absentee owner. Further legislation is contemplated to enforce rules of good husbandry for all agricultural land.
5. Lack of Registration facilities.	5. There is only one Registry of Lands and Deeds and it is situated in Lusaka. There has been considerable agitation for District Registries, most particularly in the Copperbelt. Lack of qualified staff is one of the main obstacles but the matter is under active consideration.

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