

PN-ABT-236  
isn 91432

**SWAZILAND COMPANY ACT LEGISLATION**

**BY**

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**MBABANE, SWAZILAND  
AUGUST 05, 1994**

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**ARIE BEENHAKKER, Ph.D**

**INTRODUCTION**

The terms of reference for this task state: "Review and facilitate the Swaziland Companies Act legislation". Prior to commencing this task, the consultant was informed that no documentation on past amendment and up-dating efforts could be supplied, and that many considered the issue rather sensitive. Yet, the responsible parties in Government and the private sector agree on the desirability of aiming for an up-to-date companies act for Swaziland. Without a modern companies act, Swaziland can never be in a sound position to attract badly needed foreign investments.

To understand the current state of affairs concerning the Swaziland Companies Act legislation, the consultant familiarized himself with the currently prevailing Act of 1912 and made it a primary objective to identify work performed on possible amendments during the past. His introduction to the Principal Secretary of the Ministry of Commerce and Industry, Ms. Phindile Mkhonza, by the Principal Secretary of the Ministry of Finance, Mrs. Musa D. Fakudze, proved to be invaluable in terms of learning about past, partially completed efforts to draft a new companies act, and a strategy for the near future. The consultant carefully assessed the past efforts to draft an up-dated companies act and arrived at recommendations.

The history of past efforts to up-date Swaziland's companies act has resulted in the existence of two documents: the "Draft Companies Act and Regulations 1986" and the "Companies Act 19 .. Interpretation". The detailed history leading towards these two documents is contained in Appendix I.

Given the above summarized sequence of events, this report is organized as follows:

- (1) Recommendations on the Approach to Draft a New Companies Act.
- (2) Assessment of Existing Drafts.
- (3) Standing Advisory Committee and Re-Activation of the Drafting Committee.
- (4) Tasks to be Undertaken.
- (5) Recommend USAID Assistance.
- (6) Executive Summary.

- (7) Appendix I---Brief History of Past Efforts.
- (8) Appendix II---Terms of Reference Corporate Lawyer.

**(1) RECOMMENDATIONS ON THE APPROACH TO DRAFT A NEW COMPANIES ACT**

Based on the content of solid, effective and efficient companies' acts of other countries, including those of the United States of America, Canada, and the Republic of South Africa, I strongly recommend that the approach for a new companies act for Swaziland aims at the following important objectives:

- (1) To provide for a corporate environment easily recognizable by, and attractive to international corporations and investors.
- (2) To simplify the procedures and reduce the documentation and cost of forming a company so as to encourage the formation of small business by local entrepreneurs.
- (3) To provide for additional or better remedies to protect shareholders, creditors or other members of the public from the activities of delinquent directors (or persons acting as directors), particularly when a company has been liquidated by reason of its inability to pay its debts.
- (4) To create a regulatory framework which does not unnecessarily impede or hamper companies in the conduct of their legitimate business.
- (5) To provide for a company in limited circumstances to receive protection from its creditors where there is a chance that it may be able to trade out of its difficulties or otherwise be rescued.
- (6) To simplify the act both for companies and for the Office of the Registrar as far as is consistent with providing for proper records and protection for shareholders and members of the public.

**(2) ASSESSMENT OF THE EXISTING DRAFTS**

This consultant carefully assessed the "Companies Act 19.. Interpretation" and the "Draft Companies Act and Regulations 1986" in the light of the objectives stipulated for a sound companies act (see 1-6 of the above section). The primary conclusions of this assessment are summarized below, first for the "Companies Act 19.. Interpretation" and then for the "Draft Companies Act and Regulations 1986".

## Assessment of the "Companies Act 19.. Interpretation"

The following observations summarize this consultant's assessment of the above mentioned act:

- (1) The draft is missing the first 59 sections which presumably relate to the basics of types and formation of companies. These sections provide the skeleton around which the remaining sections are built.
- (2) The draft appears to basically follow the text of the "Draft Companies Act and Regulations 1986" but certain wording has been changed. Informal, rather than professional terminology has been used.

Examples of these observations are:

- "Rule of Equity" in section 94
- "Domestic concerns and families" in Section 101
- "General Law" in Section 107 (3)
- "Quasi Loans" in Section 137 (1)

Such terminology will require interpretation with resulting confusion. In certain other instances poor English was noted, such as sentences ending with prepositions.

- (3) Throughout the draft the cross references to other sections have been omitted. This will require considerable work to insert and check. Also, the layout makes it difficult to ascertain if something has been omitted or if the proportional spacing is just too large.
- (4) This draft act criminalizes virtually everything. Between section 64 and 72 there are 8 provisions for fines. Throughout the draft fines and penalties are imposed. Such fines and penalties are difficult to administer, serve as a disincentive to investment, and are unnecessary in procedural matters.
- (5) Again throughout the draft the court is given specific rights to make orders. These rights it already has and the specifying thereof may limit the courts jurisdiction.
- (6) Certain sections are contradictory, for example, Section 153 (1) states that the annual return must be submitted within 42 days of the Annual General Meeting. In the same draft, section 151 (1) states that it must be filed not earlier than 1 July or later than 31 August.
- (7) General comments or reminders are included as part of the draft, e.g. (Section 99 (2)) and cause unnecessary confusion.

- (8) Additional procedures are incorrectly put in place. For example, companies are required to have a seal (Section 137). The use of seals went out of operation many years ago and there is no possibility of all companies being able to acquire such a thing. Moreover, the use to which the seal is to be put is not stated.
- (9) Contrary to the agreement prevailing at that time, the draft act appears to ignore the 1973 South African Act and the proposed amendments. As a result, the entire draft would have to be reviewed putting the position back to 1985.
- (10) In general, the draft discourages rather than encourages foreign and domestic investment, thereby limiting the future economic growth of Swaziland.

Assessment of the "Draft Companies Act and Regulations:

The following observations summarize this consultant's assessment of the above mentioned act:

- (1) In contrast to the "Companies Act 19.. Interpretation", the "Draft Companies Act and Regulations 1986" is "decriminalized". This decriminalized approach is the correct one for a companies act, particularly insofar as offenses concerning administrative matters are concerned where prosecutions are rarely instituted or effective. The decriminalized approach followed by the "Draft Companies Act and Regulations 1986" is in accordance with international trends that in a free enterprise economy bureaucratic control of companies is neither necessary nor desirable. This approach further believes that remedies should, through the civil courts, lie in the hands of aggrieved persons such as unpaid creditors (including employees), oppressed shareholders and other adversely affected persons, rather than being exercised by the criminal authorities.
- (2) This draft does not depart from the (revised) South African Companies Act in approach except to alter or remove provisions, which are unnecessary in a less complex business environment such as the one of Swaziland. As the South African legislation has similar roots to the 1912 Swaziland Companies Act (both have been received from English statutes) and is readily recognizable by companies and professionals doing business in both countries, adherence to the South African Companies Act's approach simply makes good sense.
- (3) Neither inconsistencies nor contradictions were observed.
- (4) A number of the South African professors' recommendations have already been incorporated in the text.

- (5) In general, the draft satisfies the six objective statements stipulated in section (2) of this report.
- (6) Most importantly, the text does not discourage domestic and foreign investments.

In conclusion, the "Draft Companies Act and Regulations 1986" is a far better draft than the "Companies Act 19.. Interpretation". I strongly recommend the following regarding these two draft acts:

- (a) Complete the "Draft Companies Act and Regulations 1986" in a professional and efficient manner; and,
- (b) Utilize the "Companies Act 19.. Interpretation" only for purposes of checking whether certain issues are covered in this text and, perhaps, were overlooked in the "Draft Companies Act and Regulations 1986".

**(3) STANDING ADVISORY COMMITTEE AND RE-ACTIVATION OF THE DRAFTING COMMITTEE**

In order to have an effective new companies act completed in an efficient manner, I strongly recommend that two (simultaneous) steps be taken as soon as possible:

- (a) Establish a Standing Advisory Committee; and,
- (b) Re-activate the earlier Drafting Committee.

The establishment of a Standing Advisory Committee is recommended for the following reasons:

- (i) This committee should review the work of the Drafting Committee and, where necessary, give direction to the Drafting Committee. To accomplish this task, the Standing Advisory Committee should meet once every two months.
- (ii) After completion of the new Companies Act, this committee should ensure that the new Act remains up-to-date at all times. For this purpose, and after the completion of the new Act, this committee should meet once every six months. The "Draft Companies Act and Regulations 1986" provides a similar recommendation (Section 18).

This consultant recommends that persons to be considered member of the Standing Advisory Committee include representation from:

Ministry of Commerce and Industry  
Ministry of Finance  
Income Tax Department  
Registrar of Companies

Attorney General  
Swaziland Chamber of Commerce  
Sibhaca Chamber of Commerce  
Swaziland Institute of Accountants  
Swaziland Law Society

The re-activation of the Drafting Committee is recommended for the following reasons:

- (i) This committee had made good progress, followed the proper approach and is already familiar with the work completed thus far and with the recommendations made by the South African professors.
- (ii) The members of this drafting committee are excellent professionals, have a long history of involvement and would not have to re-learn the concepts.
- (iii) The size of this drafting is small, which is most effective and most efficient for a task such as the one at hand here.

This consultant recommends the following for the Drafting Committee:

- (i) It completes its earlier commenced task in accordance with the six objective statements stipulated for an effective and efficient companies act (see the above section (2)).
- (ii) A legal draftsman from the Attorney General Department be assigned to work with it in order to ensure acceptability of its completed work by this Department.
- (iii) It provides its completed work to the Standing Advisory Committee once every two months.

Given the above organizational vehicle to complete the New Companies Act, attention is focussed on what, exactly, still needs to be done in the following section.

#### **(4) TASKS TO BE UNDERTAKEN**

Once completed, Swaziland's new Companies Act will contain updated versions of all the chapters and schedules listed in the following table of contents:

**SWAZILAND'S  
(DRAFT) COMPANIES ACT  
TABLE OF CONTENTS**

		<b>Sections</b>
<b>Interpretations &amp; Definitions</b>		
Chapter 1	Applicability of Act & Transitional Provisions	1
Chapter 2	Administration of Act	2 - 4
Chapter 3	Types and Forms of companies, conversions and limitations on Partnerships and Associations	5 - 18
Chapter 4	Formation, objects, capacity, power names registration and incorporation of companies, matters incidental thereto and de registration	19 - 29
Chapter 5	Share capital, reduction of capital, shares allotment and issue of shares, members and register of members, debentures, transfers, and restriction on offering shares for sale	66 - 128
Chapter 6	Offering of shares and prospectus	129 - 157
Chapter 7	Administration of companies	158 - 193
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Chapter 10	Auditors	253 - 267
Chapter 11	Accounting and Disclosure	268 - 293
Chapter 12	Compromise, Amalgamation, arrangement and Take overs	294 - 297
Chapter 13	Foreign Companies	298 - 309
Chapter 14	Winding Up of Companies	310 - 394
Chapter 15	Judicial Management	395 - 413
Chapter 16	Penalties	414
Chapter 17	Repeal of Laws and Commencement of Act	415
Schedule 1	Standard Articles of Association for Companies	
Schedule 2	Common Powers of Companies	
Schedule 3	Prospectus Information	
Schedule 4	Requirements for Annual Financial Statements	

In assessing how much has been done and how much still has to be done to complete Swaziland's new Companies Act, one should bear the following in mind:

- (a) Chapters 1 through 5 cover the structure and fundamental provisions of the Act; these issues usually require considerable research and discussion by a drafting committee.
- (b) Chapters 6 through 17 and Schedules 1 through 4 cover procedural matters of the Act; these issues are rather straight forward and, usually, do not require considerable research and discussion by a drafting committee.

The Drafting Committee (recommended to be re-activated) had completed the following chapters of the table of contents:

- (i) Chapters 1 through 4 and approximately half of Chapter 5, constituting the time-consuming structural and fundamental issues of the Act; and,
- (ii) Most of Chapters 14 and 15 dealing with winding up and judicial management.

In view of the above observations (a) and (b), it is fair to state that approximately 50% of the total workload has been completed by the Drafting Committee. Furthermore, it is fair to state that the completed draft act could be sent to Parliament early next year if both the Standing Advisory Committee and the Drafting Committee were established and re-activated, respectively, in the very near future.

#### **(5) RECOMMENDED USAID ASSISTANCE**

Part of this recommended assistance has already been performed thanks to the excellent assistance of Mr. Ed Baker's Office, USAID-Swaziland. That is, the currently available "Draft Companies Act and Regulations 1986" was not available in a modern computer language, thereby complicating any future changes to be made. The hard copy of the available "Draft Companies Act and Regulations 1986" has been completely retyped in Word Perfect and the disc made available to Ms. Phindile Mkhonza, Principal Secretary, Ministry of Commerce and Industry.

Though this disc has been given the usual spell check, it has not been carefully checked with the hard copy from which it was typed. Hence, it is highly recommended that this careful checking on accuracy be done.

This consultant recommends the following USAID assistance to facilitate and accelerate the completion of the new Companies Act:

- (i) A corporate lawyer, well versed in the latest developments of companies acts and modern financial techniques for: one week in Swaziland during the early stages of the Drafting Committee's work; occasional availability to reply to inquiries by fax and telephone-total duration not more than two weeks; and, two weeks upon completion of the entire new Act to carefully review the entire text and make last changes whenever needed (but after discussion with the Drafting Committee and Standing Advisory Committee). Hence, the total availability of the requested services is not more than five weeks. The terms of reference for the recommended services of the corporate lawyer are contained in Appendix II.
- (ii) Further assistance in typing: since the entire draft act has been retyped, only amendments, additions and changes will have to be made.

**(6) EXECUTIVE SUMMARY**

This report concludes that the "Draft Companies Act and Regulations 1986" is a professionally sound effort to arrive at a new Companies Act for Swaziland. Work on this document should, therefore, be completed as soon as possible. For this purpose, the following is recommended:

- (i) Re-activate the earlier Drafting Committee and request this group to complete their work on the Companies Act.
- (ii) Assign a legal draftsman from the Attorney General Department to work with the Drafting Committee to ensure acceptability of the draft by his Department.
- (iii) Establish a Standing Advisory Committee to review the work of, and, where necessary, give direction to the Drafting Committee. (Upon completion of the new Act, this Committee should remain in force for future updating of the Companies Act).
- (iv) Request USAID short-term assistance from a corporate lawyer to provide valuable input at the onset and review the entire draft upon completion.

It is estimated that the completed draft act can be presented to Parliament early next year if the above recommendations be implemented in the near future.

**(7) APPENDIX I---BRIEF HISTORY OF PAST EFFORTS**

The history of efforts to formulate a new Companies Act for Swaziland dates back to the mid 1970's when the then Attorney General, Mr. David Cohen, in consultation with the late Mr. Ian Hodgkinson and others started to review the 1912 Act on the same basis as the then new South African Companies Act of 1973. The aim was at that time to follow the same logical approach of the South African Companies Act of 1973, but to ensure applicability to the much smaller size of Swaziland and the limitations of Swazi infrastructure. Unfortunately, the activities of this group came to an effective end following Mr. Cohen's appointment as a Judge of the Swaziland High Court.

In 1984 a committee was established and requested to review the work of the previous group and to bring the new Companies Act for Swaziland to finality. This committee consisted of parties interested in a Companies Act and included representation from various Government Departments, such as The Registrar of Companies, and the private sector through the Swaziland Chamber of Commerce and Industry. Subsequently, it became apparent that the committee was too large and lacked the required expertise to effectively complete the assignment. Consequently, a small sub-committee, comprising mainly accountants with assistance from a legal advisor and with specific input from various persons, was appointed under the chairmanship of Mr. Ian Hodgkinson to provide the draft for consideration of the main committee. This latter draft was substantially completed in 1986 with the exception of certain schedules, indexing and the insertion of the penalty provisions. Given the near state of completion, the draft Act was given to Government for comment and approval. It was also to be referred to an attorney in South Africa, who had a wide knowledge of the subject to ensure that there were no obvious errors or omissions. No action on the substantially completed draft companies act of 1986 followed until 1989.

It is possible that a separate effort, basically performed by one person without much experience in companies act or companies' internationally accepted procedures, started drafting a separate act during the time interval of 1991 - 1993. This consultant will refer to this separately drafted act as the "Companies Act 19.. Interpretation". (A copy of this document is available at the Office of Ms. Phindile Mkhonza, Principal Secretary, Ministry of Commerce and Industry, and at the Office of Mr. Ed Baker, USAID-Swaziland). By the knowledge of this consultant, the text of the "Companies Act 19.. Interpretation" was never shared with Chairman Ian Hodgkinson and the members of his sub-committee, who produced the aforementioned, substantially completed draft of 1986.

In 1989 the substantially completed draft of 1986, produced by the sub-committee chaired by Ian Hodgkinson, was revived and this draft company act was sent, through the offices of the South African

Trade Mission, to a panel of professors in South Africa. This panel had a wide knowledge of the South African Companies Act. It was expected that this panel of professors would produce a final draft of the bill to be presented to Parliament. Toward the end of 1990, the South African professors' report was received with their indication that they considered it outside their terms of reference to produce a final draft of the bill to be presented to Swaziland's Parliament. Instead, they produced a report drawing attention to the then recent developments in Company Law legislation and correcting certain mistakes in the draft sent to them. It is this consultant's understanding that the draft referred to as "Companies Act 19.. Interpretation" was never sent to the panel of South African professors or another party for review.

Subsequent to the receipt of the report by the panel of South African professors, a sub-committee, chaired by Mr. Arthur H. Fandam was established. The task of this sub-committee was to review the professors' findings and incorporate these in a final draft. This sub-committee followed closely the composition of the previous drafting committee. It consisted of two accountants (the Chairman of the Swaziland Institute of Accountants and the Registrar of the Institute), an attorney together with a representative of the Ministry of Commerce and Industry, to ensure that the Ministry's requirements were complied with, and a draftsman from the Attorney General's chambers to ensure that the proposed act was properly drafted in final form. Together, the members of the sub-committee represented relevant expertise and experience in Swaziland, South Africa, and other countries. Given this representation, their input would likely have facilitated the acceptance of the proposed Companies Act in the business community in Swaziland.

The Arthur Fandam sub-committee commenced work and soon realized that the South African panel of professors had merely reviewed the draft sent to them, rather than produced a critical assessment of this draft. Therefore, although the input of the South African panel was valuable, considerable more work was required. The additionally required work was the result of the changes suggested by the South African professors and, even more important, of the developments which had occurred since the first draft. The approach followed by the sub-committee chaired by Arthur H. Fandam was quite rational and similar to the approach adhered to in the earlier work on the companies act by David Cohen, et al., and the subcommittee chaired by Ian Hodgkinson. Specifically, the approach followed by the Arthur Fandam sub-committee can be summarized as follows:

Compare the completed portions of Swaziland's proposed companies act with the South African Companies Act and all of the latest developments in companies act legislation and ensure that:

- (a) The provisions are appropriate for Swaziland.
- (b) Any omissions are justified.
- (c) The comments of the South African professors are taken into account.
- (d) No inconsistencies prevail as a result of the amendments.

The Arthur Fandam sub-committee continued work until the end of 1991. Their completed work is referred to as "Draft Companies Act and Regulations 1986". A copy of this document is available at the Office of Ms. Phindile Mkhonza, Principal Secretary, Minister of Commerce and Industry. Approximately 20% of this draft was critically reviewed and several significant and many minor alterations were made by the Fandam sub-committee. Incidentally, this version of the draft of the companies act is called "Draft Companies Act and Regulations 1986", because it was supposed to have been passed by Parliament in that year. It is noted that Chairman Arthur H. Fandam and the members of his sub-committee never saw the text of the "Companies Act 19.. Interpretation".

The Arthur Fandam sub-committee undertook the task of critically reviewing and, where needed, supplementing the draft companies act on a voluntary basis. Given the time constraints placed on the committee members as a result of their responsible positions in the society, most of the work was performed during the weekends. Every Saturday morning meetings of the sub-committee were held provided that at least one accountant and one legal person were present. At one point in time in 1991, the Ministry of Commerce and Industry offered to provide a full time consultant to undertake research for the sub-committee. Apparently, no suitable candidate was identified.

It became increasingly evident towards the end of 1991 that apparent differences of opinion concerning the companies act prevailed between the Ministry of Commerce and Industries and the offices of the Attorney General. These differences were considered sensitive and could result in a situation where the accomplishments of the Arthur Fandam sub-committee would not be fully utilized. Given these developments the Arthur Fandam sub-committee respectfully requested the honorable Minister of Commerce and Industry, in writing, the following:

- (a) A confirmation that the (above identified) approach followed by the sub-committee was acceptable to the Minister, or failing which what approach the Minister would recommend.
- (b) An assurance that on completion of the task of the sub-committee the draft would not be significantly changed as that would constitute a waste of the members' valuable

time.

In addition to the two reasonable requests, the Arthur Fandam sub-committee confirmed that they would be pleased to receive as much assistance as possible, and that they continued to be pleased to have the opportunity to assist Government with the important task of arriving at an up-to-date companies act for Swaziland.

By December 9, 1991, the Arthur Fandam sub-committee had not yet received a reply to the aforementioned requests, which were communicated in writing to the (former) Minister of Commerce and Industries on November 8, 1991. In a letter of December 9, 1991, the Arthur Fandam sub-committee respectfully reminded the Minister of Commerce and Industries of the earlier request to confirm the terms of reference of their committee. Furthermore, the sub-committee informed the Minister that it had suspended its deliberations on the companies act pending his response. Unfortunately, the Arthur Fandam sub-committee never received a reply to the aforementioned letters of November 8 and December 9, 1991. To the best knowledge of this consultant, no work whatsoever was performed on the companies act since early December, 1991.

Nevertheless, The Times of Swaziland of March 12, 1992, published a brief report stating that the Companies Act was almost ready. Specifically, this newspaper report quoted the then Minister of Commerce and Industries, Senator Nkomeni Ntiwane, speaking in the House of Assembly, as having said that "the long overdue Companies Act is almost ready.....and a draft of the bill was released last month". This news release came as a surprise to Swaziland's business community at large, and to the Arthur Fandam sub-committee members in particular. In another letter of March 13, 1992, to the honorable Minister of Commerce and Industries, Mr. Arthur Fandam, on behalf of his sub-committee, expressed his concern about the Minister being quoted that the Companies Act was nearly ready, and reminded the Minister of his letter of December 9, 1991, stating, inter alia, that his sub-committee had stopped its deliberations of the companies act pending a response from the Minister. In that same letter of March 13, 1991, the Arthur Fandam sub-committee respectfully requested the Minister that they be given an opportunity to review the draft act before publication. Again, no reply was received.

To the best knowledge of this consultant, since March 13, 1991, no official reports or communications concerning the status of, or work on the companies act have been published or taken place. Also to the best knowledge of this consultant, the work on the "Companies Act 19.. Interpretation" by primarily one person must have stopped in 1993 when that person permanently left Swaziland.

The Principal Secretary of Commerce and Industries, Ms. Phindile Mkhonza, had located a copy of the "Companies Act 19.. Interpretation" and shared this copy with this consultant. She

furthermore requested Mr. Arthur Fandam to share a copy of the "Draft Companies Act and Regulations 1986" with this consultant and Mr. Arthur Fandam complied with this request.

**(8) APPENDIX 2: TERMS OF REFERENCE---CORPORATE LAWYER**

**Background:**

Swaziland's current Companies Act is of 1912. A small Drafting Committee of outstanding professionals from Swaziland has been working on up-dating this old Act. A legal draftsman from the Attorney General Department has been assigned to work with the Drafting Committee to ensure acceptability of the draft by his Department. Furthermore, a Standing Advisory Committee with proper representation from both Government and the private sector has been established to review the work of, and, where necessary, give direction to the Drafting Committee. Approximately 50% of carefully reviewing the entire draft has been completed at this time.

**Objective:**

To ensure that the entire draft to be submitted to Parliament reflects the latest development in a companies act.

**Scope of Work:**

The following tasks will be undertaken:

- (1) Review the work completed thus far and meet with the Drafting Committee in Swaziland for one week to provide valuable input.
- (2) Reply to occasional inquiries from the Drafting Committee by fax and telephone during a period of approximately four months.
- (3) Review the entire text, meet with the Drafting Committee and make last changes during two weeks in Swaziland.

**Level of Effort:**

The tasks will require the services of a corporate lawyer, well versed in the latest developments of companies acts for: one week in Swaziland to provide the Drafting Committee with valuable input; occasional availability to reply to inquiries by fax and telephone--total duration not more than two weeks; and, two weeks in Swaziland upon completion of the new act to carefully review the entire text and make last changes whenever needed.

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August 5, 1994

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