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TUNISIA CONCILIATION

COMMENTS ON ALTERNATIVE METHODS

OF

VALUATION

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A. Introduction

1. Background

During the French protectorate over Tunisia, 7 private companies* were responsible for the supply of the country's electric power and gas, as also for operating the public transport system of the city of Tunis and its suburbs. These companies derived their rights and obligations from multiple concessions granted either by the municipalities or by the State of Tunis, governed by the French protectorate.

No changes were made when Tunisia became independent in 1956, although the President, Mr. Habib Bourguiba, announced in his first address to the people that the independent Tunisian Government would be taking over, one after another, all the vital sectors of the Tunisian economy, in order to exercise more direct control over the country's economic development.

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* Compagnie Tunisienne d"Electricite et Transport (CTET), Omnium Tunisien d'Electricite (OTE), Union Electrique Tunisienne (UET) and Compagnie du Gaz et Regies Co-interessees des Eaux de Tunis (CGET) were all Tunisian Societe anonyme with siege social in Tunisia and offices in Paris. Societe Nord Africaine d'Electricite, Gaz et Eaux (SNA), Societe d'Energie Electrique de la Ville de Bizerte (SEEVB) and Union Electrique d'Outre-Mer (UNELCO) were, however, French societe anonyme with siege social in France. This status continued despite the independance of Tunisia in 1956, by virtue of Article 35 of the Franco-Tunisian Economic and Financial Convention of June 3, 1955. (See Motor Columbus Raport general Annote - Deuxieme Partie p. 4.)

Two years later, the Government decided to take over, as a temporary measure, the operation of the 7 companies providing utility services, and it carried out this step in four successive stages.

On the first July 1958, the Government made the "Societe Nationale des Chemins de Fer Tunisiens" (SNCFT) responsible for operating both the public transport of the City of Tunis and the services provided by the "Chemin de Fer Tunis-Goulette-La Marsa" (TGM), both forming part of the "Transport" branch of the "Compagnie Tunisienne d'Electricite et Transport" (CTET).

On the 15th August 1958, the Government also took over "temporarily" the "Electricity" branch of the same Company, which was operated by a "Management Committee" (COMITE DE GESTION) set up by the State.

On the 26th November 1959, the State took over the "Compagnie du Gaz et Regies Co-interessees des Eaux de Tunis" (CGET) which also came under the control of the Management Committee.

Finally, on the 1st August 1960, the Tunisian Government took over the 5 smaller companies remaining, namely:

- the "Union Electrique Tunisienne" (UET, Sousse);
- the "Societe Nord Africaine d'Electricite, Gaz et Eaux" (SNA, Sfax);
- the "Omnium Tunisien d'Electricite" (OTE);
- the "Societe d'Energie Electrique de la Ville de Bizerte" (SEEVB); and
- the Tunisian branch of the "Union Electrique d'Outre-Mer" (UNELCO).

This stage of temporary take-over was concluded by the setting up of two new organizations and by the proclamation of nationalization.

By Decree Law No. 62-8 of the 3rd April 1962, the Government nationalized, retroactively from the date of temporary take-over by the Management Committee, all the assets connected with the supply of electric power and gas, as also those connected with provision of the allied services of production, transport and administration, including all the assets and liabilities of the 7 companies. The same enactment set up the "Societe Tunisienne d'Electricite et du Gaz" (STEG) and assigned to this latter company all the assets and debts, as well as the rights and obligations of the nationalized companies including that portion of the assets, such as the portfolio of holdings invested in France, which the Tunisian State has not been able to recover.

By Decree Law No. 63-8 of the 14th March 1963, the Tunisian Government officially nationalized the Transport Branch of the CTET and set up the "Societe Nationale des Transports" (SNT) to which were likewise transferred all the corresponding assets and liabilities of the nationalized company.

It was laid down in Articles 32 and 35 respectively of the two Decrees above referred to, that the terms and conditions governing compensation of the shareholders would form the subject of a later Decree. It was stated, furthermore, that the concession agreements entered into with the former companies were now "cancelled".

The companies thus penalized by the sanctions imposed by the State of Tunisia entered into direct bilateral negotiations with Tunisia in order to settle the question of compensation, but they ran into differences of interpretation which made it impossible to reach an understanding.

Basing their argument on the concessions granted to them, which constitute contracts entered into with the granting authority, the companies interpret nationalization as a step involving, in effect, the surrender of their concessions, in accordance with the specific terms of the concession agreements (Cahier des Charges), even if the proper forms for such surrender had not been respected by the State.

For its part the Tunisian Government takes the French precedent as its model and would be prepared to compensate the shareholders on the basis of the Stock Exchange value of their shares on the day on which the companies were taken over, but Tunisia claims that as the companies have retained outside Tunisia a part of the assets theoretically reflected by the Stock Exchange value, the Government's offer is properly limited to the nominal value of the shares.

There is a disparity of 11 to 1, on an average, between the companies' claims and the offer made by the Government for all the companies, which helps to explain why it was not possible to reach an understanding, even when joint efforts were made to find a solution.

In order to break this deadlock, the parties agreed to submit their cases to a conciliator and upon application being made to him, the President of the World Bank, Mr. George D. Woods, expressed his willingness to discharge that office. According to Article 4 of the Conciliation Agreement of the 28th August 1965, the conciliator had the right to appoint one of more experts to assist him in carrying out his task.

By its letter of the 25th January 1966, the Bank called upon Motor-Columbus, Consulting Engineers of Baden, Switzerland, to act as experts. On the occasion of a first interview that was held in Paris on the 12th February 1966 with a representative of the Bank, consideration was given to an exploratory approach being made to representatives of the 7 companies in Paris, and this was undertaken on the 8th and 9th March 1966 with a view to obtaining the legal and financial basis required for the purpose. The discussions were continued in Washington on the 17th March in order to define the tasks to be performed by Motor-Columbus. Since an on-site valuation of the installations was essential, an exploratory Motor-Columbus mission went to Tunisia, where it remained from the 20th to the 29th April 1966 in order to enable Motor-Columbus to prepare the terms of its offer of services by the 13th May 1966. This offer was accepted by the Bank on the 23rd May 1966. The contract binding the two parties and defining the duties to be performed by Motor-Columbus, was signed by the parties on the 14th and 25th July 1966 respectively.

2. The problem

The task of the Conciliator is governed by the Conciliation Agreement and consists in arriving at the amount that the Tunisian Government should pay to each of the companies or to its shareholders and the modalities of payment.

With a view to determining the amount of compensation that should be paid, several possibilities fell to be examined, and Motor-Columbus appears to have acted on the understanding that the companies were, to the fullest extent possible and in spite of their essentially different features, to be treated on an equal footing. The various possible methods of valuation that were felt to be open for consideration are summarized below:

a) surrender (rachat) in accordance with the terms of the agreements governing the concessions;

b) an estimate of the assets of each company, independently of the concessions; and

c) compensation in accordance with the values of the various shares, bearing in mind the reserves, both disclosed and actual.

In order to achieve this purpose, Motor-Columbus felt that it was necessary to undertake two quite separate studies:

1. on-site valuation of the installations; and

2. examination of the companies' books and accounts. In the course of carrying out both studies it was felt that it would be necessary to examine them in the light of the requirements laid down in the concession agreement in order to extract therefrom the details required for this method of valuation.

Such was Motor-Columbus' idea at the outset. In the course of their study it became clear to them that these two tasks presented serious difficulties because of the fact that precise data was frequently lacking, and also because of the very special circumstances after the take-over.

Motor Columbus Reports show, however, after discussions with the parties and examination of all the documents provided by the parties, that in their opinion insufficient reliable data was available to permit them to make the necessary and reasonably scientific calculations under any but the depreciated replacement value method of valuation. (See Rapport General Annote - Premiere Partie pp. 9 - 11.) They feel that in order to do any meaningful valuation under a method other than depreciated replacement value, they would have had to examine in detail the following:

- concession documents
- status of each company
- "rapports de gestion"*
- "comptes d'exploitation"*
- "comptes de pertes et profits"*

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* To enable them to apply the rachat provisions of the concession agreements these accounts would have to have been broken down into different types of operation (i.e. Transport and Power for CTET, Gas Water and Power for CGET) and into domaine concede and domaine prive (part belonging to Government at end of concession as opposed to that remaining the property of the company).

- bilans
- inventory of immovable property**
- inventory of movable property**
- inventory of the "balance des comptes"**

Motor Columbus report that they were unable to obtain this type of information despite requests to both parties. What they obtained was in most cases several financial statements prepared by the companies for members of the Boards of the companies for totally different purposes than Motor Columbus' requirements. The Motor Columbus report (Rapport General Annote pp. 9 - 11) suggests that the exact whereabouts of these documents is a matter of considerable confusion and dispute between the parties. Motor Columbus accordingly had had to request specific information on a piece-meal basis from both the companies and the State (a form of cross-checking). This laborious process enabled them to establish the basic inventory and helped them to work out the extent to which the State or local communities had contributed to the initial investment in certain assets.

As far as the actual data obtained is concerned Motor Columbus report (idem p.12) that they were able to obtain:

- nearly all the concession instruments (although some of the documents provided appeared to be of "doubtful validity" because of handwritten annotations and corrections) but not the necessary detailed financial statements to go with them

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** This would need to have been agreed upon and accomplished at the time of take-over.

- the statuts of the companies; again often annotated and corrected.

- "rapports de gestion" - in complete but summary form providing little information on the balance sheets, profit and loss statement and nothing on the operating accounts for the concession operations. Their form constantly varied and differed from company to company and therefore little reliance could be placed on them

- certain operating accounts for the concessions (obtained at a very late stage) - the form of which varied from company to company and none of which were broken down on a concession by concession basis, nor was it possible to decipher the elements necessary for an application of the concession's rachat provisions. In the case of CTET where the figures were broken down into the necessary detail, the breakdown didn't correspond to the requirements of the concession agreement in Motor Columbus' possession. The Company explained this discrepancy by reference to a hitherto unheard of ad-hoc agreement between the Authorities and CTET which was both unpublished and unavailable.

- the account of profit and loss (statement of profit and loss). These did not follow a uniform pattern and Motor Columbus were unable to check the figures because of their failure to obtain the necessary documents

- the detailed balance sheets - according to Motor Columbus these revealed "a chaotic situation". Motor Columbus describes these balance sheets as follows:

"Not only did one find past balance sheets which had been re-evaluated on widely fluctuating bases but in the case of CTET the balance sheet revealed entirely unexpected elements such as installations supposedly partly subsidized by the State entered as having been entirely paid for by the State on the asset side of which the debit side consisted of an entry dealing with an item which has been the subject of disagreement between the State and CTET". Few of the companies distinguished between installations covered by the concession (domaine concede) and installations outside the concession and belonging to the concessionaire (domaine prive), information which as Motor Columbus points out one must have in order to apply the concession system of valuation (the rachat clause).

- inventories for immovables. Motor Columbus comments (p.13) on these documents are confusing. While claiming that they were compiled in an often contradictory and confusing fashion, it adds that they did not exist and that Motor Columbus established such inventories with the assistance of STEG and former employees of the companies living in Tunisia. These inventories were thus apparently prepared by the Motor Columbus field mission. A breakdown between assets either entirely paid for by the concessionaire or the State or the consumer or partly paid for by one of them, was difficult and hard to establish.

- Inventories of movables were available but were often being challenged by the State.

- Inventories of the balance des comptes. These existed and were taken over by the State and are covered under the heading "petit contentieux".

- Stock Market Figures. With the exception of CTET these were not supplied by the companies; however, figures were obtained for the group CTET, UET and SNA. The Government provided the consultants with an extract from the "Courrier Financier" of Tunis giving the high and low figures for all the companies except UNELCO for the years 1956 and 1957. The figures obtained for UNELCO reflect all its operations (North Africa, Togo, Central African Republic and the Pacific) and cannot be broken down by concessions.

Motor Columbus also draws attention in its report (pp. 14-19) to the difficult problems raised by the history of these companies in the period before their take-over. Thus, for example, Tunisia, being in the Franc zone, suffered from the effects of large scale devaluations during this period. This massive devaluation came during the years which were particularly important to any calculation of compensation. It is also pointed out that during World War II considerable damage was done to the assets of the companies.

After the War and until 1965 the companies went through a period of reconstruction and expansion. However, after 1950 the likelihood of independence for Tunisia had a serious impact on the investment decisions of French private enterprises. The view of the Government and the companies on the impact of the developments in this period differ sharply (see memorials). The Government maintains that the companies abandoned any opportunity of playing a constructive role in the economy and followed instead a conservative policy in order to maximize their profits, whereas the companies reply that they not only carried out the letter of their obligations but in fact did more than was required of them.

Motor Columbus reaction to this difference of opinion is to indicate that it is impossible to evaluate, 8 years after the take-over, the exact conditions in the period before take-over. The field mission was able to establish, however, that the assets were still apparently in good working order even though some of them had been in service for a very long period and they conclude that in order for these assets to have remained in such good working condition it would appear that both the companies and the Government must have followed a meticulous policy of repair and maintenance. The consultants point out, however, that certain of CGET's assets in Tunisia were clearly out of date and would have had to be consistently replaced or repaired and that they would most probably have been entirely replaced but for the political climate. The consultants also point out that the political situation before take-over had resulted in the departure of numerous French residents

who were also among the heaviest consumers of power and they suggest, somewhat questionably, in view of the subsequent activities of STEG, that the companies future earnings might well have fallen appreciably.

With respect to the assets of the company, Motor Columbus underline that these were not affected by devaluation since they maintained their real value and, indeed, the State permitted, by decree, the revaluation of the balance sheets to take account of these changes. Both immovables and portfolios were accordingly revaluated. However, in view of the fact that certain of the companies possessed installations partly or totally paid for by the State these revaluations created problems and were as a result done on only a partial basis and to different degrees by the various companies in question*.

The resulting increase in capital was reflected either totally or partially in a gratuitous increase in the share capital of the companies (see individual company reports dated December, 1967). Motor Columbus suggests that this factor taken together with the influence of the Government on tariffs and accordingly on profits had a decided effect on the dividends paid by the companies and on the stock exchange figures for the companies. Motor Columbus

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* Thus for example, CTET appears to have never revaluated with respect to the electricity branch of its operations, whereas SNA revalued all the assets outside the concession.

(idem p. 17) also points out in this connection that the companies varied in the degree to which they were influenced or controlled by the State. CTET and OET reputedly worked under close supervision and cooperation with the State. Rather than having simply the problem of paying back subsidies or investments made for their benefit by the State, they also had a profit sharing arrangement with the State. Motor Columbus labels this relationship one of "co-management". For the other five companies the profits were also affected by the State as a result of its ability to decree the ceiling for tariffs and because the State, apparently, discouraged debt-financing by these companies. Furthermore, all the companies, with the exception of CTET, had certain installations outside the periphery of the concession either entirely or partially paid for by the State. As a result supplies of power outside the scope of the concession, for which the expense of the installations would otherwise be prohibitive, constituted important elements in the overall profit picture of the companies.

3. The Tunisian Government's Offer of Compensation

As has been noted above, the nationalization legislation left open the question of quamtum of compensation and modalities except for the stipulation that the compensation be made payable to the shareholders for the companies directly. The Memorial (at pp 6-7) presents the Government's views on these questions. The Government rejects the concept of compensation for the shareholders of the ex-concessionaire companies on the basis of the replacement value of their installations and the "indemnite d'eviction" (which appears from the company's Memorials to have corresponded to the application of the rachat formula) but agrees to "indemnify the former companies on the basis of the nominal value of their share capital". This constituted a reaffirmation of the offer of compensation previously made by the Tunisian Government in correspondence and negotiation with the companies. The Memorial goes on to note and accept an assertion by CTET that the nominal value of its share capital stood at D 580.725 instead of the previously discussed figure of D 558.630. This discrepancy was apparently the result of the Tunisian Government's lack of knowledge with respect to existence of 7,365 actions des jouissance (reimbursed shares) partially amortized at 2 dinars each but having a nominal value of 5 dinars each (three times 7,365 equals 22,095 dinars which when added to 558,630 equals 580,725 dinars). The Government accordingly assessed the nominal value of the 7 companies as follows:

C.G.E.T. (Bilan 1958)	D	848 500 ,000	
C.T.E.T. (Bilan 1957)	D	580 725 ,000	
S.N.A.E.G.E. (Bilan 1960)	D	425 354 ,105	
S.E.E.V.B. (Bilan 1960)	D	100 000 ,000	
UNELCO (Bilan 1960)	D	12 693 ,962	to be established
U.E.T. (Bilan 1960)	D	390 000 ,000	
O.T.E. (Bilan 1960)	D	169 158 ,000	

The Tunisian Memorial seems to have left open the exact amount of nominal value of UNELCO shares which it was prepared to accept as corresponding to UNELCO's investments in its operations in Tunis as opposed to its operations in other parts of the world. The Tunisian Memorial goes on to add the caveat that in the absence of the necessary financial documents these figures had been based on bilans of doubtful validity since they were neither signed nor accompanied by the necessary reports of the commisaires aux comptes[‡] .

As far as modalities of payment are concerned the Tunisian offer, as stated in the Memorial, is simple. The Memorial calls for an exchange of 50 year bonds for shares, the bonds to carry the same nominal value, and to carry interest at the rate of 3%. These bonds would be fully transferable outside Tunis and payments of principal and interest would be covered by a guarantee of transfer ability from the Government of Tunisia.

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‡ This would appear to corroborate the views expressed by Motor Columbus on the subject of the value of these documents (see supra).

4. Claims of the Companies

As has been noted above the companies based their claims upon the theory that the nationalization legislation amounted to a rachat of their concessions in accordance with the terms of their conventions and cahier des charges. Accordingly the Companies' Memorials set out claims of the companies to compensation corresponding to the applications of these provisions.

Although the precise terms and assets covered under these provisions varied from concession to concession, in general the formula appears to have called for (i) an indemnity corresponding to lost profit; (ii) an indemnity corresponding to the unamortized portion of assets belonging to the concession (domaine concede) which reverts to the State at the end of the concession and which had been erected or installed during a stated period of years prior to the date of the rachat* and (iii) an indemnity constituting the price of certain specific assets such as, for example,

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* In some concessions these figures stood at 30 years for certain major assets and 15 years for minor assets. In others a single period of 25 years was stipulated for all assets within the domaine concede and, finally, in a few, a shorter period of 15 years for major assets and 7.5 years for minor assets was specified.

a power station, generators, inventory of stocks, and movable equipment used in the disposition facilities (this price was normally to be fixed by agreement between the parties or by experts)*. In juxtaposition to these three headings of indemnity the cahier des charges generally provided a requirement that the concessionary company turn over all those assets covered by the indemnity, under the second head of indemnity above, in good working order and the State or municipality had under most of the concessions' cahier des charges the power to withhold the payment under the head of indemnity in order to permit it to set-off against the payment due the amounts it would have to spend in order to make the necessary repairs and replacements after the take-over.

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* The specific assets to be purchased under this third head of indemnity vary widely from concession to concession. In some cahier des charges the Government or commune (municipality) was given an option to buy such assets. In others there was a distinction between assets purchasable at the option of the authority and assets such as stocks in the warehouse or already ordered, of which purchase was mandatory. Even in the case of the latter requirement there are variations between the various cahier des charges in that some provide for mandatory purchase of all such stocks while others provide for the mandatory purchase of only such stock as would be necessary to operate a particular concession for six months.

Under the cahier des charges formula three further points deserve attention. First, whereas the payment under the second and third headings of indemnity were to be made within six months of the date of the rachat, the payments due under the first head of indemnity would be payable on an annual basis over a period of years corresponding to the period which would have been left to run if the concession agreement had continued in force and effect. Second, the requirement that the Government or municipality buy back certain of the assets at a price agreed or fixed by experts applied only to a limited number of assets which would otherwise continue to belong to the concessionaire. Indeed, the concessionaire might be required to remove at its own expense, certain of these assets which fell under the domaine concede if the Government did not wish to acquire them by payment of the unamortized portion according to the contractual formula; and those assets of the domaine prive on which the State did not wish to exercise its option of buying. Third, the concessions' cahier des charges made no provision for any compensation for assets of the domaine prive not specifically covered under the third head of indemnity. No compensation would be due from the Government or municipality in the event that these assets diminished in value because of the loss of the concession rights.

The following are the claims of each of the companies in accordance with the above mentioned formula purportedly as applied by the terms of their particular concessions*.

OTE. OTE's Memorial provides two sets of claims: (a) the original claim filed on October 25, 1962 amounted to D 986,256. This was made up of a request for an indemnity for those assets part of the cost of which still remained to be amortized and a claim for the purchase price of certain assets required to be purchased on the cahier des charges and other assets not covered by the concession but taken over by Tunisia in accordance with the terms of the nationalization legislation and for lost profits for the remainder of the life of each of its seven former concessions. On this latter point OTE calculated this amount by reference to the rachat formula in a Decree embodying regulations adopted by the French Government for the compensation of nationalized companies

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* It should be noted that in the case of companies holding numerous concessions the Memorials do not appear to work out the amounts of compensation due under the various headings of indemnity on a concession by concession basis. Thus, for example, OTE calculates the compensation due to it under its concession by reference to an example of a rachat provision apparently borrowed from one of the seven concessions it holds (Annex A to Memoire of OTE dated September 30, 1965).

whose assets had been transferred to EDF in 1946, (Decree No. 47-1538, 14 August 1947). This latter Decree provided for a single payment corresponding to capitalization of the amounts due each year for the remaining life of the concession together with interest at a rate of 3.25%; and (b) a revised statement of claim was filed in January 1964 in accordance with the terms of the request by the Government of Tunisia (see OTE Memorial p.3). This consisted of a table giving on an annual basis the cost of investment in French francs, at the time of investment and as revalued in dinars at the 1959 rate. This table (see Annex E to OTE Memorial) establishes a value for the assets of the concession, taken over by STEG, as well as for assets outside the concession, of 389,600 (1959 dinars).

The Memorial stipulates with respect to modalities of payment (p. 4) that:

(a) No deduction should be made for the part of OTE's portfolio still held by it either in Tunis or Paris and that no taxes or duties should be levied on the compensation payable to the companies or on the amounts eventually paid to the shareholders.

(b) That payment should be on a lump sum basis in francs preferably through the IBRD as paying agent in Paris or through some other French Bank, and that the exchange rate should be that between the dinar and the French franc applicable at the date of take-over rather than at the date of nationalization (namely 1 dinar to 11.755 French francs).

CGET. The CGET Memorial claims compensation of D12.459.259 which is broken up into claims of D400.695 for the unamortized portion of assets within the domaine concede; D7,515,907 for the amounts due on an annual basis for the remainder of the life of the concession (the annuite) capitalized together with interest of 3.25% (i.e. in accordance with the same metropolitan formula as that applied by OTE) and, finally, an amount of D3,310,583 as constituting the price of assets of the domaine prive including those which the municipality had no obligation to repurchase under the terms of the concession agreement[*]. To the total of these amounts CGET added a figure of D1,232,071 corresponding to the petit contentieux. This sum includes the stocks in the warehouse and debts as of November 26, 1959, which were taken over by the Government and which would have been taken over in accordance with the terms of the concessions. Finally, CGET, like OTE, requested payment in france through IBRD (acting as paying agent) and without deduction of taxes or duties on this payment or on the eventual payments to the shareholders.

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[*] This latter amount reflects a valuation on the basis of insurance value of the assets by the Cabinet Roux, a French firm employed by the claimant.

Unlike OTE, CGET did not make out a "second" claim under the formula set by Tunisia. The Company rejected this formula as deficient and as involving arbitrary approximations. In its Memorial CGET, however, presents a calculation under this system which totals D9,235,948. CGET also included in their Memorial figures for a valuation done by the Cabinet Roux of D8,241,138 (in comparison to D12,459,259 under the concession system). This latter calculation purports to reflect the value of all their installations at take-over on the basis of inventory made by Cabinet Roux and taking depreciation into account (vetuste). The basis seems to have been that of insurance value. The Memorial suggests that the conciliator should choose between these two valuations (i.e. concession system or "Cabinet Roux Valuation").

SNA and UET. These two companies, (members of a group together with CGET, which are all currently represented by Mr. Eclancher), filed a joint Memorial but supplied separate annexes (Dossiers A). Under them the following claims were made:

SNA requested compensation of D3,537,240 along the same format as that set out in the claim of CGET (see supra). Broken down, it requested therefore: an indemnity for the unamortized portion of assets within the concession (domaine concede) D161.464; indemnity for the amounts due on an annual basis for the remainder of the life of the concession (annuite)capitalized with interest of 3.25% totalling D1,471,652; and, an indemnity equivalent to the

price of installations belonging to the concessionaire (domaine prive) including those for which there was no purchase obligation under the cahier des charges of D1,766,612. To this was added a sum of D131,510 some of which corresponded to stocks for which payment was requested under the cahier des charges. As with CGET, SNA rejected the request for a valuation in accordance with the form suggested by Tunisia but their Memorial included a calculation made under this formula which amounted to D2,413,917. SNA, like CGET, also provided in its Memorial a valuation of all the installations at the time of take-over after deduction of depreciation done by the Cabinet Roux according to an inventory prepared by them. The figure advanced under this valuation was D2,319,346.

UET. UET requested compensation of D2,865,831. This was broken down into the respective amounts of: D63,947 for the unamortized portion of the cost of its assets within the domaine concede; D1,396,963 for the amounts due on an annual basis for the remainder of the life of the concession (annuite) capitalized with interest at the rate of 3.25%; and, finally, an amount of D1,099,015 corresponding to the price of its assets within the domaine prive including those for which there was apparently no obligation of purchase under the cahier des charges. To this sum UET added a figure of D305,904 representing the petit contentieux some of which represents assets that would have had to have been purchased under the terms of the cahier des charges.

As in the case of CGET.and SNA, UET formally objected to the request for calculation under the formula submitted by the Tunisian Government, but provided a calculation under this heading in its Memorial amounting to D2,767,369. UET also enclosed a calculation of compensation in accordance with a valuation by the Cabinet Roux amounting to D2,783,760.

Finally the joint Memorial of SNA and UET makes an identical request with respect to the modalities of payment as that made by CGET and set out in its Memorial.

CTET. The companys' Memorial provides for a claim of a total amount of D8,533,559. This amount includes D6,936,000 for the value of CTET's installation and assets which appears to have been calculated on the basis of the value of the assets as determined by the company and the valuation was apparently based on the "valeur d'ramplacement apres application des coefficient de vetuste", i.e., replacement value after taking depreciation into account and after deduction of an amount corresponding to the outstanding maturities of the loans to be serviced by Tunisia (D6,936,000). To this sum of D6,936,000 CTET added an amount of D1,350,000 for the annuite indemnity, that is to say the amounts due on an annual basis for the remainder of the life of the various concessions held by CTET,

capitalized with interest at 4% (i.e., 28 annual payments between 1958 and 1986)*. Finally there was a further addition of D247,559 for the petit contentieux. It should be noted that the amount claimed by the company for assets taken over by Tunisia is done on an across the board basis and therefore does not distinguish between assets falling within the domaine concede and assets falling within the domaine prive. A lump sum is accordingly demanded for all assets regardless of whether the cahier des charges would have called for payments of only the unamortized portion of the cost of certain assets and the price fixed by experts for certain other specified assets which would otherwise remain the property of the concessionaire**.

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* A close examination of the concession agreements would not appear to provide any justification for the calculation of the annuite by allowing for 28 annual payments through to 1986. None of the documents in our possession give any grounds for considering annual payments beyond what appears on their face to be the terminal date of the concessions, namely December 31, 1976. Indeed some of the minor concessions held by CTET were being renewed on a consecutive 5-year basis and Tunisia could well have exercised its perogative under the rachat provision and terminated the minor concessions in such a way as to have had to pay annuites for not more than 5 years. It should also be noted that whereas CTET, like OTE, CGET, SNA and UET, uses the capitalized annuite system followed in the case of the French nationalized compensation regulations, it allows a 4% interest rate rather than the 3.25% interest rate specified in the French regulations and requested in the Memorials of the above mentioned companies.

** Under the cahier des charges all other assets for what they were worth would have remained the property of the company.

The Memorial furthermore provides little information on the basis of valuation used to calculate the value of these assets. Annex C to the Memorial merely states that the assets includes all movable or immovable assets of the domaine prive which the Memorial claims the Government should pay for according to a price fixed by experts. According to the Memorial the method of valuation used was the replacement values of the assets after deduction of depreciation. Unlike the claims of other companies described above, the petit contentieux claim of CTET does not cover inventory and assets such as stocks and supplies which according to the terms of the cahier des charges the State would have been required to purchase. Presumably these have been included in the general claim for the value of all assets described above. The Memorial states that if the calculations were made in accordance with the formula suggested by Tunisia the company would be in a position to claim almost three times as much as it was claiming under the terms of the concessions. The Memorial rejects the usefulness of this formula. With respect to the offer of compensation contained in the Tunisia Memorial the company's Memorial suggested that the nominal value of its capital as shown on its 1957 balance sheet (i.e., the offer of D580,725 as reflecting nominal value should be increased by the amount of the reserves D231,312).

The Company's Memorial makes certain requests with respect to modalities of payments. Payment is requested in cash through the IBRD in French francs at the 1965 value (D85,330,000 French francs 1965). It requests, furthermore, that this sum should be net of all Tunisian taxes including taxes on distribution to shareholders, suggests that interest should be paid on the total amount claimed for the period 1958 to the date of payment. Finally it requests that a return for abandoning claims against the Government, the Government should carry out the necessary legal formalities to properly implement the assumption by Tunisia of the company's debt.

SEEVB. SEEVB's Memorial requests compensation in the amount of D 248,769. This is broken down into: a sum of D 120,352 representing the outstanding balance in SEEVB's favor in the debtor-creditor account at the time of take-over; the price of stocks in its warehouse; and, an indemnity of D 87,499 for the premature termination of its concession (it should be noted that SEEVB's sole concession expired on April 23, 1962, only three weeks after Tunisia's Decree Law No. 62-8 nationalizing the companies, legislation which the companies maintain amounted to a rachat of their concessions). This sum of D 120,352 is stated to cover the price of all the immovable and movable properties of SEEVB including stocks. The Memorial (at p. 3) justifies this apparent

departure from the terms of the concession's cahier des charges by reference to a letter No. 8,512 of December 20, 1960, from the President of the Government-appointed Management Committee (Comité de Gestion) to the Company offering to buy all SEEVB's movable and immovable assets.* The Memorial (at p. 4) indicates that the valuation of the land and buildings included in these assets was done by the Credit Foncier of France and a copy of their report was sent to Tunisia

SEEVB's Memorial provides a calculation of the amount due if the formula subsequently suggested by Tunisia were to be applied, and gives this amount, calculated on the basis of annual capital investments since establishment less depreciation and after adjustment to the 1959 Dinar, as 1,024,948 which it describes as "fantastic." The Memorial also comments that Tunisia's actual offer of D 100,000 on the basis of the nominal value of the Company's capital as shown on its 1960 balance sheet is "unjustified" and does not present an accurate picture since it did not include the Reserve established for revaluation which amounted to D 43,194. The nominal value of its capital as shown on its 1960 balance sheet should thus, it maintains, be calculated at D 143,194.

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* The Memorial reads "Par sa lettre N° 8.512 du 20 décembre 1960, Monsieur le Président du Comité de Gestion s'est engagé à acheter definitivement l'integralité du domaine immobilier et mobilier de notre Société". Such a letter indeed appears as Annex E to SEEVB's Memorial.

As far as modalities of payment are concerned, SEEVB's Memorial requests a single cash payment, made through the IBRD, in French francs converted at the 1960 rate of 1 Dinar to 11, F.Fr. It requests that such payment be made net of all taxes including any possible Tunisian tax on the distribution to SEEVB's shareholders. It leaves the question of whether to provide for interest during the period 1960-1962, to the discretion of the Conciliator.

UNELCO. UNELCO's Memorial, like the other companies' Memorials, bases its claim of compensation on an application of the rachat provisions of the contractual instruments (cahier des charges). The total claim for compensation is D 166,887.* UNELCO's Memorial indicates that the amount of D 166,887 is broken down into the following heads of indemnity: (i) D 18,887 for the unamortized part of the cost of the immovable property which would have reverted to the municipality of Gafsa which granted the concession. At the end of the concession or upon termination by rachat the Memorial provides in this respect a figure of D 16,844 for the production works and

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* UNELCO's Memorial also registers a claim on behalf of its subsidiary SOCOMETRA (a French company) for work purportedly done for the Tunisian Government. The Memorial states that this claim is made under Article 4 of the Franco Tunisian Convention of August 9, 1963, which provides for compensation in the event of nationalization of the property of the nationals of one of the Contracting States. This portion of the claim would appear to be outside the scope of the nationalization legislation of 1962 and, therefore, equally outside the scope of the current Conciliation Proceedings.

the installations and D 2,042 for construction works. The Memorial specifies that this amount reflects the unamortized amounts invested by the concessionaire during the last 15 years of production for production works and installations minus 1/15 of their value for each year of their life since the investment took place and that the remainder reflects the unamortized portion of those other removable assets established less than 7-1/2 years prior to the date of take-over minus 2/15 of their value for each year since the investment took place. The Memorial indicates that purportedly allowance has only been made for those assets which were paid for by the company and that no revaluation of these investments had taken place since the date of the original investment; (ii) D 10,800 for the value of land and immovable property which, under the cahier des charges of the concession, would have remained the property of the company at the end of the concession or at the time of rachat. The Memorial does not explain the basis or the criteria used in the valuation of these assets; (iii) D 58,614 for accounts receivable (comptes financiers) and stocks. The inventory of these assets was purportedly approved after take-over by the President of the Committee of Management by letter dated May 1, 1952; and (iv) D 78,586 for the amounts due on an annual basis for the remainder of the life of the

concession (annuité) capitalized with interest at the rate of 5%*.

UNELCO's Memorials are used for an immediate cash payment of compensation to a French bank. The reasons advanced for this are that UNELCO is a French company and that the sums in question are too small to justify payment by other means such as annual payments or the issue of bonds. UNELCO requests the application of the conversion rate between the dinars and the francs applicable on the date of take-over of its Tunisian operations. The Memorial asks for interest for the period between the time of take-over and the time at which compensation is finally paid and stipulates that the compensation should be free from taxation of any sort by Tunisia. To this end it requests that the final agreement on compensation should specify that no future legal action would be taken by either of the parties.

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* While applying the system of capitalization of the "annuité" as adopted in the regulations governing the terms of compensation after the French nationalization of 1945, UNELCO like CTET but unlike the other companies does not apply the same interest rate as those regulations stipulated, of 3.25%. There is a further unique feature about UNELCO's claim. The concession for Gafsa expired in 1990 and thus UNELCO capitalizes the annual payment for 30 years from 1959 (the year of take-over) but this is done on the basis of the net profits of the last year of its operations (1959) to which is added "l'amortissement de caducité d'exercice". UNELCO adopted this method of calculating the amount due by "annuité" rather than calculating the produit net moyen by using the figure of gross receipts and authorized expenses for certain base years. UNELCO claims that the net profit figure corresponds to the amount of its profits after taxes and, according to UNELCO, its tax declaration for 1959 would serve as a basis for corroborating this amount.

B. Methods of Valuation

1. Nominal Value of the Shares

In its memorial the Tunisian government has proposed that the nominal value of the shares should form the basis for determining the compensation due to the companies and their shareholders. According to their calculations this totalled $6.016 million. Among the reasons for this advanced by the memorial are the following:

a) The ex-concessionaires took away the archives, plans, technical documents, and accounting documents, thereby reducing the value of the assets.

b) The ex-concessionaires took away securities (titres de participation financiers) and cash, thereby reducing net assets.*

c) The Tunisian authorities assumed the long-term external debt and the short-term debt.

d) Fifty percent of stocks were useless.

e) STEG has subsequently to undertake costly works in order to concentrate generation and to create an interconnected network.

f) The ex-concessionaires defaulted in their task of assuring the energetic development of the Tunisian power system which they were required to do under the concession agreements.

First, it would seem that none of these factors have any bearing on the value of what the Tunisians took from the former owners. Second, the nominal value of the shares are, for obvious reasons, no measure of the net value of what the nationalizing power received, even when the debt is assumed by it. It does not for example take into account retained earnings

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* In the case of CGET the memorials are in conflict on this point, CGET charging that the Tunisian authorities in fact retained its portfolio.

invested in the business, reserves etc. Third, it is no measure of what the shareholders lost because it is not directly related to earning power or market value.

In their review of methods of valuation, the consultants apparently did not believe this method worthy of further consideration, and the Bank shares this view.

2. Application of the Concession Agreements

As we have noted above, the companies interpreted the nationalization legislation* creating STEG and nationalizing the seven companies and creating the Société Nationale des Transports (SNT) to take over all rail, tram and bus transportation of CTET as constituting a rachat of their concessions. Accordingly, the memorials of the companies calculated the amount of compensation due to them in accordance with their conception of the requirements of the rachat provisions of the cahier des charges attached to their various respective concessions. Their memorials and their counter-memorials minimize the importance of: the fact that the nationalization action was taken by the State, whereas many of the concessions were held directly from municipalities; and, the fact that the procedure followed by the Tunisian Government contravened many of the formal pre-requirements for application of the rachat clauses, as specified in those clauses. As has also been seen from the above discussion of the companies' claims, most of the companies, rather than following their rachat clauses to the letter, based their approach to a rachat valuation upon the rules and procedures specified in the regulations adopted in France for the purpose of settling questions of compensation with French

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* Decree Law No. 62-8 of April 3, 1962 and Decree Law No. 63-8 of March 14, 1963.

electricity and gas companies nationalized after the Second World War.*

In contrast to the company position, the Tunisian Government's Memorial rejects the possibility of basing compensation on the rachat provisions of the concessions. It justifies this rejection on the grounds that such concessions no longer existed under Tunisian law since the effect of Article 6 and Article 33 of the Decree Law 62-8 of April 3, 1962, was to abrogate all the concession agreements and other contracts for the sale of power and to transfer all the power assets of the former concessionary companies to STEG and, by subsequent legislation, all the transport assets to SNT. Furthermore, the Government Memorial points out, the nationalization was not restricted to the gas, electricity and transport operations and assets of the companies but purportedly nationalized the companies themselves. The language of Article 1 of Decree Law 62-8 would appear to corroborate this allegation. Article 1 provides:

> "The production, transport, distribution, importation and export of electricity and combustible gas are nationalized from the date of publication of the present Decree Law. Those enterprises set up (constitué)** in Tunisia which are engaged in such activities and which have been the subjects of a provisional take-over are nationalized from the date of such take-over."

Accordingly, argues the Government Memorial, the concessions have

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* Decree No. 47-1535; see Motor Columbus' Rapport Général Annoté, Deuxième Partie Annex 11-h. et seq.

** The translation of the word "constituer" could have some significance. The dictionary definition of "constituer" provides the alternatives of "to establish", "to organize" or "to incorporate" for companies. However, the language would appear sufficiently broad to cover all the companies with the possible exception of UNELCO.

expired since the companies no longer exist. The Government, rejecting the possibility of valuation according to the rachat provisions, made an offer of compensation based on the French precedent of 1946/referring/to the use made in the French precedent of the stock market system of valuation.* (though only)

It would appear that the foregoing difference of opinion between the companies and the Government about the legal justification for the application of the rachat provisions of the concessions is one which is of such a nature as to be properly a matter for reference to arbitration or the courts rather than for the Conciliator to resolve. Any attempt to settle this issue would necessarily also run into a further difficulty of requiring a decision on a secondary /dispute (legal) between the parties, the existence of which appears from an examination of their respective memorials. This dispute relates to the question of whether the companies fulfilled their development and maintenance obligations under the terms of their concessions during the period between the end of the Second World War and the time of the take-over. Here again, if valuation according to the terms of the concession agreements were to be attempted, the Conciliator would face at the outset the necessity of deciding a complex legal dispute.

Other than these two fundamental issues surrounding the propriety of applying the concession system of valuation to these

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* See Motor Columbus' Rapport Général Annoté, pp. 16-17 for a discussion of the relevance of the French precedent.

seven companies, several other general points may be made. First, it should be noted that the Tunisian Government's reference to the French precedent ignores the fact that whereas both the law and its subsequent regulations looked only at the stock exchange value for those companies which were quoted on the Paris Exchange, the valuation of the other companies was to be made by special "commissions" on the basis of the liquidation value of the companies according to terms of reference established by a subsequent regulation. The law did specify however that compensation would be determined after taking into account "all the elements, in particular valuation under the rachat provision stipulated in the cahier des charges" (Article 10, Law No. 46-628 of April 8, 1946. See Motor Columbus' Rapport Général Annoté, Deuxième Partie, Annex 11). Furthermore, the regulations subsequently adopted provided for a standardized rachat formula, whatever the nature of the activities of a particular electricity or gas company and regardless of the particular provisions of the cahier des charges of their concessions. The companies' memorials do not treat the issue arising from the fact that the Tunisian legislation was not in conformity with the formula for rachat set out in the cahier des charges. This problem would not of itself appear to justify a refusal on the part of the Conciliator to attempt to apply the rachat provisions (though he might well reject the system of valuation on other grounds). This is so because French administrative law, which appears to be followed to a large extent in Tunisia, allows for the possibility

of non-contractual rachat which may occur because the formal requirements for rachat have not been followed or because no procedure and set of rules for the application of the rachat theory in the particular circumstances are adopted by special legislation. In such cases the French administrative courts have applied the general principles of rachat as developed by contractual practice and a concept of equity freeing themselves from the need to follow the letter of any rachat provision of a cahier des charges.*

In general, it must be noted that particular factors and difficulties exist which would appear to deter any attempt to base the compensation due to the seven companies on valuation according to the concession agreements. Certain of these difficulties stem from the lack of sufficient or precise data to enable a meaningful valuation to be made. A further source of difficulty arises from the complexity of the rachat provisions and the inconsistencies and the assumptions discernible from an examination of the attempts by the various companies to calculate the amount of compensation claimed on this basis. Finally, certain other difficulties exist and some important arguments can be made against the application of this system of valuation which stem from the very nature of the rachat concept of indemnification.

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* De Laubadère, Traité Theorique et Pratique des Contrats Administratif, Vol. III, para. 1057 (Paris 1956).

a. Insufficient Data. Motor Columbus' report and the discussion under Section A2 of this memorandum review Motor Columbus' unsuccessful efforts to obtain the financial documents and data that would have been needed in order to attempt the valuation of the assets of the companies in accordance with the rachat provisions of the concession agreements. It is clear that not only were they unable to obtain all the documents they needed but that where the relevant documents were obtained, the financial data therein presented was not set out in such a way or in such detail as to enable them to apply the rachat provision or to check the claims made by the companies under the various heads of indemnity.

The type of information that would have been required is explained by the substance of the rachat provisions. Though certain of the concessions' cahier des charges provided for alternative methods of valuation at certain times during the life of the respective concessions, in general only one of the methods of calculating the indemnity due to the concessionaire was applicable in the present circumstances and each of the memorials bases its calculation of the amount of compensation due to it on the basis of this same general method. This method and the companies' breakdowns of the total amounts of compensation claimed according to their concept of its application have already been discussed in Section A4 of this memorandum. It is perhaps useful to give an example of the relevant provisions of one of the

concession agreements, namely that of SNA, which is fairly typical:*

Article 23

"In the case of re-purchase, the concessionaire shall receive by way of total compensation:

"1. during each of the years remaining to elapse until the concession expires, an annual payment equal to the average net proceeds of the 7 (seven) years of operation immediately preceding that in which the re-purchase will become effective, after deduction of the two worst years;

"In calculating the net proceeds of the receipts for each year there shall be deducted from the receipts all the properly justified expenses incurred in operating the supply service including the maintenance and the renewal of works and equipment, but not including the charges on capital or the amounts written off as original organizational expenses;

"In no case shall the amount of the annual payment be less than the net proceeds for the last of the seven (7) years taken as a basis for comparison;

"2. an amount equal to the properly justified expenditure incurred by the concessionaire in setting up those of the works (required for the purpose) of the concession that are in existence at the time of the re-purchase, and which have been carried out in a proper manner during the 25 (twenty-five) years preceding the re-purchase, subject to deduction, for each work, of one twenty-fifth (1/25) of its value in respect of each year that has elapsed since it was completed.

"The Municipality shall, furthermore, be required to supersede the concessionaire in carrying out any obligations undertaken by him for the purpose of the normal operation of the supply, and to take over the power station and its buildings, as also the stocks, whether already in the warehouse or in course of transport, together with the furniture connected with the supply.

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* Though as has been noted in Section A4 above, the period of years referred to in the paragraph dealing with the indemnity for the unamortized portion of the cost of the assets within the domaine concédé differs from concession to concession, and so does the scope of the requirement to purchase certain assets of the domaine privé (i.e. the biens de reprise).

"The value of the fixed property and of the items taken over shall be fixed by mutual agreement or following expert valuation and the relevant sum shall be paid to the concessionaire within the six (6) months following their being handed over to the Municipality. In the case of re-purchase (RACHAT) the concessionaire shall be bound to hand over to the Municipality all the works and distribution equipment in a good state of maintenance ..."

Article 24

Return of Assets

"In the case of rachat or in the case of return at the expiration of the concession, the concessionaire shall be required to give back to the Commune all the works and equipment relevant to the distribution in a good state of repair (en bon état d'entretien).

"The Commune may retain, if this should be required, such sums as are necessary to put the installations in good working order, out of the amount of the indemnity otherwise due to the concessionaire."

Several points under this formula deserve special attention. In particular it must be noted that the scope and effect of a rachat provision as set out in Article 23 of the SNA concession should be read together with the provision of the cahier des charges which provides the formula for liquidation at the end of the concession. This is so because the formula for liquidation helps to clarify which assets revert to the grantor and which remain the property of the concessionaire, some of which may have to be purchased by virtue of the rachat provision.

Under Article 22:

(i) The Commune would have obtained as biens de retour:

- "cables haute et basse tension"
- "postes de transformateurs"
- "moteurs électriques et mécaniques"
- "canalisations"
- "branchements"
- and, "tous les ouvrages faisant partie de la concession."

These assets would revert free of charge at the end of the life of the concession unless they have been installed pursuant to the terms of the concession within the 25 years preceding the end of the concession. In this case SNA would obtain an indemnity for the unamortized portion of the cost of the asset in question (provided that asset was in working order at the expiration of the concession), minus a deduction from the amount thus due for each asset of 1/25 of its total value for each year of its life which had already expired commencing from the date of construction or installation.*

(ii) The Commune would have been required to take the "station centrale et ses dependances" and could exercise the option of taking

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* As has already been noted above, the number of years to be used for the calculation of the "insuffisance d'amortissement" differed from concession to concession. In some concessions 30 years was allowed for a certain general category of assets and 15 for another category. In others a similar distinction was made but the number of years allowed were 15 and 7-1/2. In each case the fraction to be deducted for each year of the life of the asset corresponds to the number of years allowed.

the movable assets and stocks. All such purchases would be at a price fixed by "experts."

(iii) If the Commune decided not to take over the distribution facilities, the concessionaire would have to remove them at its own cost whenever they were situated on public property, but could abandon such items as "canalisations" if this did not interfere with public works.

Under the above-quoted language of Article 23, it will be seen that the total compensation in the event of premature termination by rachat included an indemnity equivalent to the unamortized portion of the same assets as are referred to under Section 2 of Article 22. Article 23, however, also calls for (Section 1) an annual payment equal to the average net proceeds (produit net moyen) for the seven years of operation immediately preceding that in which rachat took place after deduction of the results for the two worst years. The net proceeds for each year are calculated by deducting from the gross receipts all properly justified expenses incurred in operating the service. Among these expenses, the cost of maintenance and renewal of works and equipment are permitted but not the charges on capital or amounts already written off as original expenses. The figure arrived at for the average annual net proceeds should not be less than the net proceeds for the last of the seven years before rachat. Article 23 then goes on to require the Commune to take over the central station and

its buildings as well as the stocks, whether in the warehouse or already ordered and in the course of transport, together with the movables involved in the distribution operation. This latter provision of Article 23 is in contrast to the equivalent provision of Article 22. Whereas the provision of Article 22 only requires the purchase of the central station and its buildings and gives the Commune the option of purchasing the movables and the stocks, Article 23 requires the Commune to purchase all these assets, though with respect to the movables it introduces the qualification of requiring the repurchase of only those movables connected with the distribution operation.

Finally, Article 24 requires the company to return all the relevant installations and assets relating to its operations in a good state of repair and, like most of the other concessions held by the seven companies, includes an authorization for the Commune to retain a portion of the indemnity due to the company in order to enable it to put the installations into proper operating condition.

These provisions of the SNA concession serve to illustrate, as Motor Columbus has stated (see supra Section A2), the need for documentary data in great detail in order to permit a proper valuation in accordance with the terms of the cahier des charges. Thus, for example, Motor Columbus would have had to obtain separate operating accounts on a concession-by-concession basis wherever a company held

more than one concession. Such accounts, together with detailed annual balance sheets and other standard accounts, would be necessary in order to enable them to calculate the annuité due for the remainder of the term of years.* Such detail would also be necessary in order to enable us to know which assets were covered by the payment of the adjusted unamortized portion of their original cost. Furthermore, with respect to those assets for which there was a mandatory purchase requirement, such detailed financial statements would be necessary both to insure that the assets were in fact in the domaine privé and to guage the reasonableness of the prices fixed by the experts. Motor Columbus reports that even where the companies' claims were given in sufficient detail and together with documentary data, the nature of the documentary data obtained was not such as to permit Motor Columbus to check the calculations made by the company. The companies which provided little data may, of course, argue that they are unable to provide this type of data because of the fact that most of these documents were allegedly taken from them by the Tunisian Government at the time of take-over. The Tunisian Government, on the other hand, appears to argue in its Memorial and according to Motor Columbus, that the relevant documents were in fact taken out of the country at the time of take-over by the companies. It would, of course, be impossible for the Conciliator to take a position on this point and indeed it is questionable whether it would be desirable or proper for him to do so

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* The term of years remaining differed from concession to concession. See the Supplementary Memorandum on "Relevant Provisions of the Concession Agreements" for details.

even if we had more information on this subject than our consultants have been able to provide. It is interesting, however, to note that the chronology of the take-over and nationalization starting with the independence speech of President Bourguiba, and continuing with the successive take-overs of the companies, suggests that the companies had ample warning of the need to insure the availability of such documentation in the event of nationalization. To this latter point it may be added that under French administrative law concessionary companies work under the stringent requirement of keeping books in such a manner as to permit the calculation of indemnity under the reprise and rachat provisions of their concessions.*

b. Discrepancies in the Rachat Provisions. The discussion under Section A4 of this memorandum has already pointed out certain difficulties and inconsistencies relating to the claims made by the companies under their cahier des charges.** The following is a resume of certain of the more important difficulties which would arise, on a company-by-company basis.

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* De Laubadère, op. cit. supra, Vol. III, paragraph 1106, citing the decision of the Conseil d'Etat, 14 June 1933, Compagnie des Tramways du Loir-et-Cher, p. 619.

** Certain of the specific issues that would arise in connection with any attempt to apply the rachat formula under the concessions of the various companies relate to the nature and reliability of the actual concession documents and cahier des charges obtained by Motor Columbus. These specific difficulties are discussed on a concession-to-concession basis in the Supplementary Memorandum on "Relevant Provisions of the Concession Agreements."

For the largest of the seven companies, CTET, these difficulties are quite considerable and relate to the manner in which they kept their financial accounts and in particular calculated the State's share in the annual profits of the electricity branch of their operations as well as to the fact that their accounts do not reveal the breakdown of their expenses (dépenses) on a concession-by-concession basis.

In the case of CGET, the major difficulty relates to an ad hoc amendment (avenant) to a certain key provision of the cahier des charges governing its electricity operations, which Motor Columbus learned of but was unable to see and verify. This provision deals with the breakdown of the operating cost of CGET on a concession-by-concession basis (i.e. gas, electricity and water) and thus would appear to be of major importance to a calculation of the annuité.

In the case of SNA, the chief difficulty relates to the fact that under Chapter VI of the amending avenant of January 10, 1952, which extended the life of the concession until December 31, 1999, a condition was stipulated to the effect that the company would in exchange undertake eight new commitments including a precise investment program and a specified extension in the scope and level of its services. The Memorials of the Government and SNA suggest that a difference of opinion exists as to whether these conditions were fulfilled.

In the case of UET, certain avenants to the concession for Kairouan were unavailable to Motor Columbus and since later avenants which were obtained extended the life of the concession until 1999 on condition that certain requirements of the cahier des charges, as amended, be fulfilled, it is extremely difficult to get a precise picture of the rights of the company under the rachat provision. The same remarks apply to UET's concession for the Commune de Sousse with the added difficulty that in this case Motor Columbus learned of the existence of a seventh avenant which it was unable to obtain.

In the case of SEEVB, the major difficulty lies in the fact that the company's Memorial does not break down its claim for compensation into the three categories normally required under the rachat formula. This apparent departure from the normal form is justified by SEEVB on the basis of an offer by the President of the Comité de Gestion to purchase all the assets of the company (see Annex E to SEEVB's Memorial which constitutes a letter from the President of the Comité to the Company, dated December 20, 1960).

In the case of UNELCO, the major difficulty appears to relate to the fact that they provided Motor Columbus with annual reports and profit and loss statements, and the indications are that financial data was not kept separately on a concession-by-concession basis or even according to the countries in which it was operating. Motor Columbus has suggested (oral report by Mr. Weller) that this method of

bookkeeping would present serious obstacles to the application of the rachat provisions of its concession for the distribution of electricity in Tunisia (Commune de Gafsa).

Finally, in the case of OTE, which held six separate concessions from various municipalities or communes and one from the State, the major difficulty relates to the concessions for Gabes, Souk el Arba, Souk el Khemis, Commune of Tebour Souk and the State concession for the distribution of electricity in the region of Tebour Souk - Souk el Arba - Le Kef.

In the case of the cahier des charges for the municipal concessions in Souk el Arba and Souk el Khemis, the difficulty lies in the fact that though their respective provisions relating to the duration of the concession are tied to the expiration date of the concession for Beja (one of the two concessions under which there are no apparent problems with the concession documents) the terminal dates specified in these two concessions do not coincide with that specified in the concession for Beja.

In the case of the concession for Gabes, though Motor Columbus received a copy of the Convention to concessions dated October 29, 1925, they were not able to obtain a copy of the cahier des charges of the same date. It thus becomes impossible to calculate the expiration for this concession.

In the case of the concession for the Commune of Tebour Souk, there appears to have been a second avenant dated March 17, 1954, which extends the duration of the concession from April 9, 1972 (Article 21 of the cahier des charges of April 9, 1932) to December 31, 1975. The difficulty with this second avenant and with the purported extension is firstly that the copy of the avenant received by Motor Columbus is marked "Projet d'avenant" and secondly that the date 1975 has been crossed out by hand and a handwritten amendment provides for expiration on December 31, 1999. Since Motor Columbus was not provided with a signed copy of this document or with ratifying legislation, it would be difficult to take this provision into account. Perhaps an even more serious problem relates to the fact that the same "Projet d'avenant" purports to substantially revise the terms of the rachat clause of the original cahier des charges.

Other than the various basic issues of a legal character discussed at the outset of this Section, the foregoing list of particular difficulties under the available copies of the cahier des charges and the deficiencies in the financial data obtained by Motor Columbus lead Motor Columbus to conclude in their General Report (Rapport Général Annoté, Première Partie, p. 20) that:

> "It would in any case be necessary to have all the files at our disposal and to appoint an auditor to deal with (mettre une fiduciaire sur) these questions after having classified and harmonized the clauses of the concessions."

They add that while they were able to check certain of the developments under the concessions, they could not on the basis of the information provided or obtained take a "definite stand one way or another on the figures put forward" by the company.

c. General Comments.

(i) One general argument against the application of the terms of the concessions is that these agreements were negotiated prior to the independence of Tunisia. Even if no allowance is made for the difficult questions of State succession which arise in the case of concessions granted by a colonial government prior to the independence of the territory,* or for the question of Tunisia's ability to pay, it would seem a little harsh to compel the Tunisian Government to compensate the companies on the basis of the letter of the cahier des charges. In this connection, it should be noted that the companies themselves have departed from calculating their claims on the letter of their respective cahier des charges. Recent experience with post-colonial settlements and indeed with the nationalization settlements generally have fallen far short of any strict application of the letter of concession contracts and of a notion of loss of profits and have tended, rather, to be more in line with the notion of unjust enrichment, which in this case would probably mean some equitable notion of the value of the assets taken by the Government.

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* Or of technical questions such as the effect of the Tunisian legislation in view of the proper law of the contracts and such as the effects of the legislation in the context of international law standards.

(ii) In the same vein, it may be added that the very conception of rachat is hard to reconcile with a conciliation proceeding in which notions of equity and compromise are far more important than a pursuit of intricate and strictly legal solutions. It is interesting to note that an examination of the breakdown of the companies' claims in accordance with their conceptions of the formula for rachat indicates that among the amounts claimed under the headings of indemnity of the rachat clauses, the largest sums fall under the annuité and the price to be paid for the purchase of the assets deemed by the companies as falling within the domaine privé. Generally and in particular in the case of companies whose assets had not been revalued, the amounts claimed in accordance with the allowance for the unamortized portion of the domaine concédé are in comparison very small.

It is also interesting to note, for example, that in the case of CTET the total price to be paid for the assets of the domaine privé is greater than the capitalized annual payments together with interest (the annuité). Yet, the requirement that the State purchase these assets is recognized in French law as constituting a penalty against the authority exercising the right of rachat, in order to deter such action. French authorities on administrative law and government contracts both take the position that there is little justification for this penalty. They suggest that in the case of a rachat the authority should be required to pay no more for the assets in the domaine privé

than it pays for the assets in the domaine concede. That is to say, the same formula applied to the domaine concede for calculation of the unamortized portion of the cost of the assets should be applied to determining the indemnity due for assets within the domaine prive. De Laubadere states:

> "Il n'y a pas de raison logique pour que les biens de reprise soient ainsi payes au concessionnaire alors que les biens de retour ne le sont pas. La meme raison qui justifie le retour gratuit (existence de l'amortissement) vaut pour les reprises."*

The inequity of requiring Tunisia to pay the purchase price for all the assets in the domaine prive of the companies is compounded by the fact that the companies' memorials apply the purchase price "penalty" to all the assets of their domaine prive regardless of the fact that the rachat clauses of their cahier des charges require payment of the purchase price of only certain specified assets. Of course the

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* See generally De Laubadere, op cit. supra, Vol. III, Sections 1096 to 1108, and at p. 219, and Jeze, Droit Administratif, Vol. 3, p. 1182. It is also interesting to note in this connection that in the case of certain metropolitan French cahier des charges types, much of the stock and movable property, which would theoretically fall under the domaine prive, would be treated as within the domaine concede and compensation for such assets would be covered by the unamortized-portion-of-cost-formula. This was the case, for example, in the cahier des charges types for local railways and tramways of 1917 which allowed for the fact that the authority granting the concession had provided part of the initial investment capital. According to Motor Columbus, the authorities provided part of the initial capital under many of these concessions in Tunisia.

companies justify this on the grounds that the nationalization legislation covered all their assets. As Motor Columbus points out, however (Rapport General Annote, Premiere Partie, p. 19), many of the assets within the domaine prive which were not covered by the mandatory purchase requirement of the cahier des charges would have had little independent value once the concession was terminated. Thus, in the interests of equity, it seems difficult to accept the unrealistic request, set forth in the companies' memorials, that Tunisia should pay the purchase price of all the assets in the domaine prive. Motor Columbus indeed concludes that " ... since the rachat clause was to discourage any municipality from taking over the services for which the concession was granted before the concessions expire, these provisions can hardly be regarded as providing for fair compensation in the case of nationalization."* (p. 20)

(iii) As noted in Section A4 of this memorandum, the companies capitalized the annual payments (annuite) due to them under the concession agreements. This seems of itself hardly fair to Tunisia. It also raises the question of taxation. Presumably Tunisia would, if the concessions had continued to run, have collected taxes on the annual

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* Motor Columbus also raises important questions with respect to the extent to which the valuations of the assets of the domaine prive, made for the company by experts chosen by them and subsequently utilized in calculating the amounts due to them under their conception of the rachat clauses, were realistic.

results of the operations of the companies, yet the companies' memorials ask for compensation net of taxes on either payment to the companies or on distributions to shareholders.

(iv) A further fact that should also be taken into consideration is that the future earnings of privately-owned utility companies in developing countries would seem difficult to forecast with any degree of accuracy. Similarly, the companies' earnings in the future, being in Dinars, would be exposed to a considerable foreign exchange risk.* The companies' claims, as set out in their memorials, make no allowance for this.

d. Conclusion. For all the foregoing reasons, the Bank's staff shares Motor Columbus' conclusion that the valuations in accordance with the rachat provisions of the concessions would not form a suitable basis for determining an equitable compensation for these companies. The provisions are themselves unclear and of doubtful applicability, and the financial data necessary to enable us to apply them or to check the companies' calculations in accordance with the formulae set out in them, does not exist.

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* According to De Laubadere, op. cit. supra, Vol. III, paragraph 1080, p. 202, the compensation, for rachat, referring to decision of the Conseil d'Etat, 7 May 1954, Chemins de fer de Dakar a St. Louis, Actual Juridique 1954, II, p. 239, would be, according to normal conflict of law rules, payable in Dinars.

3. Stock Market Value

A further possible method of valuation to determine the compensation due to the expropriated utility companies is a valuation based on stock exchange or over-the-counter-market for some base period or periods. This, for example, was the method used for French electricity and gas companies, traded on stock exchanges which were nationalised after World War II*. For a number of reasons, the consultants have concluded, and the Bank after additional investigation shares these conclusions, that this method is not suitable in the case of the Tunisian utility companies.

First, the shares of only three companies, CGET, CTET and UNELCO were quoted in Paris during the period before expropriation**. CGET, CTET, SEEVB, OTE and UTE are believed to have been quoted in Tunisia during this period, but it has proved to be impossible to locate back numbers of the local financial weekly which reported these quotations (the Courier Financier of Tunis)***. The lack of

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* Students of these nationalisations believe that, largely because of the base periods chosen, the valuations arrived at were not very fair. Einaudi, Bye and Rossi, Nationalisations in France and Italy, Cornell, 1955.

** Some period before expropriation would necessarily be the base period for this method of valuation.

*** Both Motor Columbus and the Bank (through the Paris office) made an exhaustive effort to obtain this data.

any quotations for four out of the seven companies would, therefore, prevent the use of the quotation method of valuation for all. This would appear to be a disadvantage because in the interest of fairness it would seem desirable to use the same method of valuation for all, since if there is a limit to the amount that Tunisia can pay each company should receive a pro-rata share on some non-discriminatory basis.

Second, for those companies for which quotations are available, there is no information available on the volume of shares traded, and it is, therefore, difficult to estimate how significant an indication of value the quotations are. It is believed that several of the companies had a number of bearer shares outstanding, a factor complicating the determination of the volume of trading.

Third, even when market quotations based on a reasonable volume of trading are available, there are theoretical objections to their use as a measure of the value of assets. Except in the case of a company which is likely to be liquidated or is in the process of being taken over for the value of its assets, investors pay more attention to the company's earning power and prospects or to industry trends than to asset values. The price which they are willing to pay for shares may bear, therefore, little relationship to asset values.

Fourth, during the period before take-over, the shares of the companies quoted were not following the market and were subject to a broad downward trend. As illustrated in the following table, yields on CGET and CTET rose to a much higher level than yields on other shares and as a corollary market prices for their shares were depressed in relation to other shares. This situation undoubtedly reflected market concern over the future of these shares after Tunisia's independence with the result that market prices were not an accurate measure of the underlying assets. This tendency increased with Tunisia's independence in 1956.

	Average yield on shares of CGET	CTET	Average yield of shares quoted in Paris ✱
	(in percentages)		
1951	6.3		5.08
1952	6.0		5.47
1953	5.6	7.1	5.45
1954	14.8	8.2	4.85
1955	9.9	6.7	2.99
1956	13.4	7.8	3.88
1957	10.1	10.7	3.01

✱ Source: Capital Markets, B.I.S., 1964

Although this situation could be compensated for, in theory at least, by multiplying the quotations by a factor which would eliminate the difference in yields, it would be difficult in practice to find a single equitable factor because CGET and CTET had different yields and yield trends and because the average yield for all stocks quoted in Paris at that time was low in relation to interest rates because

investors were willing in general to accept low yields in exchange for expected capital gains.

Fifth, the three companies for which we have quotations, CTET, CGET and UNELCO, had assets outside of Tunisia - cash, investment portfolios, land and buildings, and, in the case of UNELCO, other operating properties considerably larger than those in Tunisia. The companies have retained these assets[*], and if market quotations were to be used as the method for determining the compensation for the assets taken, some deduction would have to be made for the assets retained. The determination of an equitable deduction would be difficult because the values assigned to portfolio and real estate in the balance sheets probably understate their real value.

Although each of these objections to the stock exchange quotation method of valuation (except the theoretical objection that quotations normally are not based on asset values) might be compensated for individually, taken together, they raise serious doubts about the suitability of this method. It should perhaps be added that Bonbright states that "From the standpoint of accuracy, however, the stock-and-bond method has many recognized defects - defects so serious that most appraisal experts are unwilling to approve its use except in situations where a very rough measure of value is deemed adequate, or except for the purpose of checking the inferences derived by a capitalization of earnings or by some alternative method of valuation.

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[*] It may be that CGET's portfolio is in Tunisian hands. See CGET memorial.

The consultants have made several calculations of the stock market value of several of the companies. In Annex 5 of the General Report, the consultants give average market value for each company in the year preceding its take-over. Choice of this year is obviously unfair to the companies and produces extremely low values, in some cases (e.g. CTET) lower than the Tunisian offer☆. In each of Motor Columbus' individual Company Reports dated December 1967 (the 10 to 70 series), figures are given for market values but in most cases the data on which they are based is extremely limited. For CTET and CGET, however, quotations are given for the yearly highs and lows for 1951-1957. It is possible to arrive at an average stock market value for that period for each company (CTET $1.7 million and CGET $5.7 million), but these figures are not really very meaningful. Not only is it unclear that this is a fair period, but we do not know the significance of the highs and lows quoted since we have no indication of volume and no idea of how long the shares remained at these levels. To reach a meaningful figure we would require information on trading volume and weekly or monthly price trends.

☆ The consultants say that this is what they did, but they also say that for the companies not quoted in Paris they had figures for only 1956 and 1957.

4. Capitalization of Earnings

An accepted method of valuing shares of utility companies is to capitalize the companies' expected net earnings. It has not been much used, however, according to Bonbright, because of certain practical difficulties, and the consultants concluded it was unsuitable in this case. The Bank shares this view.

First, there is the problem of determining what the expected earnings will be. Reference can be made to past earnings, but, apart from the problem of determining a suitable base period, there are two difficulties with such a reference in this case, one fundamental and the other technical. The fundamental difficulty is the relevance of past earnings to earnings after Tunisian independence. Virtually the entire history of foreign-owned utilities in independent developing countries since World War II has shown that net earnings have declined because of such factors as low tariffs, labor and social welfare legislation imposing additional costs, and inflation. With this history, it would seem inequitable to postulate some period before Tunisian independence as a basis for the future earnings of these companies. The technical difficulty is that the Bank's consultants still have not provided it with the data to select a suitable base period and determine what were the net earnings, attributable to the assets taken, for that period, and, indeed, it appears that all the data necessary may be unavailable. In order not to give too much weight to special situations which may have existed in any one year, the average amount of earnings during a period of several years should be capitalized. For most

of the companies the financial statements of only one year, either 1957, 1958 or 1959, were submitted by Motor Columbus. Moreover, the statements would have to be adjusted, especially with regard to the amount of depreciation charged. Some of the companies retained portfolio investments and other assets and because of this had earnings which should not be included in the figure to be capitalized. Though their financial statements appear to be sufficiently detailed to separate the earnings which should be capitalized from those which should not, they would need to be checked by an auditor before being used to calculate compensation amounts. Additional information and time would, therefore, be required before a satisfactory valuation on the basis of capitalized earnings could be made.

Second, there is the problem of selecting the proper capitalization rate. A major criterion is the yield which would have been satisfactory to the investor at the time of take-over, if special considerations surrounding Tunisian shares were disregarded. The yield at the time of issue of index-linked bonds and profit-sharing bonds might come close to fulfilling these conditions. In 1958 this yield averaged 7.05 percent in France which would be the equivalent of a price-earnings ratio of 14.18. However, a case could probably be made for using any rate between 5 and 10 percent, which would correspond to ratios ranging from 20 to 10 times earnings.

For the purpose of this memorandum, a calculation has been made assuming that past earnings have a relevance for future earnings and that this range of multipliers is correct. The following table compares for each company the valuation which is obtained under the depreciated replacement value method and the capitalisation of earnings using three different ratios:

	Depreciated Replacement Value	Capitalized* Earnings** based on price-earnings ratios of		
		10 x	14.18 x	20 x
		(in thousands of U.S. Dollars)		
CTET	6,518	3,658	5,188	7,316
CGET	6,217	8,665	12,287	17,330
UET	1,892	1,443	2,047	2,886
SNA	2,348	1,601	2,270	3,202
OTE	981	836	1,185	1,672
SEEVB	747	505	716	1,010
UNELCO	380	112	159	224
Total	19,034	16,820	23,852	33,640

* The earnings have been capitalized on a perpetual basis, without taking account of the termination dates of the concessions. This appears to be a reasonable assumption because the concessions of the principal companies extended, to the best of our knowledge, for a considerable period in the future.

** The information available in the Bank on the earnings of the companies is incomplete and the figures given in the above table may, therefore, not be accurate. Substantial additional information would have to be submitted by most of the companies if the capitalisation method were to be followed. Their financial statements should also be checked by

Because of the difficulties mentioned, particularly those in paragraph 10, this method of valuation appears generally unsuitable. It should be noted that in the case of CGET, however, this method gives values considerably higher than those arrived at by the depreciated replacement value method, reflecting CGET's superior earnings record. Perhaps some allowance should be made for this in arriving at the final figure for CGET.

5. Historic Cost, Depreciated and Revalued

The consultants examined this method of valuation and concluded that, although useful in many cases, it could not be used in this case because important parts of the records had been lost or destroyed in the course of the take-over and knowledgable personnel dispersed. As a result, historic cost could not be accurately determined. The Bank sees no reason to disagree with this conclusion.

6. Historic Cost

The consultants did not discuss this method explicitly, but it is subject to the same difficulty as the preceding method and to the further difficulty that the value of the franc fell significantly during the period in which the assets were acquired. As a result the use of this method would seriously understate the value of the assets acquired. The Bank accepts this position.

Continued footnote from previous page -

an auditor. To the extent it was possible on the basis of information available in the Bank, however, the earnings figures used have been adjusted to reflect earnings from the assets taken only.

5. Historic Cost

The consultants did not discuss this method explicitly, but it is subject to the difficulty that important parts of the records had been lost or destroyed in the course of the take-over and knowledgeable personnel dispersed and to the further difficulty that some of the assets were very old. As a result, the historic cost for all the assets of all the companies could not be accurately determined, though it may have been possible to do so for some of the more recently acquired assets. In addition, the value of the franc fell significantely during the period in which the assets were acquired. As a result, the use of this method, even if the data were available to make it possible, would seriously understate the value of the assets acquired.

It has been suggested, however, that because the depreciated replacement value method tends to produce higher values than the historic cost method during a period of inflation, a calculation should be made of the historic cost of sample blocks of assets (for which, hopefully, data could be found to make this possible), and this calculation should then be compared with the depreciated replacement value calculation for the same assets. This comparison could then be used to make an equitable adjustment, presumably downward, of the depreciated replacement value for each company.

Apart from the data problem which cannot be ignored, there are other objections to this suggestion. The results of the comparison would be drastically affected by the sample assets chosen. If assets

installed in the 1950's were to be chosen (and the companies made substantial investments during that period), the results would not be very difficult from those reached by the depreciated replacement value method. On the other hand, if assets installed in the 1920's or 1930's were to be chosen, the values arrived at would be substantially less. In addition, the different companies had different types of assets procured at different times so that making comparable choices of assets would be difficult. Finally, the choice of assets would probably be affected by the availability of data and this could introduce additional discrepancies. All these questions raise serious doubts about the equity of any adjustment arrived at through the comparison of the historical cost of sample assets with the depreciated replacement value of those assets.

Accordingly, the Bank does not, under the circumstances, consider historic cost a suitable method of valuation or a suitable method of adjusting values arrived at by other methods.*

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*Incidentally Bonbright made the point that in utility condemnation cases "less weight has been given to the original cost of constructing the physical plant, and more weight has been given to reproduction cost, than has been true of many rate cases. Even in the former situation original cost comes in for formal consideration, except, perhaps, where the property was constructed under very different price conditions from those now prevailing. But it is generally given weight only as a check on the accuracy of the estimates of current replacement cost." (p. 447)

6. Historic Cost, Depreciated and Revalued

The consultants examined this method and concluded that, although it might be useful in some cases, it could not be used in this situation because of the difficulties in establishing historic cost mentioned above. The consultants accordingly concluded that this method was unsuitable, and the Bank sees no reason to disagree with this conclusion.

The figures for physical assets in the balance sheets may approximate the figures which would be arrived at by this method, but they are not exact because the revaluations were made on the basis of averages established by the government and the averages may not correspond to the actual changes in the value of the particular assets of each company.

7. Fair Market Value

The consultants examined this method of valuation and concluded it was unsuitable in this case. The Bank shares this view. This method presupposes the existence of a willing buyer and a willing seller. After independence and President Bourguiba's speech announcing that all important sectors of the economy would be nationalised, this condition no longer existed.

8. Insurance Value

The consultants examined insurance value as a method for arriving at asset values and concluded that it was unsuitable. They point out that the insurance value may be lower or higher than the actual, lower in the case when the owner is a self-insurer in part or has not adjusted his coverage in a period of rising prices and higher where the insurance covers the costs of reconstruction which may be considerably more than the value of the facility being replaced which will have been partially or perhaps fully depreciated. In general, insurance value tends to produce valuations which are much too high. This method was used by Cabinet Roux to value part of the property of CGET, UET and SNA, and alternatively all the property, and it did in fact produce valuations roughly three to four times depreciated replacement value (Annex 5 of the General Report).

The Bank finds no reason to disagree with the consultants' conclusion that this method is unsuitable.

C. Questions concerning the Level of Values Reached through the Depreciated Replacement Value Method

There is some feeling within the Bank that the general level of values reached through the use of the depreciated replacement value method is somewhat high. This feeling is based not on Tunisia's ability to pay, which, though relevant with respect to the modalities of payment, is irrelevant to the question of valuation, but on more general factors of history and equity such as the origin of the concessions, the probable future of the companies if they had not been nationalized, and the expected evolution of the national power system in Tunisia. In addition, the Tunisians have contended according to Motor Columbus (oral report of Mr. Weller) that the depreciated replacement value method produces values which are too high because (a) the facilities were inadequately maintained during the last years before take-over and (b) many of the facilities were of little use after take-over.

The Bank and its consultants (see supra.) have examined the Tunisian contentions carefully and have concluded that they are unjustified. The Projects Department inspected STEG's facilities in 1965, three years after nationalisation.* It found that the facilities were being intensively used and that the general standard of construction and maintenance was as good as would be found in the south of France and greatly superior to that found in the average colonial or newly independent country. If there had in fact been any neglect, it had not been serious enough to have any permanent effect on the value of

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* See memorandum from Mr. Wyatt dated December 18, 1967.

the assets. Though it is probable that in the future Tunisia will not use some of the facilities it took over, it did use them at the time of take-over and for some time afterwards, and the valuation must be based on either the time of take-over or the time of nationalisation.*

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* See memorandum from Mr. Bailey to Working Party dated November 21, 1967, pp. 4-5, which states:

" The contention by the Tunisian Government that the companies did little or nothing to develop their undertakings during the period immediately prior to nationalization is not strictly accurate. The value of old equipment which needed replacing and lines requiring construction was such that little impression on the resultant work program could be effected in the short term. However, the record of assets show that a great deal of new construction was carried out during the years immediately preceding nationalization, and much of the equipment as taken over is still in active service 6-8 years later.

" Development from nationalization was fairly slow until 1962, and comprised routine capital works to meet normal load growth. The Societe Tunisienne de l'Electricite et du Gaz (STEG) was set up in 1962 as an autonomous corporation to administer the former commercial undertakings as a single state corporation, and STEG inherited the three-year plan (1962-64) which provided for the construction of a modern 50 MW steam station (La Goulette II) at Tunis together with the commencement of a 150 kv and 90 kv high voltage grid to connect up the principal load centers in Tunisia. Transmission line construction was completed substantially to program, but the new La Goulette II Power Station was slightly behind schedule, the first 25 MW set having been commissioned in July 1965 and the second in September 1965.

" Expenditure during the three year period amounted to 7223 x 10^3 dinars, i.e. approximately 61% of the amount allocated. The shortfall was due to late completion of La Goulette II Power Station.

" By the end of 1966 the La Goulette stations were providing approximately 83% of the total peak demand in Tunisia, and by the end of 1967 it is anticipated that this will increase to 95% of the total demand in the country, as other areas are connected to the grid and diesel stations are relegated to standby duty.

" The current four year plan (1965-68) provides for a further 50MW of generation plant at Tunis together with an extension of the 150kv

Apart from the foregoing general questions about the level of values reached by the dpreciated replacement value method, CTET poses a special problem. Unlike the other companies, a substantial part of its development and expansion was financed by bonded debt, a great deal of which was guaranteed by the Tunisian state. There was about $6 million outstanding at the time of take-over and this was assumed by Tunisia. This sum has been deducted to arrive at the figure of $6.5 million for the net depreciated replacement value of CTET.

There was, however, a considerable devaluation of the franc during the period of these borrowings which began in 1920, with the result that the burden of the debt incurred for certain assets was reduced. The amount of the reduction is of the order of $3.5 million. If in the calculation of depreciated replacement value of the assets no account was taken of this reduction, the benefit of this $3.5 million would accrue to the shareholders.

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network, and extensive rural electrification in addition to routine extensions to existing distribution, at a total cost of 29304 x 10 dinar.

" It will be appreciated from the foregoing that the general trend of development has been and still is toward the installation of a high voltage grid and expansion of the central power plant to ensure a supply of cheaper power to all areas of supply throughout the country. This has resulted in the relegation of all power stations with the exception of La Goulette to standby stations. It does not however appear to have resulted in the elimination of any of the networks taken over from the companies. These are retained and merely reconstructed and/or replaced as part of a routine annual maintenance and capital development program as would have been the case if the companies had remained in charge of operations.

It could be argued that because they chose this method of financing and because the devaluations occurred while they owned the assets, they are entitled to the benefits of devaluation. On the other hand, there are a number of considerations indicating that CTET should not receive those benefits.

First, of the 11 bond issues, 8 were guaranteed by the Tunisian State (2 of these were also guaranteed by France). The company was thus borrowing partly on Tunisia's credit and as a result, the shareholders are not entitled to the full benefits of devaluation from these borrowings.

Second, the choice of depreciated replacement value as the method of valuation discriminated against the shareholders of companies with little or no debt and in favor of those with substantial debt financing in a situation such as this in a way that other methods of valuation, such as capitalized earnings do not. The consultants were informed that in general the Tunisian authorities insisted on self-financing and this appears to have been the case with the other companies. Examination of the table in the section dealing with the capitalised earnings method indicates that CTET would have fared considerably less well than any of the other companies with the application of this method at a rate of 10 to 14.8 times earnings. By choosing the depreciated replacement value method, the Bank is giving the shareholders of CTET a windfall, in comparison with the other shareholders, which could be avoided by giving Tunisia the benefit of the $3.5 million.

Third, the $6.5 million figure for CTET works out to about $54.00 per share whereas the highest quoted price during 1953-57 was about

$28 per share. In the case of CGET the constultants' figure for depreciated replacement value produces a figure of about $29 per share which compares reasonably with CGET market prices during the period. For example, its average price in 1955 was $36.40. The Tunisians could legitimately complain about the Bank's giving the shareholders an amount so out of line with market prices. If the government is given the benefit of the $3.5 million, the per share value is between $25-26, which is still higher than the average market price in any year 1953-1958.

In addition to these special considerations affecting CTEI, it may be desirable to make some allowance for the factors of history and equity mentioned earlier. Of course, if the Bank decides, following the example of many post-World War II settlements (as opposed to arbitral awards), not to charge interest from the time of take-over to the time of settlement, this may be allowance enough for these factors. If it is not, consideration could be given to making an across-the-board percentage cut for all companies.

DRAFT
DSuratgar
January 5, 1968

TUNISIA CONCILIATION

Valuation in Accordance with the Terms of the Concessions: The Concept of Rachat

The provision on rachat in most of the cahiers des charges in force in Tunisia followed the model in application in metropolitan France. Rachat is defined by De Laubadere, Traité Theorique et Pratique des Contrats Administratifs, Vol. III (1956):

> "Il y a rachat contractuel lorsque le droit pour l'administration d'exercer le rachat en cours d'execution a été prevu et organisé par des clauses d'acts de concession...
>
> Le principle que domine les regles de ce rachat est que ces regles sont contractuelles; pour resoudre les questions relatives a son exercice, le juge devra donc appliquer strictement les clauses des contrats..." (page 189)

The two principal ideas of the rachat appear to be compensation for the ex-concessionaire based on both damnum emergens and lucrum cessans but in strict application of all the requirements and conditions stipulated in the cahiers des charges. [C.E. 11 Aug. 1922 Cie des chemins de fer de l'Est Algerien p. 737] Two general methods of compensation were recognized (a) Indemnisation en Capital and (b) (b) Indemnisation par annuités, and one or other method was specified

in the rachat clause of most French cahiers des charges. Some types of concession gave the concessionaire an option as to the method to be applied. The cahiers des charges type for the distribution of electricity (1928) in use in France provided that during the last 15 years of the concession only the system of "indemnisation par annuite" would be available.

(a) The system of "Indemnisation-en-capital" called for compensation under the two heads, - the indemnité d'amortissement and the indemnité industrielle.

(i) indemnité d'amortissement - this called in turn for the payment of: a sum known as the amortissement financier which would enable the concessionary company to reimburse its shareholders and to pay off its debt [CE. 25 July 1939 Cie générale d'eclairage de Bordeaux p. 521]; and, a sum known as the amortissement industriel which would permit the concessionaire to complete the amortization of its plant and machinery, etc. De Laubadere says that

the controlling principle in determining the scope of these "amortissements" was that:

> "il convient de rechercher pour chaque categorie de dépenses si elles ont pour but d'assurer dans les meilleurs conditions possibles l'execution du service concédé." (at p. 196)

Thus, the amortization payable covered all assets and installations authorized by the première établissement of which was the terms of the concession, regardless of whether the asset was to revert at the end of the concession to the authority granting the concession or to remain the property of the company. [CE. 24 April 1931 Ste. eclairage éléctrique de Bordeaux p. 434 and idem CE. 26 July 1933 p. 892].

(ii) indemnité industrielle - this was designed to compensate the concessionaire for lost profits. The basis here would be the average net profits realized by the concessionaire over a period of years fixed by the rachat clause. From this figure you would, however, then deduct the amortization of principal and interest on the capital invested in the concession since this would already have been covered under the indemnité d'amortissement. [CE. 22 Feb. 1929 Ville de Montdidier 224)

(b) The system of Indemnisation par Annuités is also composed of two elements - the indemnité de reprise and the annuité de rachat to which in certain circumstances may be added a prime d'eviction which was designed apparently to discourage conceding authorities from premature terminations of concessions by rachat.

(i) indemnité de reprise - this corresponds to the price of the assets and installations (the biens de reprise) the conceding authority is specifically required to buy at the end of the concession in accordance with the terms of the concession. The same rules of valuation apply in determining the price as would apply if the assets were being purchased at the end of the full term of the concession. The biens de reprise are defined contractually and the contract will usually further specify which of these assets must be bought by the state or commune and which of them may be purchased if the state or commune so desires. The contract also specifies which of the concessionnaires assets revert free of charge to the state or commune. This latter category of assets are known as the biens de retour and they are usually listed in the provision of the cahiers des charges dealing with the liquidation of the concession at the expiration of its life. The rules apply by analogy if there is a premature termination by way of rachat but in the case of the biens de retour, the authority must pay the concessionnaire an amount equivalent to the unamortized portion of the value of the asset. This is designed

to compensate a concessionnaire who is subject to rachat before he has fully amortized his biens de retour. According to De Laubadere (Vol. III. p. 214) biens de retour are normally the immovable property used in the concession whereas biens de reprise are the movables. These assets together are know as the domaine concédé whereas the assets left to the concessionaire by the contract or which were never "partié integrante de l'exploitation du service" are known as the "domaine privé."

The concessionnaire thus normally receives the price, fixed by the experts or by agreement, of the contractually defined biens de reprise (which have been taken either because their purchase is required by the contract or because the authority decides to use its option to purchase them) and a sum equivalent to that fraction of the amortization figure for each asset classified as de retour (as also determined by a formula in the contract) which the contract deems would have been justifiably set aside had the concession continued to run.

(ii) annuité de rachat - this corresponds to the concept of lucrum cessans. The French Conseil d'Etat has ruled:

> "L'objet de l'annuité est de permettre au concessionaire de continuer a jouir, apres rachat, jusqu'a la fin de concession, de bénéfices analogues a ceux qu'il retirait de celle-ci" [CE. 20 May 1952 Gleize p. 268]

The conceding authority must therefore pay each year for the remainder of the stipulated life of the former concession - an annuity equal to the produit net moyen (average net income) of a certain number of years prior to the rachat. The concession's cahiers des charges usually stipulates that the last seven years prior to rachat should be taken and then that the worst two years should be ignored and that the results for the last year before rachat should constitute a minimum below which the annuité cannot be allowed to fall. The produit net moyen is calculated on the results for the whole concession operation. Thus if the concession is for distribution of gas and electricity one looks at results of both operations [CE. 10 May 1928 Cie eclairage Bordeaux p. 485. In order to make the calculation there must, however, be strict regard only for the results of operations directly connected with the concession operation - other activities are to be treated as

entirely separate: "...en tenant compte seulement des exploitations distinctes" [CE. 15 Jan. 1932 Commune de Vizille p. 45; and CE. 12 May 1942 Commune de Lucen-Drois p. 148 in which it was held that the concessionaire must produce "les pieces comptables se rapportant et justifiant des chiffres de recette et de depense".] The produit net for any year is obtained by determining the excess of the recettes* gross income over the "depenses d'exploitation". The recettes which are to be counted for purposes of this calculation are only those "effectivement realisées chaque année"[CE. 20 May 1952 Gleize p. 267. This case also confirmed the need for the concessionaire to produce clear and detailed figures to enable such calculations to be made. The decision stressed (at p. 269) the contracts' requirement that the indemnité de reprise be equivalent to the sum properly spent by the concessionaire for the premiere etablissement of the relevant assets and installations during the 15 years prior to the date of the rachat, still in use at the time of the rachat, minus one fifteenth of the value of each asset or installation for each year since its commissioning]. Furthermore, from this amount there may also be deducted such amounts as the authority feels should have been and therefore now have to be spent in order to put the assets or installations in the proper working order called for under the terms of the cahier des charges. It is permissible on the other hand to add to the receipts of the principal activity of the concession, accessory receipts from the sale or lure of machinery, subventions (such as payments to the concessionaire by conceding authority of an assured annuity equivalent, for example, to a 4% return on non-amortized capital invested in the concession

* The calculation is based on the gross income and not the profits. As in CTET's case in Tunisia, the profits are often shared under the concession agreements with the State or Commune.

operation) and, returns on investment of funds not currently invested in the concession operation [CE. 22 February 1929 Ville de Montdidier p. 224, CE. 19 May 1926 Depart. de la Vendeé p. 500, CE. 15 December 1937 Ville de Bordeaux p. 1039]. The dépenses for the purpose of this calculation would be those required and "inhérentes a l'exploitation" and usually include the government or commune's share in the profits, to the extent that such sharing is stipulated, and the cost of renewals and maintenance required by general legislation or the terms of the cahiers des charges. Under the metropolitan cahier des charges type for the distribution of electricity (1928 - Article 23) the cost of interest and the amortization of capital invested in the project were not normally considered as a depense for this purpose. [De Laubadere Vol. III paras 1079-1080]

Certain concession instruments called for the system of indemnisation par annuités but added the requirement of a prime d'eviction. This was meant to compensate the ex-concessionnaire for the loss of his expectation of future increases in the number of consumers or in the scope of his operations. This prime was subsequently largely replaced by the use of a clause correctif designed to take account of the average decrease or increase in the income from the concession in the years preceding the rachat.

Finally, under the annuité system of compensation, the ex-concessionaire receives besides a lump sum under the indemnité de reprise an annual sum compensation for each of the years which would have been left to run under the former concession, although certain cahiers des charges have provisions calling for a down-payment [CE. 25 Jan. 1923

Cie générale des eaux p. 77]. As far as modalities of payment are concerned it is also noteworthy that De Laubadere [Vol. III p. 202 - para 1080] states:

> "S'il s'eleve des difficultés relatives à la monaie de paiement de l'annuité (par example francs metropolitairs ou francs CFA) il faut tenir compte, si la commune intention des parties n'implique pas de solution differente, du lieu d'execution du contrat".

[a decision to this effect has apparently been handed down by the Conseil d'Etat, CE. 7 May Cie des Chemins de fer de Dakar à St. Louis Actual jar. 1954 II p. 239]

TUNISIA CONCILIATION

COMMENTS ON ALTERNATIVE METHODS

OF

VALUATION

DRAFT
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January 5, 1968

SUPPLEMENT ON APPLICATION OF THE CONCESSION AGREEMENTS

Relevant Provisions of the Concession Documents

1. Compagnie Tunisienne d'Electricité et de Transport. Until 1953 called the "Compagnie des Tramways de Tunis", this is a société anonyme under Tunisian law, with its siège social in Tunis and offices in Paris, established on the 13th January 1903 for a period of 75 years subsequently extended until 31 December 1999. CTET,(which will be used even where reference should correctly be to the Compagnie des Tramways de Tunis), held at the time of its nationalization in 1962 a myriad of concessions in the fields of power and transport. Theessential agreement for both power and transportation, however, was the Convention of August 20, 1905, for the construction and operation of tramways in and around the city of Tunis and for the distribution to the city of excess power produced from its generators, which were primarily designed to supply power for its transportation operations. This agreement accordingly presents the basic point of departure for CTET's activities in both the power and transportation fields.

A. Electricity

(i) The Convention of August 20, 1905, together with its Cahier des Charges and the related implementing decree, constitutes the master instrument governing the electric power operations of the company. By virtue of Article 3 of the Convention of August 20 the concession was to remain valid until December 31, 1976, and this was to remain the terminal date regardless of future modifications in the scope and financial aspects of the concession.

The basic instruments of 1905 have since been amended at least eight times by "Avenant" modifying or amending certain provisions of the

basic concession other than that specifying the terminal date. These amendments appear to have been the following:

First Avenant dated December 15, 1909

Second Avenant dated August 7, 1917

Third Avenant dated February 18, 1929

Fourth Avenant dated December 28, 1929

Fifth Avenant dated April 25, 1932

Sixth Avenant dated December 17, 1937

Seventh Avenant dated March 5, 1938

Eighth Avenant dated January 26, 1953.

Each of the avenants was accompanied by an implementing decree and by a Cahier des Charges.

The economic and financial repercussions of the First World War were reflected in a temporary convention between the Government and the company dated December 1, 1919. This temporary arrangement was extended on a yearly basis until superseded by the Convention of 18 February 1929. The terms of settlement embodied in this later Convention were in turn amended several times by special amendive avenants dated April 15, 1932 and September 1, 1949.

(ii) CTET also held numerous minor concessions for the distribution of electricity in the areas surrounding Tunis. These concessions were in each case granted by the particular municipalities concerned and approved by decree.

These appear to have been for the following communities:

(a) Sidi-Bou-Said - dated February 24, 1911, entered into force June 16, 1911.

(b) Maxula-Radès - dated April 13, 1911, entered into force June 17, 1911.

(c) Hammam-Lif - dated April 13, 1911, entered into force June 17, 1911.

(d) La Marsa - dated November 16, 1912, entered into force November 27, 1912.

(e) Ariana - dated May 1, 1914, entered into force July 16, 1915.

(f) Kram - dated July 2, 1917, entered into force February 7, 1918 (avenants dated July 2, 1917, April 7, 1918 and November 21, 1925 also existed for this concession).

(g) Bardo - dated July 31, 1925, entered into force December 8, 1925.

(h) Mateur - dated December 29, 1925, entered into force June 6, 1926.

(i) St. Germain - dated May 14, 1926, entered into force May 17, 1926.

(j) Grombalia - dated November 13, 1928, entered into force January 19, 1929.

(k) Nabeul - dated November 13, 1928, entered into force January 13, 1929

(l) Meuzel-Bou-Zelfa - dated November 13, 1928, entered into force January 13, 1929.

(m) Saliman - dated November 13, 1928, entered into force January 13, 1929.

All these concessions were governed by an individual Convention with an attached Cahier des Charges. Their duration was always in accordance with the same formula, as set out for example in Article 3 of the Convention relating to Sidi-Bou-Said. This provided for a duration of 40 years from the entry into force, at the end of which period "la Ville aura la faculté de résilier en prévenant la Compagnie ... six mois avant l'expiration de la quarantième année." In the absence of such resiliation the Convention was to be deemed renewed for a five-year period and the same procedure was applicable for each successive five-year period with a final termination date of December 31, 1976 (the date on which the main CTET concession of 1965 terminated, see supra). Article 3 adds that in case the life was prolonged until 1976 the distribution assets would revert free of charge to the town - in case termination intervened earlier the company could remove the installations or use them for service to private subscribers (see also Article 7).

(iii) CTET also undertook short-term sales of power to small communities in accordance with "Marché de gré à gré". These minor arrangements constituted special agreements governing the sale of power to be distributed through municipally-owned lines and for street lighting. The prices charged were permitted to deviate from the general tariffs for such sales of power stipulated by the Master Cahiers des Charges. These

were the Marché de gré à gré for

(a) Commune de Tunis (October 7, 1935)

(b) Medjez-el-Bab (March 17, 1936)

(c) Teboura (April 30, 1936)

(d) Zaghohan (September 15, 1936)

(e) Services Municipaux de La Goulette (January 1, 1942).

Motor Columbus appear to have paid little attention to these minor contracts and this may be explained by the fact that they used assets also used under the concession operations and by the fact that the contracts were in each case for a period of 5 years with the possibility of tacit renewals on a year-to-year basis.

(iv) CTET also purchased the property and distribution rights of other companies in at least two cases. These appear to have included the rachat of the "réseau d'éclairage public communal de La Goulette" from CGET (approved by decree dated January 27, 1938) and the rachat of the concession for Ferryville (by Conventions dated January 8 and 25, 1953, both approved by Decree dated December 9, 1954). In the case of the La Goulette distribution concession which was purchased from CGET, we have no information on the duration though presumably this was determined under the original concession to CGET which CGET did not provide to Motor Columbus as part of the documents relevant to its operations. Perhaps it is permissible to assume that its life was linked to that of the main concession of 1905 since the service was purportedly to be incorporated into CTET's overall operations. In the case of the

Ferryville concession, Article 2 of the Convention specifies that it will terminate on December 31, 1986, unless the main CTET concession (namely that of 1905, see supra) should have been terminated by rachat prior to December 31, 1976.

(v) CTET also held by Convention dated September 27, 1929, the right to distribute electricity in certain areas of the "Second Region" of Tunisia and by virtue of a Convention with the Marine-National dated June 8, 1933, (as approved by Decree dated October 5, 1933) the right to distribute power to the arsenal at Sidi-Abdallah. The Convention for the Second Region specified a duration of 40 years from the date of the Decree approving the Convention (July 5, 1930), with the same formulation for tacit renewal in four five-year periods up to but not beyond December 31, 1976, as described above with respect to the minor distribution concessions. The second Convention, dated June 8, 1933 (which entered into force on October 5, 1933), was to run for a period of 25 years from January 1, 1933.

B. Transport

The concession instruments governing the transportation operations of CTET begin with certain agreements predating the Convention of August 20, 1905, with its attached Cahier des Charges (which constitute the master instrument governing the transportation operations of CTET as it also does for the electricity operations, see supra). The original tramways concession was dated July 16, 1896, and entered into force on the 20th of the same month. Article 14 of the Cahier des Charges stipulated that the concession would terminate on March 23, 1956. Subsequently by Convention and Cahier des Charges dated August 13-25 1900, a tramways concession was

granted for a line from Tunis to La Manouba. This concession entered into force on November 21, 1900. Article 14 of the Cahier des Charges stipulated that the concession would terminate on December 31, 1970. A subsequent concession for tramways, between Tunis and Ariana, dated March 26, 1904, entered into force on May 31, 1904, and Article 2 of the Convention specified that the concession would be on the same terms as applied to that between Tunis and La Manouba (i.e. would also expire December 31, 1970). As has already been noted in connection with the electricity operations of CTET the main concession for both the transport and electricity sides of CTET's operation, namely the Convention of August 20, 1905, was to run until December 31, 1976.

There appears to have been only three further transport concessions since the 1905 Convention. The first of these was the Convention for establishment of an electric railway between Tunis and Hamman-Lif dated June 25, 1913, which by virtue of its Article 3, was to terminate on December 31, 1976. The second was the Convention with respect to the tramway line between Tunis and Djebel-Djelloud dated July 1, 1913, which by virtue of its Article 6 was also to expire on December 31, 1976. The third agreement is the Convention d'Autobus and attached Cahier des Charges for the route Montfleury-Mutuelleville dated April 4, 1934, which entered into force on February 21, 1935. By virtue of Article 7 of this latter Convention the duration was to be for five years from July 1, 1934 tacitly renewable for further consecutive five-year periods unless denounced by either of the parties six months before the expiration of any such period.

C. Comments

Motor Columbus reports (oral report by Mr. Weller) that CTET used the same administrative personnel and the same building facilities for both their transport and electricity activities. The transport operation didn't receive the tariffs necessary for CTET to cover all costs and make a profit and in any case this operation's administrative and other costs were shared with the power operation. Motor Columbus feels that certain of these costs on the power side were pushed on to the transport operation.

Under the 2ème Avenant to the Convention of February 18, 1929 (agreement settling the financial questions arising from the War*), CTET agreed on the original formula (since changed) to split up its share capital, for financial purposes, into a part devoted to power and a part devoted to transport.** On the transport side they were to be assured of a 6% return on their investment. Motor Columbus calculate that this investment amounted to roughly 35% of CTET's total share capital but have no information on what the basis of this 35% was in fact, but feel that it reflected an ad-hoc agreement. The Government assured CTET that it would meet any losses CTET suffered as a result of its transportation operations

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* After the First World War, CTET experienced severe financial strain in its power distribution operations. The Government therefore agreed to help the company over its temporary difficulties under the Agreement of 1919. A "final" formula was established in 1929.

** This is in itself confusing since the Agreements of 1919 and 1929 related only to the operations under the major concessions stemming from the 1905 Convention. Presumably some of CTET's capital was invested, however, in the minor concessions.

and would assure them of the 6% return on the agreed amount of capital. On the power distribution side the Government had a share in the profits as a result of its investment in certain facilities of the company. It also assured a return to the company of 4% on the capital invested in the power production and distribution operation.* Whenever the returns exceeded this rate (and Motor Columbus admit that it nearly always did) but were less than 7%, the profits were apparently split 1 to 4 in favor of the company, from 7 to 10% return on profits split 1 to 2 in favor of the company, and with returns of over 10% the profits would be split 2 to 1 in favor of the Government. A further complication in the unravelling of these confusing figures for purposes of obtaining an accurate basis for calculations in accordance with the rachat clause is that according to Motor Columbus, before calculating the 4% or 6% return due in any year the practice was to deduct an agreed percentage rate of return, known as the "interêt", on the capital invested in stock (inventory). Mr. Weller reported orally that this appears to have run at a rate of about 3% unless only part of the stock was considered for this purpose in which case the figure would be nearer 4%.

Motor Columbus concludes that in view of the complex and often ad-hoc nature of the financial relationship between the State and the company and the lack of detailed financial statements on a concession to concession basis, it was impossible to make any meaningful calculation in accordance with the rachat clauses of the various concessions. The Working party sees no reason to disagree with this conclusion.

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* Of course power production wasn't included in the scope of concessions.

2. Compagnie du Gaz et Régie Co-Intéressée des Eaux de Tunis (CGET)

A Tunisian société anonyme with siège social in Tunis and offices in Paris, established in 1885 originally for 50 years, but subsequently extended for 74 years. CGET's operations in Tunisia covered three separate functions. Namely, the distribution of gas, the distribution of electricity and the distribution of water within the city of Tunis (this latter function was carried out on a non-profit basis; CGET received a fee in return for carrying out the task for the municipality and collecting the revenues on behalf of the municipality).

A. Electricity

According to Motor Columbus' report on its discussions with CGET the only instrument it obtained from CGET which relates to the Company's electricity operations is a Cahier des Charges governing the distribution of electricity by CGET within the city of Tunis. The preamble to this Cahier des Charges, dated March 16, 1953, constitutes the fourth amended version of the original Cahier des Charges attached which entered into force on the same date as the Convention of December 30, 1922. The Cahier des Charges received by Motor Columbus states in the preamble that it entered into force on October 15, 1953, and represents a consolidation of the provisions of the Convention of December 30, 1922 and of the four subsequent avenants to that Convention. According to Article 40 of the Cahier des Charges, as amended, the concession expires on December 31, 1999.

B. Gas

The basic instrument governing the gas operations of CGET is the Convention between the Ville de Tunis and CGET, dated December 30, 1922, together with its annexed Cahier des Charges, which entered into force on January 1, 1923, as modified by Avenant dated June 22, 1933, July 12, 1937 and March 16, 1953, all as promulgated by decree. Article 41 of the Cahier des Charges as amended fixes the terminal date of the concession as December 31, 1999.

C. Water

The basic instrument governing the water distribution functions of CGET is the Convention dated December 28, 1934, between the Direction des Travaux Publics of the French protectorate (acting in the name of the Régence de Tunis) and CGET which entered into force and effect on January 26, 1935. According to Article 53 the Convention was to run from January 1, 1935 to December 31, 1944, with a possibility, however, of tacit renewal for consecutive ten-year periods unless termination was requested by either party more than two years before the expiration of the original period or any one of the succeeding ten-year periods.

D. Comments

Motor Columbus reports that several amendments were made to the concession instruments governing the distribution of electricity but that no copies of these amendments were obtainable. According to Motor Columbus Article 42 of the electricity Cahier des Charges was amended but that there is no record of the substance of this amendment. This would appear to present a serious obstacle to the use of the rachat method in the case of CGET unless the parties were to agree, during the conciliation

meetings, on the substance of this amendment which deals with the break-down of the operating costs and the receipts for each of the three fields of operation of the Company - i.e. gas, electricity and water. Apparently, the overall operating expenses (dépenses) of CGET were divided between the three aspects of its operations according to the formula 25% electricity: 25% gas: 50% water. According to Motor Columbus (oral report by Mr. Weller), this formula was subsequently changed to 60% electricity: 15% gas: 25% water. Motor Columbus deciphered this new sharing formula by its own calculations on the basis of the company's annual reports and account, to the extent that they were made available to them. Motor Columbus feels that this factor presents a serious obstacle to the application of the concession system of valuation to CGET since the calculation of the "annuité de rachat" (annual payment of compensation equal to average surplus of receipts over expenses of the concession) would require detailed knowledge of the expenses and receipts for each concession separately and in each case for a period of seven years before the date of the rachat. In the case of CGET this is particularly important because the duration of the water concession could well have been terminated as of 1964 (expiration of second ten-year renewal period).

3. Société Nord Africaine d'Electricité, Gaz et Eaux (SNA or alternatively SNAEGE)

This company appears to have held one concession - that for the distribution of power to the municipality of Sfax. According to the original Convention and Cahier des Charges, dated August 1, 1922 (entered into force on November 1, 1922), the duration of the concession was to be for fifty years from November 1, 1922 (i.e. 1972). Five amendments were subsequently adopted by Avenants dated November 26, 1927, November 18, 1933, March 10, 1939 (not available to Motor Columbus), January 10, 1952 and June 7, 1960 (not given to us by Motor Columbus). No change in duration was stipulated by the first three Avenants, but by virtue of Chapter Six of the Avenant of January 10, 1952, the life of the concession was extended until December 31, 1999, on condition that the company undertake eight new commitments including an investment program and a specified extension in the scope and level of its services. As the memorials indicate (p.___ Tunisian Memorial, p.___ SNA Reply), there is a serious dispute as to whether these conditions were satisfied if one was to rely on the basis of the available financial data and on the rachat provisions of the Cahier des Charges.

4. Union Electrique Tunisienne (UET)

Motor Columbus reported (oral report by Mr. Weller) that the concession framework for this company's operations is at best confused. There appear to have been three areas in which UET held the concession for the distribution of electricity; the Commune of Kairouan, the region of Sahel de Sousse, and the Commune of Sousse. Motor Columbus were unable to get the complete collection of concession instruments (see Data Report on UET dated December 1967).

A. Commune of Kairouan

The original concession in this area was granted by Convention and Cahier des Charges, dated November 22, 1923, to Omnium Tunisien d'Electricité (in some documents reference is made to Omnium Français d'Electricité which Mr. Weller assumes was the name at one stage for OTE). A Government Decree dated April 15, 1930, approved the assignment of OTE's rights and duties to the Société de distribution d'electricité de Sousse. This company then merged in 1950 into the UET. Since 1923 there appear to have been three major amendments to the Convention and Cahier des Charges. The first of these is called an Addendum and appears to be dated March 9, 1924, and the second, also termed an Addendum, is dated May 26, 1924. The third is termed an Avenant and carries the caption "Avenant No. 3 à la Convention et au Cahier de Charges du 22 novembre 1923 modifiée par Avenant No. 1 en date du 9 juin 1931 et par Avenant No. 2 en date du 21 mai 1942." We do not have copies of these two earlier Avenants. Since the Avenant No. 3 consists of revised provisions to be inserted in some cases in lieu of the Articles of the original Cahier des Charges and in other cases in lieu of the revised texts of certain Articles as set out in the missing Avenants --

the picture is accordingly extremely confused. The Avenant No. 3, for example, stipulates (Chapter 6) that the revised Article 21 as set out in Avenant No. 1 of June 9, 1931 is null and void and henceforth will be replaced by the following revised version. This latter version then sets the expiration date of the concession as December 31, 1999 (Article 21 of the original Cahier des Charges, had set the date at 1974):

> "La durée de la présente concession est reportée au 31 décembre 1999. Pendant cette période, et pour tenir compte de l'extension prise par la distribution, le concessionnaire s'engage à maintenir ses moyens de production et de distribution suffisants pour satisfaire à tous les besoins permanents de la Ville".

The provision then goes on to add a list of other conditions for the extension of the life of the concession until December 31, 1999. These conditions involve a detailed new investment program and overall commitment with respect to extensions in its distribution and generating facilities as the needs of the community might develop in the future. The Avenant No. 3 compounds the confusion by adding a final stipulation (Chapter 17) to the effect that all provisions of the Convention and Cahier des Charges of November 22, 1923 as modified by Avenant No. 1 of 1931 and No. 2 of 1942, and which were not modified by the Avenant No. 3 will continue in force and effect. It is accordingly extremely difficult to form any conclusions with respect to the exact nature of the obligations of the parties with respect to the conditions governing the extension of the life of the concession until 1999, and, with respect to the nature of the company's repair and maintenance obligations.

B. Sahel de Sousse. This concession was granted to the Société d'Etudes pour l'Electrification Tunisienne by Convention and Cahier des Charges dated December 2, 1930 and it entered into force on September 15, 1931. This concession, unlike the concession for Kairouan, was granted by

the State. Presumably UET was the successor company to the original concessionaire. Article 21 of the Cahier des Charges fixes the terminal date for the concession at September 15, 1981.

C. Commune de Sousse

The original concession in this case was granted by Convention and Cahier des Charges dated September 11, 1905, to the Société de Distribution d'Electricité de Sousse. Motor Columbus were unable to obtain copies of these original instruments nor were they able to obtain copies of the Avenant dated March 12, 1921, December 12, 1923 and May 31, 1926. Motor Columbus received, however, copies of the Fourth Avenant to the original Convention (of September 11, 1905) dated October 21, 1929 and a Fifth Avenant dated October 14, 1938. The Fourth Avenant appears to have provided an entirely revised Cahier des Charges in substitution for the one attached to the Convention of September 11, 1905. Article 21 of this revised Cahier des Charges set the duration of the concession at 40 years from October 21, 1929. Accordingly, the concession would expire on October 21, 1969. The Fifth Avenant does not appear to have altered this 40-year duration period. The Sixth Avenant which entered into force January 29, 1953, however, appears to have extended the life of the concession until December 31, 1999 (see Chapter 16 of Avenant No. 6). This Sixth Avenant followed the merger on May 9, 1950 between the original concessionary company, the Société de Distribution d'Electricité de Sousse, with the UET. The provision of the Sixth Avenant extending the life of the concession until 1999 also set out a detailed investment program and general investment commitment as a condition to the extension of the concession's duration.

These conditions seem substantially similar to those stipulated in the concession agreements covering Kairouan and Sahel de Sousse. It is important to note, however, that even allowing for the difficulty of determining whether these conditions for the extended life of the concession had been met or would have continued to be met by the company, in the case of the operations in the Commune de Sousse, we would be faced by the further difficulty that Motor Columbus has learned of the existence of a Seventh Avenant which it has been unable to obtain.

5. Société d'Energie Electrique de la Ville de Bizerte (SEEVB)

SEEVB appears to have had at least two concessions for the distribution of electricity. There was also apparently a third distribution operation entrusted to SEEVB, namely that for the Corniche de Bizerte. This latter phase of SEEVB's operations was established by an Arrêté of the Director General of Public Works of Tunisia dated April 23, 1932 (Journal Officiel, June 15, 1932). However, despite Motor Columbus' request for all the instruments relating to all the operations of SEEVB, no concession agreement was obtained with respect to the area of the Corniche de Bizerte. The Arrêté, however, appears to contain most of the provisions normally associated with a Convention and Cahier des Charges. The Arrêté indicates that SEEVB was authorized to distribute electricity within the described area in return for a redevance annuelle due to the government as a rent for the portions of the public domain used in the operations and SEEVB also received a subsidy from the government for purposes of covering the cost of transformers and high and low tension transmission lines. Article 2 stipulates that the authorization established by the Arrêté would last for 30 years and would expire on April 23, 1952. The copy of the Arrêté provided to Motor Columbus by SEEVB contains a marginal annotation in ink, suggesting that the expiration date was in fact 1962 rather than 1952.

The two main concessions held by SEEVB were the concessions for the Ville de Bizerte and for the Région de Bizerte. The concession for the Ville de Bizerte was one for both the production and distribution of electricity and was granted by the local town authorities. SEEVB's original operations in the town had been carried out in accordance with the terms of a Convention dated April 10, 1911, together with its attached Cahier des

Charges. These Agreements had been subjected to modification by Avenant dated April 5, 1924, and July 24, 1928. Article 4 of the Convention of November 27, 1933 annulled all the previous agreements and substituted for them the terms of the new Convention and Cahier des Charges. Article 3 of the Convention of 1933 added, furthermore, that in order to take into account the deficits suffered by the company during the period 1914-1928 the old concession agreement had been prolonged for a period of eleven years. As a consequence, it added, the new concession would be permitted to run until April 23, 1962 (similar provision in Article 21 of the Cahier des Charges of the same date).

Motor Columbus were also provided with a 1er Avenant to the 1933 Convention and Cahier des Charges, dated October 15, 1937, which entered into force on October 28, 1937 (Journal Officiel No. 92, p. 1440, November 16, 1937). This Avenant appears to make no change in the date of termination. The second major concession for the distribution of power was one granted to SEEVB by the authorities of the protectorate for the distribution of electricity within the Région de Bizerte. The instruments in this case are the Convention and Cahier des Charges dated March 6, 1935, which entered into force on March 16, 1935. Article 3 of the Convention appears to indicate that this concession was to expire on the same date as the concession for the Ville de Bizerte, that is to say April 23, 1962. Article 4 of the Convention suggests that the operations in the Corniche de Bizerte pursuant to Arrêté dated April 23, 1932, were thereafter incorporated within the concession for the Région de Bizerte. This may explain the marginal annotation changing the expiration date of the Arrêté from 1952 to 1962. The

concession for the Région de Bizerte was subsequently the subject of at least one Avenant dated October 23, 1937, which entered into force retroactively on August 1, 1937. This Avenant does not appear to have extended the duration of the concession.

6. Union Electrique d'Outre-Mer (UNELCO)

Unlike the other companies, UNELCO is a societe anonyme constituted under French law on March 8, 1929 with its siège social at 52 rue de Lisbonne, Paris 8. This company held only one concession for the distribution of electricity in Tunisia. This was the concession granted by the Commune de Gafsa. It held similar concessions, however, for the cities of Lome (Togo) and Banqui (Central African Republic). Other than the Gafsa concession, UNELCO also entered into contracts for the exploitation en régie of the production and distribution of electricity to the small communities of Tozeur, Zarzis, Ben Gardane, Medenine, Djerba and Kasserine.

The concession for Gafsa was governed by a Convention and attached Cahier des Charges dated April 3, 1930, which entered into force on September 12, 1930. Article 2 of the Convention stipulated a duration period of 40 years from the entry into force of the Convention. The concession would have accordingly terminated on September 12, 1970. The Convention and Cahier des Charges appear to have been the subject of at least four subsequent Avenants: Number 1 dated December 24, 1937, No. 2 dated February 4, 1941, Number 3 dated June 4, 1946 and finally No. 4 dated May 2, 1953. The first three Avenants do not appear to have extended the terminal date of the concession but Article 2 of the fourth extended the concession for a further twenty years, that is to say until September 12, 1990.

UNELCO, as already mentioned, also held several agreements governing the supply of power to smaller communities. These appear to have been issued as a result of an overall "Convention de Gerance" between the Director of Public Works of the Protectorate of Tunisia and UNELCO, dated September 17, 1952. The Convention de Gerance indicates in its preamble that the Protectorate envisaged granting UNELCO a distribution concession for the southern part of Tunisia and accordingly agreed with the company that within the initial period the task of distribution would be assumed by UNELCO which would take over existing and future installations for electricity distribution and maintain them in good condition and would make all other necessary investments to enable it to distribute power to the communities covered. In the event of losses on these operations the government would reimburse the company. The actual terms for the sale of power to the various communities were the subjects of special tripartite agreements between the State, the community and the company, which regulated such matters as the price which the communities would pay for power, the contributions of the community and the State in the event that the company lost money on particular distribution facilities, and provided for the eventual granting of individual distribution concessions for the communities

concerned. Article 1 of the Convention de Gerance stipulated that the authorization to sell power would run for five years from the date of each individual tripartite arrangement. Article 4 indicates the matters to be covered under the individual tripartite agreements. Article 10 stipulates with respect to the five year duration of the Convention if at the end of this five-year period an individual distribution concession should not have replaced the tripartite arrangement the provisions of the Convention de Gerance and appropriate tripartite arrangement would continue to be applied unless and until such concession should have entered into force. Article 10 also stipulates that at the expiration of the management arrangement for each community all the installations mentioned in the inventory would revert freely and unencumbered to the company whereas the inventory of stocks and supplies could be taken over by the company at the prices set out in the inventory. Motor Columbus was provided with the full text of the tripartite agreement covering the distribution of electricity to the Commune of Medenine, dated April 15, 1953. Extracts only were provided for the other four tripartite agreements. Significantly the last tripartite agreement was that for the supply of power to Kasserine which was dated November 29, 1959, that is to say in the year following the seizure of CTET's

assets and in the same year as the takeover of CGET's operations. It is also significant that though the pre-independence Convention de Gerance did not mention the possibility of a tripartite agreement covering Kasserine, the post-independence (1959) tripartite agreement for Kasserine appears to ratify by reference the terms of the pre-independence Convention de Gerance.

Comment - UNELCO provided Motor Columbus with annual reports and profit and loss statements which indicate that financial data was not kept separately for each of its foreign electricity concession operations. Mr. Weller suggested (oral report) that this method of bookkeeping would present serious obstacles to the application of the rachat provisions.

7. Omnium Tunisien d'Electricite (OTE)

A société anonyme with siege social in Tunis and offices in Paris, of which 85% of the shares belonged to Electricité et Gaz d'Algerie. The company appears to have held six concessions from municipalities or communes and one from the State.

(a) Commune de Beja. The concession for Beja appears to have been regulated by the following instruments:

(i) Arrete of December 31, 1923, giving temporary license for the establishment of a distribution line between M

for the establishment of a distribution line in the neighborhood of Sidi Fredj.

(ii) Arrete of May 15, 1924, of a transmission line between Mateur and Nebeur.

(iii) Convention de Concession and attached cahier des charges for electricity distribution to Beja dated December 30, 1924, entered into force on the same date.

(iv) Arrete dated August 17, 1925 and March 6, 1928, renewing the license for the line between Mateur and Nebeur and authorizing use of the public domain for a line between Tunis and Souk el Ahras.

(v) Avenant No. 1 to the Convention and cahier des charges of December 30, 1924.

(vi) Subsequent arretes of 1932 and 1933 with respect to licenses for transmission lines and occupation of the public domain.

The Convention agreement of 1924 (Article 21) established a termination date of 40 Gregorian years from December 30, 1924. The Avenant of 1930 does not appear to have extended the life of this concession.

(b) Gabes

(i) Convention de Concession and cahier des charges dated October 29, 1925.

(ii) Avenant No. 1 of September 29, 1926, entered into force on August 3, 1926.

(iii) Avenant No. 2 dated September 2, 1938, entered into force on November 8, 1938.

We have not received a copy of the cahier des charges for this concession and accordingly can't establish the expiration date. Neither of the Avenants appear to have extended the life of the concession. In view of the provisions of the other contemporary concessions of OTE, a 40-year period likely to have been specified (i.e. 1965).

(c) Souk el Arba

(i) Convention de Concession and attached cahier des charges dated June 9, 1926, which entered into force on September 7, 1926.

(ii) Avenant No. 1 to the above Convention and cahier des charges, dated January 31, 1930.

(iii) Convention of July 30, 1930, with respect to certain land and the supply of water.

(iv) Avenant No. 2 dated February 9, 1938.

(v) Various Arretes authorizing the establishment of certain transmission and distribution lines.

Article 21 of the cahier des charges of June 9, 1926 specifies that the concession would terminate at the same time as that for the distribution of electricity to Beja

and specifies the date of December 30, 1965.* The Avenant No. 1 of January 31, 1930, which entered into force on June 28, 1929, appears to have amended the terms of Article 21 of the cahier des charges of 1926, stipulating a new 40-year period from June 28, 1929 (i.e. an extension from 1965 to 1969).

(d) Souk el Khemis

(i) Convention de Concession and attached cahier des charges of May 20, 1926, entered into force August 3, 1926.

(ii) Avenant No. 1 of November 12, 1929.

(iii) Numerous Arretes with respect to transmission and distribution lines.

In accordance with Article 21 of the cahier des charges a concession was to run until December 30, 1965. There is again the confusing cross-reference to the expiration date in the Beja concession. There does not appear to have been any subsequent extension in the life of this concession.

(e) Commune de Le Kef

(i) Convention de Concession and cahier des charges of May 27, 1931, entered into force July 11, 1931.

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* [The substance of Article 21 appears to contradict the calculations imposed by the terms of the equivalent provision of the concession for Beja.]

(ii) Avenant of January 19, 1938.

Article 21 of the cahier des charges specifies a period of 40 years from July 11, 1931 (i.e. July 11, 1971). There appear to have been no subsequent extensions.

(f) Commune of Tebour Souk

(i) Convention de Concession and cahier des charges of August 27, 1931, entered into force April 9, 1932.

(ii) Avenant No. 1 of March 1, 1938, entered into force April 28, 1938.

(iii) There appears to have been a further Avenant dated March 17, 1954. (The copy provided to Motor Columbus has numerous marginal annotations and corrections and is marked with the description "Projet.")

As with the other concessions Article 21 fixes the duration of the concession as being for 40 years (i.e. April 9, 1972). The first Avenant does not appear to have made any extension. The second and somewhat controversial "Projet Avenant" stipulates that an amendment to the provision on duration and states that the concession will terminate on December 31, 1975. The figure 1975 is, however, crossed out and an insertion in ink provides the new date of 1999. There appear to have been no signatures to this document and since no ratifying legislation is recorded, it seems difficult to accept this provision or,

for similar reasons, the hand-corrected revised version of Article 23 of the original cahier des charges - namely the rachat provision.

(g) Concession d'Etat for distribution of electricity in the civil areas of Tebour Souk, Souk el Arba and Le Kef.

(i) Convention and cahier des charges of February 23, 1931, entered into force June 22, 1931.

(ii) Avenant No. 1 of October 10, 1932.

(iii) Avenant No. 2 of January 21, 1937.

(iv) Avenant No. 3 of January 29, 1938.

(v) Avenant No. 4 of October 8, 1953.

Article 21 of the concession fixes a duration period of 50 years from June 22, 1931 (i.e. June 22, 1981) Article 11 of the Avenant No. 4 of October 8, 1953, states a new termination date of December 31, 1989. The copy Motor Columbus received of Avenant No. 4 again appears to be a draft, though it bears the handwritten heading "Definitif."