



# Negotiating the Treaty

**Laura Rees-Evans**

**Hearing for the First Phase on the Merits**

***Indus Waters Treaty Arbitration (Pakistan v. India)***

**PCA Case No. 2023-01**

**9 July 2024, The Hague**



# Outline

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- Historical origins and circumstances of conclusion of the Indus Water Treaty
- The negotiation of the Treaty
- The *travaux préparatoires* and the interpretation of Article III and Annexure D



# **The historical origins and circumstances of conclusion of the Indus Water Treaty**



ANOTHER "KOREA" IN THE MAKING?

P-0233

BY DAVID E. LILIENTHAL

India and Pakistan are on the edge of war over which shall possess Kashmir - a fight the U.S. might be forced to enter. Here's a proposal that could preserve peace and increase prosperity.

A dispute between India and Pakistan over possession of Kashmir threatens to erupt into a war which could involve the U.S. For a firsthand report Collier's sent David E. Lilienthal, formerly head of the Atomic Energy Commission, to the two nations. Mr. Lilienthal has returned with a plan which he believes would make it possible for them to live in harmony and increased prosperity.

I saw the source of water supply for Lahore and the surrounding farming country near the border when (probably for some operating reason) India had cut down the flow; every passer-by could see how low the canal's waters had fallen. An hour later I talked to Pakistanis so furious and worried they were ready to fight with their bare hands. Later in the day, the waters were up again; but the fear was still there. In the spring of 1948, during international negotiations as to the allocation of water for irrigation, India cut off most of the supply of water to Pakistan for a month, causing distress, loss of crops and general disruption. This rankles and makes Pakistan fearful of the future.

Only three years ago these armies, composed of some of the toughest fighting men in the world, were actually in a shooting war until a truce was arranged by the Security Council of the United Nations, and the UN began its so far fruitless effort to settle the dispute.

Back in the hills tens of thousands of tribesmen, who inhabit Pakistan's North-West Frontier Province, stand ready to sweep down into Kashmir and again raid the villages and again engage the Indian troops; in almost every one of thousands of villages and cities religious fanatics and young hoodlums of both sides are ready to set off once more for the butchery that in the religious riotings of 1947 cost the lives of 2,000,000 people and caused starvation and suffering for many more millions.

The tension and bitterness mounts; the Pakistanis grow more openly belligerent as they see India solidifying its position and preparing for a fait accompli; the Indians are angered by what they regard as unwarranted "interference" by the United Nations in the "internal affairs" of Kashmir, which they point out



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Pakistan includes some of the most productive food-growing lands in the world in western Punjab (the Kipling country) and the Sind. But without water for

irrigation this would be desert, 20,000,000 acres would dry up in a week, tens of millions would starve. No army, with bombs and shellfire, could devastate a land as thoroughly as Pakistan could be devastated by the simple expedient of India's permanently shutting off the sources of water that keep the fields and the people of Pakistan alive. India has never threatened such a drastic step, and indeed denies any such intention - but the power is there nonetheless.

That there is danger that war will break out any day is neither speculative nor alarmist. In Kashmir's high mountains two armies face each other in anger. Only three years ago these armies, composed of some of the toughest fighting men in the world, were actually in a shooting war until a truce was arranged by the Security Council of the United Nations, and the UN began its so far fruitless effort to settle the dispute.

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India and Pakistan are today on the very verge of a war that would

The starting point should be, then, to set to rest Pakistan's fears of deprivation and a return to desert. Her present use of water should be confirmed by India, provided she works together with India (as I believe she would) in a joint use of this truly international river basin on an engineering basis that would also (as the facts make clear it can) assure India's future use as well.

Ocean.

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Confidential  
February 5, 1954

P-0130

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Proposal by the  
International Bank Representative  
for  
a Plan for the Development and Use of the  
Indus Basin Waters

Introduction

desirable, so far as practicable, to avoid control by India over waters on which Pakistan will be dependent, and to enable each country to control the works supplying the water allocated to it and determine in its own interests the apportionment of waters within its own territories.

wide. In rough approximation, the two plans (as modified by recent concessions) provide for the following division of usable supplies of water:

Indian Plan

Usable supplies  
allocated to

- |          |  |
|----------|--|
| India    | - all of the Eastern rivers and 7% of the Western rivers   |
| Pakistan | - none of the Eastern rivers and 93% of the Western rivers |

Pakistan Plan

- |          |  |
|----------|--|
| India    | - 30% of the Eastern rivers and none of the Western rivers |
| Pakistan | - 70% of the Eastern rivers and all of the Western rivers  |



# The negotiation of the Treaty





# 1954 Bank Proposal

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“a. The entire flow of the Western rivers (Indus, Jhelum and Chenab) would be available for the exclusive use and benefit of Pakistan, and for development by Pakistan, except for the insignificant volume of Jhelum flow presently used in Kashmir.

b. The entire flow of the Eastern rivers (Ravi, Beas and Sutlej) would be available for the exclusive use and benefit of India, and for development by India, except that for a specified transition period India would continue to supply from these rivers, in accordance with an agreed schedule, the historic withdrawals from these rivers in Pakistan.”



## 1954 Bank Proposal (continued)

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“c. The transition period would be calculated on the basis of the time estimated to be required to complete the link canals needed in Pakistan to make transfers for the purpose of replacing supplies from India. [...]

d. Each country would construct the works located on its own territories which are planned for the development of the supplies. The costs of such works would be borne by the country to be benefited thereby. Although no works are planned for joint construction by the two countries, certain link canals in Pakistan will, as stated above, be needed to replace supplies from India. India would bear the costs of such works to the extent of the benefits to be received by her therefrom. [...].”



## May 1957 Heads of Agreement

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“1. Subject to the provisions of the succeeding paragraphs of this Annex, the entire flow of the three Western Rivers of the Indus System (Indus, Jhelum and Chenab) shall be available for the exclusive use and benefit of Pakistan and for development by Pakistan, and the entire flow of the three Eastern Rivers of the Indus system (Ravi, Beas and Sutlej) shall, as from the expiration of the final transitional period hereinafter in this Annex referred to, be available for the exclusive use and benefit of India and for development by India.”



# May 1957 Heads of Agreement

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“10. The functions of the Commission shall be the following:

[...]

(g) A review of, and a determination on, all proposals for future local development in the State of Jammu and Kashmir from the flow waters of the Indus or the Jhelum or the Chenab. In carrying out any such review and in making any such determination, the Commission shall be guided by the principle that such development shall comprise relatively insignificant consumptive uses.

(h) A review of, and a determination on, all proposals for the construction of works on the Indus or on the Jhelum or on the Chenab, outside the boundaries of Pakistan, which are likely to interfere with the timing of the natural flow into Pakistan of the waters of any of these rivers.”



Pak Comments P-0410

PRELIMINARY NOTES AND QUERIES REGARDING THE ANNEX  
TO VICE PRESIDENT ILLIFF'S LETTER OF MAY 13, 1957

I

Without minimizing the constructive nature of the approach proposed in Vice President Illiff's letter of May 13, 1957, the fundamental question remains whether it is not necessary in the first place to agree on the list of replacement works. As recognized in the Bank Proposal and the Aide Memoire, these works though built exclusively for replacement affect directly Pakistan's internal economy and development. In the nature of things the planning of these works and their integration with the non-replacement works must be determined by the Government of Pakistan, although that Government continue to hope that the Bank will put forward a list which meets the standards of the adjusted Bank Proposal. In as much as the Indian liability is measured by the system of works referred to in paragraph 9 of the Aide Memoire, Indian concurrence (or approval by the Commission) would seem to be necessary. Some matters, such as the capacity of some of the link canals, could be left to the Commission, but the essential replacement plan will have to be agreed to by the Government of Pakistan. If agreement is not possible now for all three phases, it might be reached as to Phase I and Phase II. The Water Treaty would provide for Phase III when at a later time agreement could be reached.

As to Paragraph 10(h) of the Annex, it is assumed that it is not meant to give to the Commission authority to change the fundamental division of the rivers, or increase Indian control over the Western Rivers including their upstream tributaries. It will be recalled that the Bank Proposal

stated "It is desirable, so far as practicable, to avoid control by India over waters on which Pakistan will be dependent, and to enable each country to control the works supplying the water allocated to it . . .". This being so, any development on those rivers upstream of Pakistan would have to have the consent of the Government of Pakistan. It is not sufficient to have the Commission ascertain that the proposed works are not likely to interfere with the timing or amount of the natural flow into Pakistan.



(b) I told Mr. Gulhati that Pakistan had made the point in relation to Par. 10(h) of the Annex that the construction of works in the Indus, Jhelum or Chenab should not be left to the Commission but the formula should be that such works should be constructed by India only after agreement with Pakistan. Gulhati said that while the Government of India would certainly be prepared to undertake not to construct live storage on any of those rivers or to interfere with the timing of the natural flow, India would wish to be free to construct run-of-the-river plants. I also mentioned that Pakistan would wish the qualification to be extended to the tributaries of the three Western rivers as well as to the main streams.

*Mr Iliff, "Memorandum of Discussion on May 27 with Mr Gulhati and Dr Berber", 27 May 1957, P-0411*

4. It appears to me that Pakistan is likely to remain firm and would not give in on the following points:

(i) Pakistan is not prepared to acquiesce in any interference by India on the River Chenab

I made no mention of the Mahru tunnel but Pakistan Representatives said that Pakistan

would not agree to any storage on the River Chenab in Indian territory for purposes of replacement. (Some anxiety was also expressed regarding hydro-electric development by India even if it did not involve storage).

6. It was explained by Pakistan that it could not agree to the control by India of the Western Rivers even through works for generation of Hydro-electricity.

*Pakistan's Memorandum, 14 June 1957, P-0363*

4. These principles are understood by the Government of Pakistan to be, inter alia:

A. India and Pakistan would enter into a treaty under which, subject to the performance of the other provisions of the treaty implementing the principles of the Adjusted Bank Proposal, Pakistan would agree that the entire flow

of the Eastern Rivers (Sutlej, Beas and Ravi and their tributaries above the border between Pakistan and India) will eventually be available to India for its exclusive use and benefit and for development by India; and India would agree that the entire natural flow of the remainder of the Indus system of rivers historically reaching Pakistan will be available for the exclusive use and benefit of Pakistan and for development by Pakistan.

B. The historic (pre-Partition) uses in Jammu and Kashmir on the Western Rivers (Indus, Jhelum and Chenab and their tributaries other than the Eastern Rivers) will continue to be enjoyed by Jammu and Kashmir together with such additional uses in Jammu and Kashmir (stated to be quantitatively insignificant) as may hereafter be specifically agreed upon. Works may not be constructed outside the boundary of Pakistan which might interfere or make it possible to interfere with the natural flow into Pakistan of the Western Rivers.

*Letter from Mr Mueenuddin to Mr Iliff, 13 July 1957, P-0416*

*Summary Report of Mr Iliff's Talk with the Representatives of the Government of Pakistan – Lahore, June 11-14, 1957, P-0412*



3. The essence of the Bank Proposal and the basic justification for the division of rivers was to make the two countries independent of each other in the operation of their supplies. Being the lower riparian, Pakistan alone is vulnerable to interference by India. By introducing for the first time at this stage new uses on Western Rivers, e.g. those in Himachal Pradesh and Punjab (India) as well as unrestricted right to develop hydro-electric power from these rivers,

India has, while trying effectively to secure to herself the exclusive use and development of the Eastern Rivers, sought to deny the reciprocal independence to Pakistan which the Bank Proposal and the Aide Memoire promised to afford to each country.

*his letter was handed to me personally by  
: Mueen-ud-din Tahir (31st Oct. 1957) P-0420*  
657  
51/x

Washington, D. C.  
Dated as of  
September 10, 1957

to communicate as below the views of the

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June 24,  
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(3) India claims unrestricted right to develop hydro-electric power from the Western Rivers and their tributaries. Hydroelectric works will interfere, or make it possible to interfere, with the flow of the rivers. Such interference is repugnant to the provisions of the Adjusted Bank Proposal and Pakistan cannot agree to any such works in areas under the control of India.

In fact, to achieve the objective of the Bank Proposal, namely, of affording mutual independence to the two countries it will be necessary to provide that no works are constructed in areas under the control of India which will restrict, diminish, or make it possible to interfere in any manner with the flow of the Western Rivers.

on the part of India to  
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3. The essence of  
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right to develop hydro-electric power from these rivers,



CONFIDENTIAL P-0452  
Date: 20/07/2012  
London.  
June 16th, 1959

8. Pakistan accepts the general principle that India should be entitled to reserve on the Western Rivers (a) Common Uses (b) Historic irrigation uses, and additional irrigation uses "relatively insignificant in amount", and (c) Hydel Uses not involving consumptive use of water.

10. On (c) (Hydel Uses), Pakistan expressed concern that the works that India constructed might interfere with the timely flow of water in the low-water season, and emphasised that they would look for some protection on that point.

negotiated on one point and hoped that some way round the difficulty could be found.

- (b) No mention should be made in the Treaty, of Mangla or of any other specific work that would be included in the system of works that Pakistan would undertake to construct.
- (c) India was concerned that the actual construction by Pakistan of a reservoir at Mangla should not carry any implication that India's sovereign rights in Jammu and Kashmir were in any way or to any degree eroded. India therefore wished to find some formula that would protect her in this respect.
- (d) Desai discussed the problem with me and gave me the draft of a formula which might be incorporated in an exchange of letters as part of the protocol to the Treaty.
- (e) I undertook to take the matter up in Karachi.

4. The general principle underlying the Bank approach was that neither party should, on the one hand, seek to gain, in or from the Water Treaty, any support for its own general position on the Kashmir issue, or, on the other hand, should seek to erode the general position of the other party.

Arch July 6





P-0453

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July 13, 1959

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Mr. W. A. B. Iliff  
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Dear Mr. Iliff:

As I left Mueenuddin on June 26 at the conclusion of the IBAB session, he asked me to transmit the following assorted messages.

CHOICE OF PLAN - The choice among alternatives has been difficult because of engineering doubts raised by some Pakistan engineers regarding some features. Mueen hopes that it will be possible to settle on a Plan in August or September, and feels that the going will be clear once the major selection is made.

SCHEDULE - He hopes to start construction by the first of January.

TREATY-HYDROELECTRIC - Mueen reports unanimity among those he has talked with that India should not have a "strangle hold on the Pak economy". The Bank should be considering possible safety guards (engineering or administrative), perhaps a guaranty by some third party, as in the case of the boundaries of Israel, or the safety of Pakistan against invasion. *Mueen feels*

IBAB - Expects the group to meet again in October, and wants me to stay on until perhaps January or February. He is concerned not only that IBAB produce a plan, he wants to insure that the plan is accepted and implemented.

LONDON MEETING - He requests that engineering matters be dispatched as early as possible so his engineers may return home promptly. Heads of agreement or legal items could then be taken up.



# The final negotiations, August 1959 to September 1960

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“I have made it quite clear that our Government cannot possibly agree to storages which, if malevolently operated, would make an appreciable difference to our economy. I have left Iliff in no doubt that Pakistan would not agree to giving India a stranglehold over her economy.”

*Letter from Mr Mueenuddin to Mr W. A. Sheikh, 10 September 1959, P-0475*

“I have, however, made it quite clear to Gulhati that our Government would not, under any circumstances, agree to the construction of works which would give India the power to do us effective harm. The question whether the potential for harm is effective or not can only be studied in the context of definite proposals.”

*Letter from Mr Mueenuddin to Mr W. A. Sheikh, 15 September 1959, P-0134*



# 1959 Heads of Agreement

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## Article II – Division of Waters

“Subject to the provisions of Articles III, IV and V below, the waters of the Eastern Rivers shall be available for the exclusive use of India and the waters of the Western Rivers shall be available for the exclusive use of Pakistan.”

## Article IV – Arrangements Concerning Western Rivers

“(1) India shall let flow the waters of the Western Rivers free from any interference except for the following uses restricted in the case of each river to the drainage basin of that river. [...]

(2) India shall be entitled to generate hydro-electric power on the Western Rivers in accordance with the provisions of Annex “B”.



# December 1959 draft

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## Article III – Provisions Regarding Western Rivers

“(1) Pakistan shall be entitled to receive for unrestricted use all those waters of the Western Rivers which India is under obligation to let flow under the provisions of Paragraph (2) of this Article.

(2) India shall be under an obligation to let flow all the waters of the Western Rivers and shall not permit any interference with these waters except for the following uses, restricted (except as provided in Annexure C ( )) in the case of each of the rivers Indus, Jhelum and Chenab to the drainage basin thereof:

[...]

(d) Generation of hydro-electric power, as set out in Annexure D.

[...]

(4) Except as provided in Annexure E, India shall not store any water of, or construct any storage works on, the Western Rivers.”



P-0483  
INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT  
~~SECRET~~  
OFFICE MEMORANDUM  
Date: April 13, 1960  
TO: Files  
DATE: April 13, 1960

Nevertheless, Pakistan has recognised that the area in question may have needs for hydro-electric development and for flood control. Accordingly, it has agreed to meet these needs by permitting India as much power development as it desires from run-of-the-river plants. In addition, as noted above, Pakistan is prepared to agree to 0.5 MAF of storage for irrigation. This can be used for hydro-electric power as well.

It is suggested that such proposals as the Bank puts forward with respect to storage should keep in view (a) that it is politically essential for Pakistan's irrigation system to be as independent as possible and works that could cause interference should be minimal;

the Bank should adopt this alternative, then the Bank would reluctantly be obliged to announce that its good offices had failed to bring about agreement between the two Governments and that it was withdrawing from the dispute. Moreover, if either Government, after considering any Bank formula, should find itself unable to accept it, this too would mean that the Bank would have to withdraw.



# **The *travaux préparatoires* and the interpretation of Article III and Annexure D**



# First conclusion: the “let flow” obligation

## *Heads of Agreement 1959*

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### **Article IV – Arrangements concerning Western Rivers**

“(1) India shall let flow the water of the Western Rivers free from any interference except for the following uses restricted in the case of each river to the drainage basin of that river.

- (i) Domestic Uses;
- (ii) Non-- consumptive uses; and
- (iii) Consumptive Uses [...].”



# The “let flow” obligation

*December 1959 draft*

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## **Article III – Provisions regarding Western Rivers**

“(1) Pakistan shall be entitled to receive for unrestricted use all those waters of the Western Rivers which India is under obligation to let flow under the provisions of Paragraph (2) of this Article.

(2) India shall be under an obligation to let flow all the waters of the Western Rivers and shall not permit any interference with these waters except for [...]”



# The “let flow” obligation



P-0517

Indus Waters Treaty - Draft of ~~20<sup>th</sup> April~~ 20 June 1960

## ARTICLE III

### Provisions Regarding Western Rivers

(1) Pakistan shall ~~be entitled to~~ receive for unrestricted use all those waters of the Western Rivers which India is under obligation to let flow under the provisions of Paragraph (2).

(2) India shall be under an obligation to let flow all the waters of the Western Rivers and shall not

THE GOVERNMENT OF PAKISTAN:.....

.....;

permit any interference with these waters except for the following uses, restricted (except as provided in Paragraph 6 (d) of Annexure C) in the case of each of the rivers, The Indus, The Jhelum and The Chenab, to the drainage basin thereof:

- (a) Domestic Use, ~~subject to the provisions of Article IV (11);~~
- (b) Non-Consumptive Use;
- (c) Agricultural Use, as set out in Annexure C; and
- (d) Generation of hydro-electric power, as set out in Annexure D.



## Second conclusion: the exception for hydroelectric power use

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“[A]ny development on [the Western] rivers upstream of Pakistan would have to have the consent of the Government of Pakistan.”

*Preliminary notes and queries regarding the Annex to Mr Iliff’s letter of May 13, 1957  
(Pak Comments), P-0410*

“3. Pakistan will not object to the following uses of the waters of the Western Rivers by India or seek to impose a charge for any such use. [...]

(b) Non consumptive use, for example, fishing and fish culture, navigation, timber floating, recreation and generation of hydro—electric power [...].”

*Pakistan Rough Draft (Secret), 10 August 1959, P-0133*



# The exception for hydroelectric power use

## *1959 Heads of Agreement*

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### **Article IV – Arrangements Concerning Western Rivers**

“(1) India shall let flow the waters of the Western Rivers free from any interference except for the following uses restricted in the case of each river to the drainage basin of that river. [...]

(2) India shall be entitled to generate hydro-electric power on the Western Rivers in accordance with the provisions of Annex ‘B’.”



# The exception for hydroelectric power use

*December 1959 draft*

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## **Article III – Provisions regarding Western Rivers**

“(2) India shall be under an obligation to let flow all the waters of the Western Rivers and shall not permit any interference with these waters except for the following uses, restricted (except as provided in Annexure C ( )) in the case of each of the rivers Indus, Jhelum and Chenab to the drainage basin thereof:

[...]

(d) Generation of hydro-electric power, as set out in Annexure D.”



## Third conclusion: The importance of information sharing

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“12. The Government of India and the Government of Pakistan shall each afford to the Commission all facilities for discharging the functions assigned to the Commission by this Annex, including the provision of such statistical information as the Commission may from time to time require, and shall grant liberty of access by the Commission to all irrigation works on the Indus system of rivers located in the territories of either of the two governments.”

*May 1957 Heads of Agreement, P-0362*



# Fourth conclusion: The evolution of Annexure D

## Pondage

Draft given by Pakistan on Hydrel formula on 15.8.59.

2. In the case of run-of-the-river hydro-electric developments which involve construction of a dam across a stream, the following considerations shall govern the design, construction and operation of such works.

- (a) there shall be no live storage which can be operated except as provided below.
- (b) the intake to the power house shall be fixed at such a level that the pondage above that level is adequate only to cater for the weekly load factor of the power plant (daily load factor in the case of a power house involving the construction of a dam on the main stem of the Chenab river).

factor in the case of a power house involving the construction of a dam on the main stem of the Chenab river).

- (c) the spill way shall have a fixed crest without gates.

*Letter from  
Mr  
Mueenuddin  
to Mr W. A.  
Sheikh (with  
enclosures),  
P-0365*



# The evolution of Annexure D

## *Calculation of Pondage*

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- “[T]he [live] storage in the operating pool [...] required to meet fluctuations in the discharge of the turbines arising from variations in the daily or weekly load of the power plant.”

*Heads of Agreement 1959, Annex B, paragraph 2, P-0136*

- “The volume between the maximum and minimum levels of the operating pool shall not exceed that required to meet the daily or weekly load fluctuations as the case may require.”

*Heads of Agreement 1959, Annex B, paragraph 3(b), P-0136*



# The evolution of Annexure D

## *Calculation of Pondage*

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- “‘Pondage’ means storage of only sufficient magnitude to meet fluctuations in the discharge of the turbines arising from variations in the daily and the weekly load of the plant.”

*April 1960 draft of Annexure D, paragraph 5(c), P-0476*

- “The maximum Pondage in the Operating Pool shall not exceed twice the Pondage required for Firm Power.”

*April 1960 draft of Annexure D, paragraph 7(c), P-0476*



