**THE NET ZERO TEESIDE PROJECT DCO**

**REFERENCE: EN010103**

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**NOTE ON BEHALF OF ORSTED HORNSEA PROJECT FOUR LIMITED**

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1. This note is provided to the Examining Authority on behalf of Orsted Hornsea Project Four Limited ("**Orsted**") which is registered as an interested party in relation to the Examination of the DCO application for the Net Zero Teeside Project ("**the NZT Project").** The NZT project is being promoted by a consortium including BP Exploration Operating Company Limited's ("**BP**"). Orsted has made an application for a DCO in respect of the Hornsea Project Four Offshore Wind Farm (ref: EN010098), which is currently in Examination (**"the Hornsea Project"**).

2. The DCO for the NZT Project seeks consent for, inter alia, "*the onshore section of a CO2 transport pipeline for the onward transport of the captured CO2 to a suitable offshore geological storage site in the North Sea*". The NZT Project will connect with BP's Northern Endurance Partnership Project ("**the Endurance Project**") via this pipeline. The seabed interests of the Endurance Project and the Hornsea Project granted by The Crown Estate overlap (**"the Overlap Zone"**).

3. The NZT Project applicant's oral summary of Issue Specific Hearing 1, included "Appendix 7 - Outline of options for the SoS on Orsted Hornsea Project 4 and implications for deliverability of this project". The points made included the following:
    a. The Hornsea Project DCO Examination is considering in detail the competing legal and competing technical arguments as to whether co-existence of the Endurance Project and Hornsea Project is possible within the Overlap Zone. And, that Examination is also considering the nature of the provisions which should be included in the Hornsea Project DCO in order to address issues in relation to the overlap;
    b. Re-litigating these issues during the Examination for the NZT Project DCO would not be sensible, as the recommendation to be made by the relevant Examining Authority in the Hornsea Project DCO Examination will ultimately be provided to

the same decision maker (the Secretary of State for Business, Energy & Industrial Strategy) prior to that decision maker receiving a recommendation in respect of the NZT Project;

c. The NZT Project DCO does not extend to the Overlap Zone. It has, therefore, no direct physical conflict with the Hornsea Project. In contrast, the Hornsea Project DCO application does seek authorisation of development in the Overlap Zone;

d. Notwithstanding the above matters, the applicant for NZT Project DCO will seek the inclusion of an Article in the DCO, to address liabilities which could in certain circumstances otherwise arise under the Interface Agreement (**"IA**"). The IA governs, and has done since 2013, the interface between the Hornsea Project and the Endurance Project in the Overlap Zone. The proposed Article will be included in the NZT Project applicant's draft DCO to be submitted at Deadline 2. What is proposed, it is understood, is as follows "*Disapplication of Interface Agreement - From the date of this Order, the Interface Agreement shall no longer have effect, and no claim may be made, nor award granted, for any damages as a result of any alleged antecedent breach of the Interface Agreement prior to the date of this Order*".

e. Reference is made by the NZT Project applicant to submissions made by BP to the Hornsea Project DCO Examination, in which they expressed concern that there may be an antecedent breach of the IA unless it is disapplied.

f. The NZT Project applicant has requested that the scrutiny of/advocacy for its proposed disapplication of the IA is limited to the Hornsea Project DCO Examination, so limiting duplication of time/resource in the NZT Project DCO Examination.

4. So, in the context of the NZT Project DCO the applicant is seeking the disapplication of the IA by including an article for that purpose in the DCO. The effect of this, if included, is the same or at least similar to what BP are seeking by way of protective provisions in the context of the Hornsea Project DCO. The suggestion is that any and all legal argument in relation to the disapplication of the IA take place in the context of the Hornsea Project DCO. The purported justification for this is that both DCOs will be determined by the same decision maker and that the Hornsea Project will be determined first. The latter point is not accepted as the exact determination timescales or order cannot be known at this stage.

5. That said Orsted understands the desire to limit the costs wasted arguing the same matters twice in two DCO applications that will be determined the same decision-maker. Accordingly, Orsted attaches to this note its legal submissions in relation to the proposed disapplication of the IA in the context of the Hornsea Project DCO Examination. These submissions set out why such disapplication would neither be lawful nor appropriate. Those submissions apply also to what is proposed in the context of the NZT Project DCO. The Examining Authority is asked to consider those legal submissions to the extent it considers that the disapplication of the IA is something it must deal with in the context of this DCO application.

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**Thursday, 09 June 2022**

**HORNSEA PROJECT FOUR OFFSHORE WIND FARM**

**ORSTED HORNSEA PROJECT FOUR LIMITED**

**THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010 (AS AMENDED) – RULE 17 (REF: EN010098)**

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# APPLICANT'S LEGAL SUBMISSIONS

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## Introduction

1. These are the submissions of Orsted Hornsea Project Four Limited ("**Orsted**") in response to BP Exploration Operating Company Limited's ("**BP**") response to Deadline 4, and the Examining Authority's request for information made by letter dated 14 April 2022 pursuant to Rule 17 of The Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) and addressed to Orsted and BP.

2. These submissions deal with the issue of whether it is lawful, and if so, appropriate, to include in the Development Consent Order ("**DCO**") for the Hornsea Four Offshore Wind Farm ("**the Hornsea Project**") certain protective provisions proposed by BP. The effect of these provisions is to (to use BP's language) "disapply" a commercial agreement, namely the Interface Agreement ("**the IA**"). This governs, and has done since 2013, the interface between the Hornsea Project and the Northern Endurance Partnership Project ("**the Endurance Project**", sometimes referred to in the documents as "**the NEP**") in an overlapping area of seabed referred to as the "**Overlap Zone**".

3. At the outset it should be noted that the effect of what BP asks the Secretary of State to include in the DCO is two-fold: (i) to exclude the Hornsea Project from the Overlap Zone; and (ii) to "*disapply*" the terms of a commercial agreement under which Orsted would be entitled to compensation in relation to this exclusion.

4. Using provisions in a DCO to "*disapply*" a commercial agreement is wholly unprecedented. Moreover, while the language used by BP is "*disapply*" what is actually sought by BP is to deprive Orsted of the benefits of a commercial agreement that was freely entered into by the parties and indeed acceded to by BP (without amendment) as recently as 2021. Thus, Orsted's valuable contractual rights in the IA would be abrogated.

Where precedent does exist under the Planning Act 2008 ("**the PA 2008**") for the overriding or modification of existing land agreements, through the compulsory acquisition regime, then this is accompanied by compensation mechanisms to ensure the affected party is compensated for loss of its private rights. In this case, BP is seeking to remove the Applicant's private contractual rights without there being any compensation provided for under the PA 2008. This is made more egregious by the fact that BP is seeking specifically to remove existing rights to compensation which Orsted has under the IA.

**The background**

**(i) The IA**

5. The IA is dated 14 February 2013. It was entered into by: (i) the Crown Estate Commissioners, (ii) National Grid Twenty Nine Limited and (iii) Smart Wind Limited. Under the IA these parties are referred to as "**the Commissioners**", "**the Carbon Entity**" and "**the Wind Entity**" respectively. The IA in the recitals rehearses that:
   i. the Commissioners have entered into a zone development agreement ("**ZDA**") with the Wind Entity in respect of an area defined as "**Zone 4**";
   ii. the Commissioners have also entered into "**the Carbon AfL**" (defined as an agreement for lease of the Overlap Zone (with other areas)) with the Carbon entity in respect of an area defined as the "**Lease Option Area**";
   iii. "*As Zone 4 and the Lease Option Area overlap, the Parties have entered into this Agreement to regulate and co-ordinate their activities within the Overlap Zone with a view to managing potential conflicts and resolving actual conflicts*".

6. The IA has, as already been noted, been in place since 2013.

7. The IA was varied by a Deed of Adherence and Variation in 2016.

8. Moreover, it was subject to a subsequent Deed of Covenant and Adherence dated 10 February 2021, the effect of which was that from that date onwards BP as "*the Incoming Party*" agreed and covenanted "*with the Continuing Parties that it will perform and observe the future Obligations of the Outgoing Party under the Interface Agreement arising on after the Effective Date [10 February 2021] and be bound by the terms of the Interface Agreement in every way as if the Incoming Party had at all times with effect from and including the Effective Date been party to the Interface Agreement in place of the Outgoing Party.*" In effect, BP became "*the Carbon Entity*" under the IA. Orsted and the Commissioners were defined in the Deed and

Covenant of Adherence as "*Continuing Parties*". So, following the Deed of Covenant and Adherence, BP is "*the Carbon Entity*" and Orsted is "the *Wind Entity*" under the IA. As already noted there was no variation of any of the relevant terms of the IA upon BP's accession in 2021.

9. It is important to understand that the IA is an agreement, a contract, of a commercial nature. In the joint position statement between Orsted and BP (dated 8 March 2022) it is recorded in terms at para 2.1.1.1 that the IA governs the "*commercial relationship*" between Orsted and BP.

10. The purpose of the IA is set out in clause 2.1. Thus it is said:
    i. to provide "*a mechanism to seek to ensure successful co-existence*" in the Overlap Zone "*and to provide sufficient certainty to the Entities to be able to plan and implement their respective projects*";
    ii. to be "*intended to provide a framework within which both the Carbon Entity and the Wind entity are incentivised to work together and to plan their activities to give each other sufficient certainty to progress their respective projects*".

11. The provisions of the IA include:
    i. Requirements that the parties act in good faith (see e.g. clauses 2.1 and 2.3), consult each other (clause 2.2) and do not object to each other's applications for the necessary consents;
    ii. Compensation provisions should there be a material adverse effect on any project as a result of the other;
    iii. An acknowledgement that the rights of the Entities under their agreements with the Commissioners are subject to the IA; and
    iv. An acknowledgement that the Entities do not have any recourse against the Commissioners as a result of the operation of the IA.

12. The Commercial nature of the IA is further underlined by clause 2.5 which provides that "*where the Entities have reached a commercial agreement in relation to any changes to either of their respective Activities pursuant to this Agreement and/or any compensation that may be payable, the terms of such commercial agreement will be documented in writing …*".

**(ii) BP's position**

13. Having acceded to the IA in 2021, without varying its terms, BP says it is now of the view that the Hornsea Project and the Endurance Project cannot co-exist in the Overlap Zone. Therefore, BP have proposed protective provisions that exclude Orsted from the Overlap Zone and also disapply the IA. Orsted maintains that co-existence is possible. However, for present purposes that is not the material issue.

14. In BP's position statement submitted for Deadline 1, it contended:

> **"15. JUSTIFICATION FOR PROPOSED DISAPPLICATION OF THE INTERFACE AGREEMENT IN THE PROTECTIVE PROVISIONS**
>
> **(i) History and purpose of the Interface Agreement**
>
> …
>
> 15.2 The IA was intended to regulate how the respective projects would interact and co-exist with one another in the Overlap Zone. It was originally put in place during the pre-feasibility stage of both developments, when it was considered that co-existence in the Overlap Zone would be possible. For the reasons set out earlier, this is no longer the case. Following detailed technical work, bp's position is now that co-existence in the Exclusion Area is not possible if the NEP project is to be delivered to meet the ECC plan.
>
> 15.3 In circumstances where it is possible for only one project to proceed in the Exclusion Area, the terms of the IA create the risk of significant financial liability being incurred by Orsted or bp.
>
> 15.4 The financing model for NEP (discussed in Section 9 above) means that NEP will have limited ability to cover additional exceptional costs (as would apply to such a compensation payment) …. If the scale of such compensation payments were large it could render the project uneconomic. Certainly some of the project value losses that Orsted in discussions with bp has suggested might arise in respect of Hornsea 4 if the Exclusion Area were undevelopable for the Hornsea 4 project would render NEP unviable …
>
> 15.5 In summary, the IA is not appropriate in view of the present day reality, and its terms are now adverse to the public interest in the successful delivery of Government policy …
>
> **(ii) Why disapplication of the IA via protective provision is necessary rather than commercial negotiation of a replacement agreement**
>
> …
>
> 15.7 It has now, however, become clear to bp through the results reported in the bp Technical Assessment report (Annex 1) that co-existence within the Exclusion Area is impossible.
>
> 15.8 It is also clear that the risks presented by the IA for the NEP project (and delivery of the UK's decarbonisation policy) are too high to bear, and urgently need to be resolved in the public interest.
>
> 15.9 It is for this reason that bp is requesting protective provisions which would disapply the IA. This approach, of disapplying the IA and replacing those of its provisions which remain relevant and appropriate with suitable protective provisions, gives the Secretary of State the power to grant a DCO for Hornsea 4 which enables both projects to be delivered viably side-by-side.
>
> 15.10 This approach affords Orsted, bp, the ExA, and any other Interested Parties the opportunity to work together through the course of the DCO examination to make any changes

or additions to the draft protective provisions which are considered necessary to strike a balance between the needs of the two projects in the context of the wider Government policy, and the desirability that both projects are facilitated.

15.11 Whilst the disapplication of an agreement between parties under a DCO is novel, Section 120(3) of the Planning Act 2008 enables the Secretary of State to include any provision "relating to, or matters ancillary to, the development for which consent is granted" and so the ability to do is clear and fully justified in these unique circumstances.

**(iii) The need to protect against liability for antecedent breach**

15.12 bp's proposed protective provisions would also prevent the parties to the IA claiming for antecedent breach of the IA, following the coming into force of the Hornsea 4 DCO and the disapplication of the IA. This provision is important because should the DCO be granted with provisions which prevent Orsted from developing Hornsea 4 infrastructure in the Exclusion Zone, there is a risk that Orsted could take action against bp under the terms of the IA for bp seeking and obtaining such provisions (at a time when the IA existed and therefore was actionable, before its disapplication by the DCO). Therefore, should the Secretary of State be minded to disapply the IA via the protective provisions, it is important that its disapplication goes hand in hand with a provision which prevents action for antecedent breach. Without such a provision, there is a risk that bp's action in successfully putting forward protective provisions which restrict the Hornsea 4 project could give rise to significant liability for the NEP project. There is a risk that such liability could render the NEP project unviable, as part of the ECC plan. This risk would certainly deter essential investment in the project.

**(iv) No adverse impact on The Crown Estate of disapplying the IA**

15.13 Besides Orsted and bp, the other party bound by the IA is TCE. We do not consider there is any adverse impact on TCE through the disapplication of the IA given the limited nature of the provisions relevant to TCE in the IA.

…"

15. There are several points to note about what is proposed by BP in the context of the DCO:

    i. The legal basis for what it proposes is said to be s. 120(3) of the PA 2008;

    ii. The purpose, and effect, of what is proposed is not just to exclude Orsted from the Overlap Zone but to deprive Orsted of all of its rights to compensation for this under the terms of a commercial agreement that BP itself acceded to in 2021 and agreed and covenanted to perform in full;

    iii. BP accepts, as it must, that what it seeks could instead be achieved by commercial renegotiation of a replacement for the IA. The IA is not special in this regard. Like any other agreement between two commercial organisations, it can be renegotiated.

16. In the Applicant's position statement submitted for Deadline 1 it is said (see para. 7.2):

"bp's proposed protective provisions also seek to disapply the Interface Agreement. This would constitute an abuse of process and as a matter of law would be ineffective. Protective provisions cannot have legal effect such than one party can unilaterally set aside a contract it no longer likes, without the consent of the other parties to that contract. It would not be appropriate for the Secretary of State to interfere with that private contract, which has managed

the relationship of the parties to it since 2013. If any amendments to the Interface Agreement were deemed to be required, the appropriate and lawful course of action would be for bp, the Applicant and The Crown Estate to negotiate a deed of variation to the Interface Agreement. Bp's rationale for disapplying the Interface Agreement is that it is necessary in the public interest to remove the risk that the terms of the agreement lead to award of compensation to the Applicant in relation to an adverse impact of the NEP Project on Hornsea 4 which renders the NEP project unviable. In response to that: (i) this potential liability has been known to those promoting the NEP Project since 2013, and bp entered into the Interface Agreement cognoscente of it, therefore it is a potential liability that should have been factored into the financial modelling of the NEP Project and to have progressed this far suggests the liability would not render the NEP Project unviable; (ii) to the extent (if any) that there is public interest in this matter as bp suggests, it applies at least equally in respect of the public interest in not allowing a nascent technology to curtail the generation capacity of offshore wind and undermine the path to Net Zero; (iii) bp has failed to justify the lawful basis for the disapplication of the Interface Agreement; and (iv) it appears that bp has not sought the views of TCE on this matter. The Applicant's position remains that financial compensation is needed to facilitate coexistence and the parties' rights and obligations under the Interface Agreement should be left unfettered.. The Interface Agreement is not contrary to policy and is simply a mechanism to facilitate coexistence. Contrast the approach taken by bp with the reasonable approach taken by the Applicant whose protective provisions are without prejudice to the rights or obligations of all the parties under the terms of the Interface Agreement."

17. Herbert Smith Freehills ("**HSF**") on behalf of BP responded to the Applicant's Deadline 1 submissions in its Deadline 2 submission at para. 7.9 and annex 2. It should be noted that at para 1.2 it is clearly acknowledged that what BP seeks is not just that Orsted be excluded from the Overlap Zone but also, and crucially for these purposes, that the DCO include provisions that "*disapply a commercial agreement which is currently binding on bp, Orsted and the Crown Estate (the "Interface Agreement"); and (ii) provide that no claims for antecedent breach may be brought in respect of the Interface Agreement ...*". The relevant extract of the BP proposed protective provisions is then set out: "***Interface Agreement*** *6. From the date of this Order, the Interface Agreement shall no longer have effect, and no claim for any damages may be made as a result of any alleged antecedent breach of the Interface Agreement prior to the date of this Order.*"

18. The HSF response in so far as it goes to matters related to the legal basis and justification for what BP proposes states as follows:

"Legal basis and justification

4.2 We recognise that seeking to disapply a commercial agreement of this sort via provision in a DCO is unusual and possibly unprecedented. However, as a matter of law it is clearly within the vires of the Secretary of State's powers under Section 120(3) of the Planning Act 2008, which authorises the Secretary of State to include any provision "relating to, or matters ancillary to, the development for which consent is granted". The existence and impact of an agreement which governs the relationship between the proposed Hornsea 4 Project and another project which forms a key part of the Government's energy and climate policy (the NEP project) is clearly in principle a matter which is related to the proposed DCO development.

> 4.3 It is therefore not a question of vires, but of bp successfully persuading the Secretary of State that such disapplication is justified in the unique circumstances of this case. That justification, as provided at Deadline 1 and summarised above, essentially relates to the risk that the existence of IA (and its compensation provisions in particular) could render the NEP project unviable.
>
> 4.4 This is clearly a 'material consideration' for the Secretary of State in planning terms when determining the Hornsea 4 DCO. It may be that when weighing up the impact on the NEP project against the arguments made by Orsted in relation to the impact on Hornsea 4, the Secretary of State decides (i) not to prevent Hornsea 4 infrastructure within the Exclusion Area (in which case the disapplication of the IA is not needed), or (ii) to prevent the delivery of Hornsea 4 in the Exclusion Area but not to disapply the IA. However, given the importance of the NEP project from a policy and public interest perspective, it is essential that the Secretary of State is aware that he has the option, by virtue of s120(3) of the Planning Act 2008, to disapply the IA should he consider this justified to avoid the risks to the NEP project.
>
> 4.5 In principle, of course, the parties to the IA could agree to set it aside and replace it with an alternative commercial agreement which did not jeopardise the viability of either project. Orsted and bp are seeking to find resolution to the issue and a mutually acceptable outcome through the ongoing commercial discussions. However, there is no certainty that agreement will be reached between the parties in the necessary timeframe. It is therefore vital that the ExA engages with the proposed bp protective provisions during the examination and is able to advise the Secretary of State of the full implications of disapplying or not disapplying the IA in circumstances where no commercial resolution has been reached between the parties by the end of the examination."

19. Further submissions made by BP at the Deadline 3 and Deadline 4 stages have not materially added anything beyond what is set out above. The relevant provision seeking to disapply the IA has though been amended so that it now reads "*From the date of this Order, the Interface Agreement shall no longer have effect, and no claim may be made, nor award granted, for any damages as a result of any alleged antecedent breach of the Interface Agreement prior to the date of this Order.*"

**The legal submissions on behalf of Orsted**

20. The legal submissions are divided into the following sections:
    i. The proper legal characterisation of what BP seek;
    ii. The proper interpretation of the scope of s. 120(3) of the PA 2008;
    iii. Why BP's disapplication should not be included in the DCO even assuming there is a power to do so.

***(i) The proper legal characterisation of what BP seek***

***a. Introduction***

21. By way of introduction, the following points are made.

22. First, as set out above, there is agreement between BP and Orsted as to the nature of the IA. It is an agreement that governs their "*commercial relationship*". It being a commercial

agreement it can in the ordinary way be waived or varied by renegotiation and agreement between the parties.

23. Second, the effect of the provisions sought by BP is to exclude Orsted from the Overlap Zone and also, crucially for these purposes, to deprive them of their contractual rights to compensation in respect of this. Compensation in this regard is something explicitly provided for in the IA. The IA was, of course, freely entered into and has been in force since 2013. BP acceded to the IA as recently as 2021 without any variation of the compensations (or other) provisions. What BP seeks, via the provisions it proposes are included in the DCO, is to wholly circumvent its commercial obligations. Obligations which it freely, and only very recently, took on. It seeks to do so to the detriment of Orsted which is left without either access to the Overlap Zone or any contractual (or other) rights to compensation.

24. Third, despite carrying out extensive legal research, there does not appear to be any precedent, in terms of previous DCOs, to support the inclusion of provisions, the effect of which is described as the disapplication of a private commercial agreement. There is no jurisprudence either which supports this. By their own admission, neither have BP found any precedent (as per their Deadline 2 submission): "*We recognise that seeking to disapply a commercial agreement of this sort via provision in a DCO is unusual and possibly unprecedented*".

25. Fourth, where under the PA 2008 there is provision for the abrogation or modification of existing land agreements, through the compulsory acquisition regime, then this is accompanied by compensation mechanisms to ensure the affected party is compensated for loss of its private rights. In this case, however, BP is seeking to remove all of the Applicant's private contractual rights without the availability of any statutory right to compensation. Indeed, to make matters worse, BP is seeking specifically to remove the rights to compensation which Orsted currently has under the IA.

***b. The Human Rights Act 1998 ("the HRA 1998")***

26. S. 3(1) of the HRA 1998 provides that "*[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*". Thus, what might otherwise be seen as wide powers in primary legislation should be read down to ensure compatibility with Convention rights. Reading down means in this context applying a narrow interpretation of legislation in order to

ensure that the legislation remains compatible with Convention Rights. See by way of example ***R. v Waya (Terry)*** [2013] 1 A.C. 294 where the Supreme Court held that the provisions on the confiscation of assets obtained as a result of crime in the Proceeds of Crime Act 2002 had to be read down to ensure that they did not constitute an interference with the peaceful enjoyment of possessions as protected by Article 1, Protocol 1.

27. Article 1, Protocol 1 (a Convention right as defined by s. 1 and Appendix 1 to the HRA 1998) of the European Convention on Human Rights ("**the Convention")** provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

28. It is now well-established in both the Strasbourg and the domestic case-law that contractual rights can be a "*possession*" for the purposes of Article 1, Protocol 1.

29. The case-law was most recently reviewed by the Court of Appeal in ***Solaria Energy v Department for Business, Energy and Industrial Strategy*** [2021] 1 WLR 2349.

30. In that case, the claimant company entered into a subcontract for the supply of solar panels to a company which had been engaged by a local authority to supply and install solar panels for hundreds of commercial and residential premises. However, within the currency of the subcontract, the Department of Energy and Climate Change ("**DECC**") published a proposal to reduce the subsidies payable by electricity supply companies for power generated by solar panels. The proposal was never implemented because of a court ruling that it was unlawful, but it nevertheless had a significant adverse impact on the solar energy industry. Seven years after the publication of the proposal, the claimant company brought a claim against the DECC's successor, the Department for Business, Energy and Industrial Strategy ("**DBEIS**"), under s. 7 of the HRA 1998, seeking damages for wrongful interference with the claimant's "*possession*", namely the subcontract, in breach of its right to peaceful enjoyment of its possessions, guaranteed by Article 1, Protocol 1 of the Convention. In particular, the claimant company contended that, as a result of the publication of the proposal it had been obliged to renegotiate the subcontract at a lower rate. At first instance the claim was struck out on the basis that: (i) the subcontract was not a "*possession*" protected by Article 1, Protocol 1 and (ii) that the claim

was time-barred. The Court of Appeal overturned the finding on (i), albeit it upheld the finding on (ii).

31. The Court of Appeal reviewed the previous case-law, in particular two earlier Court of Appeal decisions, namely ***Murungaru v Secretary of State for the Home Department*** [2009] INLR 180 and ***Breyer Group plc v Department of Energy and Climate Change*** [2015] 1 WLR 4559. In ***Breyer***, the Court of Appeal held that where a contract had been concluded, and a party had enforceable rights pursuant to the same, that contract will constitute a "*possession*" within the scope of Article 1, Protocol 1: "*Contracts which have been secured may be said to be part of the goodwill of a business because they are the product of its past work*": see para. 49. In other words, concluded contracts are part and parcel of a business's marketable goodwill because they have been achieved by dint of the business's hard work. This is relevant because the Strasbourg Court has long recognised that the marketable goodwill of a business may constitute a possession qualifying for Article 1, Protocol 1's protection: see e.g. ***Van Marle v The Netherlands*** (1986) 8 EHRR 483. In ***Breyer*** the Court of Appeal also reasoned that the claimant companies had a legitimate expectation in respect of profits they would make from concluded contracts (which were themselves "possessions" within the meaning of Article 1, Protocol 1): "*[w]here the contracts were 'matters of hope or aspiration' there was not a sufficient property right to which the legitimate expectation could be attached. But where a contract had been concluded prior to the proposal, there was a legitimate expectation that there would be no interference with it*" (see para. 52). It is, of course, well established that a legitimate expectation can constitute a possession for the purposes of Article 1, Protocol 1: see, e.g., ***Pine Valley Developments Ltd and Others v Ireland*** (1992) 14 EHRR 319.

32. In ***Solaria*** Coulson LJ., with whom the other members of the Court agreed, having undertaken a review of this case-law said at para. 34 (emphases added):

> "Whilst not all contracts are possessions within the meaning of A1P1, <u>the starting point must be that a signed and part-performed commercial contract is, prima facie, a possession</u>. Indeed, that was the central assumption in ***Breyer***. On that basis, the subcontract into which Solaria had entered with GBBS was a possession. <u>It was a commercial arrangement which was of value to Solaria. It had a value in monetary terms without the need for it having first been converted into money</u>. On the face of it, if the Department wrongly interfered with the performance of that subcontract without justification, then that could trigger a claim for wrongful interference by reference to A1P1"

33. Coulson LJ went on to reject the view, taken by the Judge below, that to be a "*possession*" a contract had to be assignable. This was held to be a relevant factor in determining if a contract is a "*possession*" for Article 1, Protocol 1 purposes but it is not determinative. Of course here the IA is clearly assignable – see the provisions in clause 8 on succession. It was these that resulted in the deed of covenant and adherence which BP entered into in 2021 to perform and observe the obligations of the Carbon Entity under the IA.

34. There are some other cases, not apparently cited in ***Solaria***, which further support the view that commercial contracts, especially where signed and part-performed, are a "*possession*" for these purposes:
    i. In ***Solaria*** Coulson LJ remarked (see para. 31) that most of the Strasbourg cases appear largely to be "*not concerned with claims for wrongful interference with an existing contract. They are concerned with less tangible rights, like a licence or inclusion on a register*" and that (para. 26) "*[a]uthorities involving an alleged interference with existing contracts are far fewer in number, perhaps because a contract may comprise a rather more obvious "possession" than a licence or a place on a register*". However,
        i. in ***Association of General Practitioners v Denmark*** 62 DR 226 at 234 (not cited in ***Solaria)*** the compliant related to changes in the contracts between GPs and the health service effected by legislation and having the effect of reducing the fees payable to GPs. The Commission in Strasbourg ruled that the applicants were correct to contend that contractual rights could constitute "*possessions*";
        ii. in ***Stran Greek Refineries and Stratis Andreadis v Greece*** (1995) 19 EHRR 293 the Greek Government had been the subject of an arbitration award under a contract. In response it used a legislative provision that allowed the state to terminate contracts where this was adjudged to be in the interests of the national economy. The Strasbourg Court found there to be a "*possession*" for Article 1, Protocol 1 purposes. It went on to hold that there was an interference with the applicants' right of property as guaranteed by Article 1, Protocol 1 since the legislative provision made it impossible for them to secure enforcement of an arbitration award having final effect and under which the state was required to pay them specified sums in respect of expenditure which they had incurred in seeking to fulfil their contractual

obligations, or even for them to take further action to recover the sums in question through the courts;

ii. Further, in ***Wilson v First County Properties Ltd.*** [2004 1 AC 816 Lord Nicholls (with whom Lord Hope, Lord Hobhouse and Lord Scott agreed) said (at para. 39) "*"Possessions" in article 1 is apt to embrace contractual rights as much as personal rights. Contractual rights may be more valuable and enduring than proprietary rights*". That case concerned a loan agreement entered into between the claimant and the defendant pawnbrokers in January 1999 which breached regulations made pursuant to s. 60(1) of the Consumer Credit Act 1974 1 by failing correctly to state the amount of the credit so that s. 127(3) of the Act barred the court from enforcing the agreement. This was alleged to be an interference with rights under Article 1, Protocol 1. In that case, a declaration of incompatibility under s. 4 of the HRA 1998 was made.

35. On the basis of the above case-law, it is clear that:
    i. the IA itself, and the contractual rights it confers on Orsted, constitute a "*possession*" for the purposes of Article 1, Protocol 1;
    ii. the provisions which BP seek to have included in the DCO, were they to be included, would "*interfere*" with that "*possession*".

36. The case-law categorises "interferences" under Article 1, Protocol 1 into three categories (in decreasing order of severity): (i) a deprivation; (ii) an interference in peaceful enjoyment and (iii) a control of use.

37. The effect of the provisions BP seeks would be, it is submitted, to deprive Orsted of all the benefit of the IA. As such, it is submitted that what is involved here is an interference which amounts to a de facto deprivation. The case-law is clear that where what is involved is a deprivation, then for it to be justified in the public interest under Article 1, Protocol 1 compensation must be payable other than in the most exceptional circumstances and that is so even where the public interest pursued is strong.

38. In this case, as already noted, the provisions BP contend for are designed to deprive Orsted of any and all contractual rights, including to compensation, which would otherwise be due to it under the IA. This deprivation is proposed to be effected via the DCO and without any form of compensation being payable. The effect of what BP propose is

essentially that the state effect the compulsory acquisition (deprivation) of Orsted's contractual rights under the IA, which rights which constitute a "*possession*" for the purposes of Article 1, Protocol 1.

39. If it was not accepted that what is involved here is to be classified under Article 1, Protocol 1 as a "*deprivation*", although it is difficult to see how it could not be, then it would fall into the second category of interferences, namely "*an interference with peaceful enjoyment*". As noted above depending on the severity of the interference, compensation may be required in order for there to be a "*fair balance*" under Article 1, Protocol 1: see ***Sporrong v Sweden*** (1983) 5 E.H.R.R. 35 at paras. 58 and 60. In that case the measures imposed by the state were held not to constitute a formal or de facto deprivation but were nonetheless adjudged to be of such severity that they were not justified without there being compensation. See also in this regard ***Stran Refineries*** (above) at paras. 68 – 69.

40. In ***Mott v Environment Agency*** [2018] 1 WLR 1022 the Supreme Court upheld the findings of the Courts below that it was not necessary to categorise the measure as either expropriation or control. It was enough that it "*eliminated at least 95% of the benefit of the right*", thus making it "*closer to deprivation than mere control*" (see para. 36). The claimant in ***Mott*** was the joint leasehold owner of a right to fish for salmon at Lydney in the estuary of the River Severn, using a putcher rank of individual conical baskets to trap adult fish making their way back from the sea to the river of their birth to spawn. Under his licence the claimant was able to catch about 600 salmon per year until the defendant Environment Agency, pursuant to paragraph 14A of Schedule 2 to the Salmon and Freshwater Fisheries Act 1975, as inserted, imposed conditions reducing the permissible catch to 30.

41. In the present case what BP proposes deprives Orsted of *all* of its contractual rights. As compared to the facts in ***Mott*** this is *a fortiori* a deprivation.

42. Even where the interference is not classified as a deprivation, the availability or otherwise of compensation, especially for interferences but also for controls of use, is highly material in determining whether a "*fair balance*" has been struck for the purposes of Article 1, Protocol 1: see ***Mott***. In ***Mott*** the Supreme Court noted that (see para. 22) that an authoritative summary of the principles is found in the Grand Chamber decision in ***Hutten-Czapska v Poland*** (2006) 45 EHRR 4 , para 167:

> "Not only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest', but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.
> The concern to achieve this balance is reflected in the structure of article 1 of Protocol No 1 as a whole. In each case involving an alleged violation of that article the court must therefore ascertain whether by reason of the state's interference the person concerned had to bear a disproportionate and excessive burden."

***(ii) <u>The proper interpretation of the scope of s.120(3) of the PA 2008</u>***

43. S. 120(3) and (4) of the PA 2008 provide:

> "(3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.
> (4) The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5."

44. There are a number of points that can be made about these sub-sections.

45. <u>First,</u> it is not argued by BP (and rightly so) that what it proposes falls within any of the specific matters listed in Part 1 of Schedule 5. Instead, BP places reliance on the terms of s. 120(3) itself and the reference to a DCO being able to include "*provision relating to, or to matters ancillary to, the development*".

46. <u>Second</u>, while on the face of it these are widely drawn words, what s. 120(3) is being relied on for here is to empower the Secretary of State to "*disapply*" a commercial agreement. That is to say, in effect, to deprive Orsted of all of its contractual rights under the IA.

47. In relation to this:
    i. "*It is a principle of legal policy that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law*": see Bennion, Bailey and Norbury on Statutory Interpretation at section 27.6. The authors note that "*[i]nterference with property may take many forms*" and that "*[m]any decisions illustrate the reluctance of courts to countenance statutory interference with property rights unless there is clear authority to do so*";
    ii. One of the cases cited in support of this last proposition ***is Allen v Thorn Electrical Industries Ltd*** [1968] 1 QB 487 at 503 where it was said by Lord Denning MR (with whom the other members of the Court agreed) that if the "*requirement in the statute*

*is ambiguous and uncertain: in which case the rights under the contract must prevail. No man's contractual rights are to be taken away on an ambiguity in a statute"*. The law report (at 495) records the submissions to the Court. These submissions set the context for this observation of Lord Denning MR: "*on well known principles a statute which seeks to fetter freedom of contract and a fortiori to take away an accrued legal right must be construed strictly so that it interferes as little as possible with those rights; and (b) if there is an ambiguity, such as a word or phrase capable of two possible constructions, the court will adopt that which will do less violence to accrued rights and the freedom of the subject:* ***Marshall v. Blackpool Corporation*** [[1933] 1 KB 688]*, per Lord Hewart C.J.9"*;

iii. In the ***Marshall*** case Lord Hewart said at 693:

> "He referred, in support of the general proposition, to the well known case of ***Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ld***. where Lord Atkinson, referring to what he described as a canon of construction of statutes well recognized, said: "That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms." Finally, in the case of ***Attorney-General v. Horner***, Brett M.R. said: "It seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so."

iv. Moreover, in the context of the compulsory acquisition of land the Supreme Court held in ***R (Sainsbury's Supermarkets Ltd) v Wolverhampton CC*** [2011] 1 AC 437 that:

> "9 Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: ***Rugby Joint Water Board v Shaw-Fox*** [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, "Expropriation, Public Purpose and the Constitution", in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade*, (1998) ed Forsyth & Hare, p 91.
>
> 10 In ***Prest v Secretary of State for Wales*** (1982) 81 LGR 193, 198 Lord Denning MR said:
>
> > "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands …"
>
> and Watkins LJ said, at pp 211—212:
>
> > "The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of

those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

11 Recently, in the High Court of Australia, French CJ said in ***R & R Fazzolari Pty Ltd v Parramatta City Council*** [2009] HCA 12, paras 40, 42, 43:

"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights.

42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights . . .

43. The terminology of "presumption" is linked to that of "legislative intention". As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights." …

While the above passage is focussed on the taking of land (or other private property rights) these principles are also applicable, it is submitted, to the abrogation by the state of other contractual rights. This is so not least because, as Lord Nicholls recognised in ***Wilson*** (see above), "*[c]ontractual rights may be more valuable and enduring than proprietary rights*". This view is also strongly supported by the reasoning in the ***Allen*** case (see above) and the Article 1, Protocol 1 case-law;

v. Further, the principle against expropriation or other interference with the enjoyment of property, and other similar rights, is likely to carry particular weight in cases where no compensation is available: see Bennion et all (*ibid.)*. As Brett MR said in ***A-G v Horner*** (1884) 14 QBD 245 at 257 "*[i]t is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged so to construe it.*" This was approved in ***Consett Iron Co Ltd v Clavering Trustees*** [1935] 2 KB 42 at 58; ***Bond v Nottingham Corpn*** [1940] Ch 429 at 435 and see also ***Wells v London, Tilbury and Southend Rly Co*** (1877) 5 Ch D 126 at 130);

vi. Finally, the contractual rights sought to be disapplied are also "*possessions*" for the purposes of Article 1, Protocol 1, which are being interfered with. S. 3 of the HRA 1998 must thus be used to "read down" the scope of s. 120(3) of the PA 2008. This is required because the effect of s. 120(3) of the PA 2008, if interpreted as BP

contends, facilitates Orsted being deprived of its contractual rights – a possession – without any compensation. In contrast under the PA 2008, any compulsory acquisition of land or rights over land is subject to compensation rights: see e.g. s. 126 of the PA 2008. Here the position is especially egregious as the contractual rights "*disapplied*" explicitly provide for compensation. The clear aim of BP's provisions being to prevent there being any such compensation. If s. 120(3) of the PA 2008 is used to effect this then that would be, it is submitted, a breach of Article 1, Protocol 1: see above.

48. For all these reasons, it is submitted that, s. 120(3) should not be construed as allowing for the overriding of contractual rights in a commercial agreement. That sub-section should be interpreted narrowly and as not authorising the disapplication (deprivation) of valuable contractual rights absent any compensation.

49. If contrary to the above s. 120(3) is interpreted as providing the power (that is to say the *vires*) to the Secretary of State to do what BP seek, then that power should not be exercised for the following reasons.

**(iii) <u>Why BP's disapplication should not be included in the DCO even assuming there is a power to do so</u>**

**a. <u>Introduction</u>**

50. Orsted contends that disapplying the IA would not be appropriate, even assuming there was *vires* to do so, for these reasons:

i. What is proposed is wholly unprecedented;

ii. It is contrary to public policy to interfere with an existing commercial relationship in the way proposed;

iii. Because effect of the provisions would be to deprive Orsted of its contractual rights, rights which are a "*possession*" for Article 1, Protocol 1 purposes, this requires it to be established by BP that this would be in the public interest and they have not discharged that burden;

iv. The Crown Estate's consent would be required and has not been obtained.

### b. The precedent issue

51. As noted above there is no precedent for a DCO ever having been used to disapply a private commercial agreement.

52. In this regard it should be noted that the Secretary of State for Transport in granting the recent DCO for the M54 to M6 Link Road rejected one of the proposed provisions (see p. 30 of the decision letter dated 21 April 2022) because the "*Secretary of State notes that this provision appears to be unprecedented. While reference to precedents have been set out in the explanatory memorandum none of them have a provision that is the equivalent …".*

### c. The public policy issue

53. Even assuming that (contrary to what is submitted above) s. 120(3) allows for the disapplication (or rather deprivation) of contractual rights under a commercial agreement, a view needs to be taken by the Secretary of State as to whether it is in fact appropriate to do so in this case. Orsted contends that this would be inappropriate for a number of reasons.

54. First, freedom of contract remains a general principle of the common law. Thus in Chitty at para. 2-004 under the heading "Freedom of contract in the modern common law" it is said that:

> "Freedom of contract as a general principle of the common law retains considerable support. For example, in 1966, Lord Reid rejected the idea that the doctrine of fundamental breach was a substantive rule of law, negativing any agreement to the contrary (and capable of being used to strike down an exemption clause) on the ground, inter alia, that this would restrict "the general principle of English law that parties are free to contract as they may think fit". In 1980, in the same context, Lord Diplock observed that:
>
> "A basic principle of the common law of contract … is that parties to a contract are free to determine for themselves what primary obligations they will accept."
>
> This support remains particularly strong in commercial contexts. So Lord Bingham of Cornhill stated that "[l]egal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting". Moreover, English courts have proved unwilling to strike down contracts on the ground simply that one of the parties suffered from an "inequality of bargaining power"."

55. This is the same principle that underlies the rule of construction, see above, against legislation being interpreted as interfering with contractual rights unless that is very clearly the intention.

56. Second, in this case, as already noted:

i. The IA is a commercial agreement;

ii. It was entered into, and has been in place, since 2013. It has thus since then governed the commercial relationship of the Carbon Entity and the Wind Entity and regulated the proposed co-existence between the wind and carbon projects, and their respective promoters, in the Overlap Zone;

iii. Importantly, one of the stated purposes of the IA (see clause 2.1) was "*to provide sufficient certainty to the Entities to be able to plan and implement their respective projects*". BP's proposals are the antithesis of this, and undermine Orsted's legitimate expectations;

iv. The IA is capable of being varied by commercial re-negotiation, as indeed it was in 2016;

v. BP acceded to the IA in 2021 without any modification of its terms.

57. Given, (i) the length of time the contract has been in place; (ii) the fact that it can be varied via commercial agreement and (iii) BP as late as 2021 acceded to it without any modification of terms, the Secretary of State should be very reluctant to use any power under the PA 2008 (assuming there is such power) to circumvent commercial obligations freely entered into, via the DCO process. This would be an affront to the common law principle of freedom of contract and would destroy the certainty that the IA was entered into to provide. It is, as noted above, especially egregious given that what is proposed is that the DCO removes contractual rights to compensation and that it does so with no other right to compensation under the PA 2008 or otherwise. Moreover, BP's contention that their understanding of the technical evidence has evolved since the IA was entered into is no justification for what is proposed, given that they acceded to it only in 2021. In any event, if it is the case that the IA no longer suits BP's commercial interests then it should seek to deal with this via negotiations not by seeking to employ the power of the state to deprive Orsted of its contractual rights without compensation.

58. Third, in oral submissions made against BP's proposed disapplication at the Issue Specific Hearing 1 on Tuesday 12 April 2022 Orsted contended that what is proposed would be an abuse of process. Abuse of process has been defined as *"using that process for a purpose or in a way significantly different from its ordinary and proper use"*: see ***Attorney General v Barker*** [2000] 1 FLR 759. It has been emphasised in the case-law that the scope of the concept of abuse of process is not a closed one. In this case BP is seeking to use protective provisions

in a DCO for a purpose it accepts is "*unusual*" and "*unprecedented*". Moreover, what is proposed by BP is an abuse because it is seeking, quite wrongly, to use the DCO process to escape freely entered into commercial obligations. Obligations that were intended to provide certainty for both parties going forward.

**d. <u>The public interest issue</u>**

59. There appears to be agreement between BP and Orsted that the Secretary of State must be satisfied that the provisions BP propose be included in the DCO are in the public interest. That this is the case is strongly supported by:

    i. The fact that what is proposed constituted an interference with a "*possession*" under Article 1, Protocol 1 and so is only lawful if done, inter alia, "*in the public interest*".

    ii. Even leaving aside the Convention, what is proposed here is in effect compulsory acquisition of valuable contractual rights. For that to be justified it must be shown that the public interest decisively demands this: see by analogy the ***Sainsbury's*** case above. Indeed, in relation to compulsory acquisition of land, the law generally requires the decision-maker: (i) to be satisfied that there is a compelling case in the public interest for the exercise of such powers; and (ii) to exercise such a power only as a "last resort" e.g. the party seeking the power be exercised having first made efforts to acquire the interests voluntarily. These principles are also applicable, it is submitted, to other processes that interfere with private rights. Thus, for example, the use by local authorities of what is now s. 203 of the Housing and Planning Act 2016 ("the HPA 2016") and what was previously s. 237 of the Town and Country Planning Act 1990 ("the TCPA 1990"). The provision confers a right to override easements and other rights and restrictions such as covenants. The provision is most commonly invoked in respect of rights to light, thereby removing the risk of injunction and converting these property rights and any actionable claims into mere claims for compensation under s. 204 of the HPA 2016. In R ***Leeds CC, ex p Leeds Industrial Co-operative Society Limited*** (1997) 73 P&CR 70 McCullough J considered the approach to be taken by a local authority when considering whether to appropriate land in order to engage s. 237 of the TCPA 1990. He considered that as the application of s. 237 would materially affect rights of third parties any appropriation should only be effected where the authority considered that it "*has good reason to believe that interference with such rights is*

*necessary*" (see p. 77). He saw appropriation in such circumstances "*as the equivalent of compulsory purchase*".

60. The disapplication of the IA is: (i) unprecedented (see above); (ii) affects very seriously the contractual rights of Orsted; and (iii) is sought for the benefit of BP. In those circumstances, the burden of proof lies on BP to establish that in fact what it proposes is in the public interest. Orsted is of course the applicant for the DCO but it does not seek any provisions disapplying the IA. Indeed it actively opposes these. It is BP which seeks to use the DCO process to disapply the IA agreement. BP must make out a case in the public interest. It must undertake an exercise similar to what the Examining Authority would expect BP to be doing if it was itself promoting a DCO and seeking compulsory acquisition. BP's case comes nowhere near this.

61. In relation to the case that has been advanced by BP there are a number of points.

62. First, BP's position is that the disapplication of the IA is in the public interest on the basis that if Orsted claimed compensation under the IA, this may be disallowed in the regulatory funding model being provided to support carbon capture and storage by DBEIS. If so, the viability of the Endurance Project would be prejudiced and that would not be in the public interest (see BP's response to Orsted's Deadline 1 submissions, annex 2 para. 2.12). Orsted's position is that the terms of the IA have been known since 2013 and the potential liability for compensation should have been factored into the financial model and viability assessment for the Endurance Project (including its bid and documentation submitted to BEIS).

63. Second, Orsted's position is also that both the Endurance Project and the Hornsea Project will operate in a public subsidy framework, the mechanisms for which encourage a reduction in the cost of energy, and both projects are in the public interest. To the extent, if any, that the public interest submissions made by BP in relation to the effect of compensation of the viability of the Endurance Project are sound, they equally apply to the Hornsea Project. In the absence of compensation from BP under the IA and a reduction in the developable area owing to exclusion from the Overlap Zone, the viability of the Hornsea Project would be prejudiced.

64. The Secretary of State in determining whether to make the DCO is bound by s. 6(1) of the HRA 1998 which provides that "*[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right*". Thus, if it is accepted that the inclusion of the provisions sought by BP would result in an unlawful interference with Orsted's rights under Article 1, Protocol 1, the Secretary of State must refuse to include that provision in the DCO. The PA 2008 contains other provisions which seek to ensure that at the DCO stage there is no violation of the HRA 1998: see ***Spurrier v Secretary of State for Transport*** [2020] PTSR 240 at paras. 37 and 661 – 665.

**e. <u>The Crown Estate issue</u>**

65. If the Secretary of State does have power to include a provision in the DCO disapplying the IA, and considers it would otherwise be appropriate to do so, then this would require consent of the Commissioners pursuant to s. 135(2) PA 2008 which provides:

> "An order granting development consent may include any other provision applying in relation to Crown land, or rights benefiting the Crown, only if the appropriate Crown authority consents to the inclusion of the provision".

66. Orsted is unaware that any such consent has either been sought from the Commissioners or granted. Orsted have previously raised this point see its Deadline 1 position statement at para. 7.2 and its oral submissions at the Issue Specific Hearing 1 on Tuesday 12 April 2022. The only response so far from BP has been to say in its Deadline 1 position statement "*Besides Orsted and bp, the other party bound by the IA is TCE. We do not consider there is any adverse impact on TCE through the disapplication of the IA given the limited nature of the provisions relevant to TCE in the IA*". The mere assertion by BP that they consider the Commissioners would not be adversely affected is not the same as seeking and obtaining the consent. There is no evidence of any consent being obtained. Absent that consent the provisions may not be included in the DCO.

**<u>Conclusions</u>**

67. For all these reasons, the provisions proposed by BP should be rejected.

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**Wednesday, 08 June 2022**