MORECAMBE OFFSHORE WIND GENERATION ASSETS NSIP ('THE PROJECT') (PROJECT REF. NO. EN010121)

CROWN LEASE MATTERS & MARINE PROPERTY RIGHTS and THE APPLICANT'S OBLIGATIONS RELATING TO ENHANCEMENT and SELECTED RESPONSES TO THE APPLICANT'S DEADLINE 5 and 5A SUBMISSIONS, FOLLOW-UP AND FURTHER COMMENTARY AND SUBMISSIONS ON BEHALF OF BODORGAN MARINE LIMITED (BML)

DEADLINE 6

INTRODUCTION TO THIS D6 SUBMISSION

1 This D6 submission by Bodorgan Marine Limited (BML) is in three parts.

2 Part One examines the issue of whether The Crown Estate ('TCE') has the power to grant leases for aquaculture within the United Kingdom's Exclusive Economic Zone ('EEZ') or whether, alternatively, there is gap or oversight in the Crown's otherwise extensive powers.

3 Part Two deals with the issue of whether the Applicant has a duty in its design of mitigation for commercial fisheries to deliver enhancement of commercial fisheries: what BML terms as '**Enhancement**'. The ExA will note that BML has made previous representations on the consequences, in terms of the lawfulness of the Secretary of State's DCO permitting powers, of the Applicant's failure to comply with the requirements of policy.

4 Part Three deals with all other matters, as indicated above.

PART ONE: CROWN LEASE MATTERS & MARINE PROPERTY RIGHTS

The Issue: Can TCE grant a lease for co-located aquaculture in the UK's EEZ?

5 Can the Crown Estate ('TCE') or another organ of the United Kingdom Government, grant a lease for co-located aquaculture beyond 12 nautical miles (nm)? BML's position is that: yes, the grant of such rights is possible. The grounds supporting BML's position are set out below.

Understanding TCE's Stated Position on Sub-Letting for Aquaculture

6 BML believes it to be important to be clear about exactly what TCE has stated in its two, in effect, identical representations on its power to provide for co-located

aquaculture in its OWF leasing arrangements: to the Morgan Examination (**EN010136**) (**REP6-102**) and to this Morecambe Examination **ExQ3 3CF1 (REP5a-075)**. BML understands TCE to have put forward three propositions.

7 The first TCE proposition is that the form of TCE's Irish Sea OWF leases will only grant rights pursuant to and framed by Section 84 of the Energy Act. To the extent that the original form of the Scottish precedent for a Crown OWF lease reflects the 2023 Morecambe OWF form of lease, BML believes this proposition to be correct, insofar as it relates to the present form of that drafting.

8 The second TCE proposition is that underletting for co-located aquaculture is not possible under the present form of the Morecambe OWF lease, given the manner in which lease has been drafted. Again, and for the reasons recited above, BML believes this proposition to be correct, insofar as it relates to the present form of that drafting.

9 The third TCE proposition is that Section 84 rights do not extend to co-located aquaculture beyond the territorial seas. This is a matter that is examined below.

10 However, what BML believes TCE has <u>not</u> stated is that it is impossible pursuant to international law for TCE to grant rights for aquaculture beyond 12 nm limit. Rather, what BML believes TCE is stating is that the Morecambe OWF lease is framed by reference to Section 84, and that Section 84 does not provide for the grant of rights in respect of co-located aquaculture beyond 12nm.

11 If BML has understood TCE's position correctly, it would appear that TCE has by choice elected to draft its OWF leases and frame the rights therein in an unnecessarily narrow manner. In short, and for reasons examined below, BML understands that TCE was not obliged to limit the grant of rights by reference to Section 84; TCE could instead have decided to frame lease rights by reference to Section 41 of the Marine and Coastal Access Act 2009.

Form of Crown 'Agreement for Lease' (AfL): A Need for a Further Minor Amendment

12 BML notes that the present 'Agreement for Lease' granted by TCE to the Applicant ('the AfL') does not allow for co-located aquaculture. This is common ground between the Applicant, TCE and BML.

13 Consequently, and in order for co-located aquaculture to be deliverable, and for the Morecambe OWF DCO to be capable of lawful permitting by the Secretary of State, the AfL will need to be amended and/or supplemented by another form of Crown grant. It is BML's view that an amendment to the AfL is readily deliverable.

14 A further mark-up (from that contained in BML's D3 submission (**REP3-098** in Paragraph 12 and Annex 2) of the Scottish precedent OWF lease is attached to this submission at **Annex 1** below. The ExA will note that minor changes have been made to the Rights Granted to the Tenant provisions at Schedule 1 and two of the definitions used in that Schedule, 'REZ Site' and 'Renewable Energy Zone'. The amendments have been crafted to bring the AfL into line with the reality of the legal status of the EEZ, pursuant to Section 42(5) of the Marine and Coastal Access Act, 2009. The effect of this Section 42 (5) is examined below.

15 BML is not expressing the view that this is the only way in which the AfL might be amended to provide for co-located aquaculture. Indeed, BML would welcome effort

by the TCE, which is now well-resourced, as a result of the OWF boom to grapple with the issues raised by BML.

The Marginal Seabed: A history of uncertainty, reticence and confusion in and around the United Kingdom

16 BML acknowledges that there is uncertainty as to who owns the seabed beyond the United Kingdom's Territorial Waters, i.e. beyond 12 nm limit.

17 This uncertainty is of ancient origin and is recorded in the following, which are set out in **Annex 2** below:

a) The seminal legal text book on the legal status of the seabed (or the 'marginal solum') off the United Kingdom, Geoffrey Marston's '*The Marginal Seabed: United Kingdom Legal Practice*'; see in particular:

- Pages 260-267 on the Crown's 'The Traditional Claim' to the marginal solum;
- Page 298, which comprises the conclusion to the book; and,

b) Halsbury's Laws, where at paragraph 235 of Volume 100, it is stated: '*In the absence of any treaty between states or of actual possession by any state, the soil under any part of the high seas which is more than 12 miles from the coast is the property of no person'.* (refer to **Annex 3** below)

18 Allied to this uncertainty is a history of reticence from both the Crown and Parliament (as well as opposition from the Admiralty), which is recorded in Marston's The Marginal Seabed; see in particular (also in **Annex 2** below):

a) Page 273, which records the Legislature's reluctance '*to describe the Crown's interest in the solum outside inland waters*'; and,

b) Page 277, which records that no expression of the Crown's pleasure to take sovereignty of the marginal solum '*has ever been promulgated formally annexing or declaring the solum to be part of the territorial possessions of the Crown or to be British territory'.*

19 There is another aspect that has the potential to sow confusion, and this Is whether there is a distinction to be drawn between: 1) property ownership by the Crown; 2) sovereignty; and, 3) sovereign rights? The uncertainty relating to this topic is recorded in Marston's The Marginal Seabed at pages 240, 241, 244, 245, 267, 268, 275, 280 and 281 (again refer to **Annex 2** below).

20 This 'confusion potential' is perhaps best illustrated at page 268 of Marston's Marginal Seabed, and in the following terms: '*There is thus the possibility of arguing that, since 'sovereign rights' are a lesser quantum than 'sovereignty' and a fortiori less than 'property', the Crown, by ratifying the* [1958] *Convention* [on the Continental Shelf]*, has by implication abandoned in favour of the Convention regime whatever rights in municipal law it might previously have been able to claim in submarine soil beyond the present limits of the territorial sea' (*again refer to **Annex 2** below).

21 BML believes that this long-standing history of uncertainty, reticence and confusion is reflected in TCE's stated position in both this DCO Examination and the Examination of the Morgan OWF DCO.

Leasing Activity beyond the 12nm limit: A Uniquely British Problem?

22 Given that aquaculture co-located with offshore wind development is being delivered beyond the12 nm limit in European waters, it would appear that European Governments suffer from no timidity in granting co-located aquaculture leases beyond 12 nautical miles.

23 This is not surprising given that Part V of UNCLOS gives clear sovereign rights to contracting parties over all aquaculture activities within the EEZ, whether stand-alone or co-located. Article 56(1) (a) is of particular relevance and provides that: '*In the Exclusive Economic Zone, the coastal state has (a) sovereign rights for the purpose of …exploiting…the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed…, and with regard to other activities for the economic exploitation … of the zone, such as the production of energy from…wind…..'.* Also, in Article 56(1) (b) it further refers to *'the establishment of artificial islands, installations and structures'*. (refer to **Annex 4** below and also to the following: UNCLOS+ANNEXES+RES.+AGREEMENT).

24 It will be noted that the language of Article 56 is reflected in the language of the domestic UK statutes examined below and in the language of the Applicant's own application for the Morecambe OWF DCO. Therefore, it strikes BML that there is an irony in that the legal basis for OWF development in the EEZ is being used to thwart co-located aquaculture in the EEZ, which it seems to BML was designed specifically to promote rather than preclude fisheries co-existence/co-location within the EEZ.

25 So that the position is clear: for the purposes of Article 56, there is no distinction to be drawn between the full sovereign rights that coastal states enjoy over wind energy production and aquaculture in the EEZ.

26 Furthermore, and for the purposes of completeness:

a) Given the existence of the UNCLOS Treaty and the 2013 EEZ Order (examined below), the position set out in Halsbury's Laws (and recorded at paragraph 17b above that the seabed has no owner does not apply in the UK EEZ; and,

b) TCE clearly exercises the Crown's power to lease beyond 12 nm limits and the AfL is evidence of this power.

A Section 84 Energy Act, 2004 Interpretation Problem?

27 BML notes that TCE appears to have expressed the view that Section 84 does not in any circumstance provide authority for TCE to grant a lease for co-located aquaculture beyond 12 nm limit.

28 BML invites the ExA to consider Section 84 (2) (c) of the Energy Act 2004: '*This section applies to the rights under Part V of the Convention that are exercisable by the United Kingdom in areas outside the territorial sea – for other purposes connected with such* [the production of energy from wind] *exploitation.'* (refer to **Annex 5** below and the following: Energy Act 2004)

29 BML is of the view that co-located aquaculture is, in the present circumstances, a purpose that is directly and necessarily connected with offshore wind energy development.

30 To amplify: BML is of the view that, in order to make its development proposal policy compliant and therefore capable of lawful permitting by the Secretary of

State, the Applicant needs to deliver in its design of mitigation enhancement of commercial fisheries. BML notes that the other present Irish Sea OWF applicants have accepted that it has been unable to deliver such enhancement. BML is of the view that the only enhancement that is reasonably practicable to be delivered is co-located aquaculture.

The Position under other Statutes

31 BML notes that statute has the power 'cure' any uncertainty relating to TCE's ability to grant rights for co-located aquaculture beyond 12 nm limit. So, if BML is not right about the extent of Section 84 (2) (c), other statutory provisions give TCE the power to grant rights for co-located aquaculture beyond 12 nm limit.

The Continental Shelf Act, 1964

32 BML draws the ExA's attention to Section 1(1) of the Continental Shelf Act, 1964 Act whereby: '*Any rights exercisable by the United Kingdom outside the territorial waters with regard to the seabed…and their natural resources…are vested in Her Majesty'.* (refer to **Annex 5** below and the following: Continental Shelf Act 1964).

33 The United Kingdom enjoys clear Treaty rights (and this is before any examination of the Crown's powers pursuant to the Royal Prerogative) to locate aquaculture inside the UK's Exclusive Economic Zone. Part V of UNCLOS and, in particular Article 56, is clear in this regard, and it is notable that the UK's European neighbours are exercising such aquaculture rights in their EEZs.

34 From this, BML can only conclude that the right to grant leases for aquaculture beyond 12 nm limit is currently vested in His Majesty and, having so vested, can be granted out to subjects.

The Crown Estate Acts 1961 and 2025

35 BML draws the ExA's attention to the extent of the Crown Estate and the power of the Crown Estate Commissioners, which is defined in Section 1 (1) of the Crown Estate Act 1961, as follows: *'The Crown Estate Commissioners shall continue to be a body corporate for all purposes, charged with the function of managing…land and other property, rights and interests, and of holding such of the property, rights and interests under their management as for any reason cannot be vested in the Crown … and the property rights and interests under the management of the Commissioners shall continue to be known as the Crown Estate' (BML's emphasis added).* (refer to **Annex 5** below and the following: Crown Estate Act 1961).

36 Given that TCE is leasing for OWF and other purposes beyond 12 nm limit, BML is of the view that it is unlikely that TCE take the view that:

a) The seabed in the UK's EEZ is not vested in the Crown; or,

b) Such seabed is not part of the Crown Estate and so not under TCE's management.

37 BML draws the ExA's attention to the recent enactment of the Crown Estate Act 2025, and, in particular, Section 5 which provides for disposal by TCE of the seabed within the UK's territorial waters (refer to **Annex 5** below and the following: Crown Estate Act 2025). It strikes BML, in the light of the TCE's uncertainty as to whether it has the power to grant co-located aquaculture leases beyond 12 nautical miles, that TCE might, or indeed given the matter was in issue in the three current Irish Sea OWF DCO Examinations ought to, have taken the opportunity presented

by this legislation to have confirmed its powers. Furthermore, BML is of the view that the delivery of such legislative confirmation of TCE's leasing powers would have been, and indeed continues to be, reasonably practicable.

Section 41, Marine and Coastal Access Act, 2009 ('MACAA') and the 2013 EEZ Order

38 BML draws the attention of the ExA to Sections 41(1) and (2) of the Marine and Coastal Access Act, 2009 whereby the UK's Part V UNCLOS rights are confirmed to '*have effect as rights belonging to Her Majesty*….'. (BML emphasis added and refer to **Annex 5** and the following: Marine and Coastal Access Act 2009).

39 Section 41 (3) provides for the EEZ to be defined by an Order in Council, and such Order in Council was made in the form of the Exclusive Economic Zone Order in 2013 (refer to **Annex 5** below and the following: The Exclusive Economic Zone Order 2013). The Morecambe OWF is located within the UK's EEZ.

40 This 2013 EEZ Order in Council having been made, the UNCLOS Part V rights took effect as rights belonging to Her Majesty, and (as for the Continental Shelf Act, 1964), what belongs to His Majesty can be granted out (in whole or part) to subjects.

Section 42(5) of the MACAA and the 2013 EEZ Order: Moving beyond a Renewable Energy Zone to an Exclusive Economic Zone

41 BML draws the attention of the ExA to Section 42 (5) of MACAA (as noted above in Paragraph 39) whereby, following the making of the 2013 EEZ Order, the EEZ is no longer to be treated as a mere Renewable Energy Zone: '*Until the coming into force of the first Order in Council made under Section 41 (the exclusive economic zone), the reference in subsection (1) (b) to the exclusive economic zone is to be read as a reference to the renewable energy zone.'* (also refer to **Annex 5** below)

42 What this means is that, since the coming into force of the 2013 Order, there has been no impediment in international law to the UK carrying out aquaculture beyond the 12 nm limit.

43 BML is of the view that this change in status of the area beyond 12 nm limit is telling. In short, it appears to BML that TCE, in its participation to date in this DCO Examination, has yet to recognise the change in legal status brought about by the coming into force of Section 42 (5).

Legislative timing: the coming into force of 1) the present form of Section 84(4) of the Energy Act 2004; and, 2) Section 42(5) of MACAA and the 2013 EEZ Order

44 BML draws the ExA's attention to the separate Statutory Instruments and dates on which the two, for present purposes, key legislative provisions were provided to come into force:

a) Section 84 (4) of the Energy Act 2004 ('Section 84 (4)') which created the Renewable Energy Zone; and,
b) The Exclusive Economic Zone in UK waters.

45 The present form of Section 84 (4) of the Energy Act, 2004 was provided for by Paragraph 4 of Part 1 of Schedule 4 of MACAA. The Commencement Order that brought this new form of Section 84 (4) into force - the Marine and Coastal Access Act, 2009 (Commencement No. 6) Order 2013, Statutory Instrument Number 3055

of 2013, was enacted on 3 December 2013 (refer to the following: The Marine and Coastal Access Act 2009 (Commencement No. 6) Order 2013).

46 The provision bringing into force the change in the legal status effected by Section 42 (5) MACAA – in short a change from Renewable Energy Zone to Exclusive Economic Zone, post-dated the Statutory Instrument bringing into force the new and present form of Section 84(4). It can be seen that the EEZ Order was made on 11 December 2013 and laid before Parliament on 18 December 2013.

47 It appears to BML that these two Statutory Instruments are not fully aligned and that their coming into force provisions are temporally mismatched. If BML is correct, might this apparent misalignment be yet another source of reticence and confusion.

Observations on the Fisheries Act, 2020

48 BML raises a simple point: how can the Fisheries Objectives set out in Section 1 of the Fisheries Act, 2020, which cover aquaculture, be delivered if there is no mechanism for TCE to grant aquaculture-facilitating property rights in the UK's EEZ?

An Alternative Approach: The Crown's Continuing Prerogative Power

49 Marston's The Marginal Seabed examines both the Crown's historic claims to the marginal solum and modern modes of potential expression of the Crown's prerogative power:

a) At page 275 where Diplock L.J. for the Court of Appeal is recorded as stating: '*It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction.';*

b) At page 279 where soil is noted as becoming British territory through occupation by structures; and,

c) At page 281 in relation to the Courts' inability to refuse an exercise by the Crown of its power to declare the extent of its territorial possessions.

50 The reason for BML raising the Crown's prerogative power goes to the issue of reasonable practicality. The Crown, if it so choses, has the power to declare the seabed within the EEZ to be Crown property; and, such a declaration would be effective in domestic law. Who would object to such a declaration by the Crown: certainly not the UK's UNCLOS treaty partners.

Conclusions: Matters requiring confirmation by the Applicant and/or TCE

1 For TCE: Is it TCE's clear and unambiguous view that it has no powers to grant property rights for aquaculture in the UK EEZ?

2 For TCE: does recognise the history of uncertainty reticence and confusion recorded in Marston's Marginal Seabed; and, if there is such uncertainty, what the most reasonably practical manner of resolving it?

3 For TCE and Applicant: do they accept that a form of lease as amended by BML (refer to **Annex 1** below) would be effective to allow for co-located aquaculture in the UK EEZ?

4 For TCE and the Applicant: the legal status of aquaculture in the UK's EEZ: the same as OWF: is it the same as for OWF?

5 For TCE: please comment on the legal basis for co-located aquaculture in European waters and how and why that differs from the UK position?

6 For TCE: to confirm who owns the seabed in the UK's EEZ and on what basis and is the seabed in the UK EEZ part of the Crown Estate?

7 For TCE and the Applicant: if an activity is required to make OWF development lawfully permissible would this activity comprise another purpose for the purposes of Section 84(2) (c) of the Energy Act, 2004?

8 For TCE: does TCE agree that statute can as a matter of domestic law give or confirm to the Crown property rights?

9 For TCE and Applicant: do they accept that Section 1(1) Continental Shelf Act, 1964 vest the sea bed on the UK's continental shelf in the Crown; and that Section 41, MACAA vests rights in the Crown?

10 For TCE: if rights are so vested in the Crown pursuant to the Continental Shelf Act,1964 and MACAA 2009/2013 Order, is the Crown capable of granting out such rights in whole or in part?

11 For TCE: please comment on the legal effect of Section 41 MACAA in the light of the 2013 EEZ Order?

12 For TCE: please comment on the legal effect of Section 42(5) MACAA in the light of the coming into force of the 2013 EEZ Order?

13 For TCE: does the Crown still hold the prerogative powers described in Marston's Marginal Seabed book (refer also to Annex 2) and noted in Paragraph 49 above?

PART TWO: ENHANCEMENT

Explanation of Main Issue

51 At ExQ3 the ExA asked of the Applicant a clear question (Question 3CF3): is the Applicant proposing any specific Enhancement measures? It appears to BML that the Applicant has elected not to give a direct answer to the ExA's very clear question. Furthermore, it is clear to BML that the Applicant has not proposed any specific measures of Enhancement.

52 What is not clear to BML is whether the Applicant accepts and recognises that policy (and specifically Paragraph 2.8.251 of NPS EN-3) requires the Applicant to provide Enhancement. At the beginning of its ExQ3 response the Applicant appears to accept that it has an obligation to provide Enhancement as part of its design of the mitigation of commercial fisheries. However, as the Applicant's ExQ3 response rolls on, this apparent acceptance begins to fall away.

a) First, 'Enhancement' is kicked into the 'very long grass' of the post-consent world; and,

b) By the end of its response, it appears that the Applicant has resiled from its earlier acceptance of its obligation to provide Enhancement.

53 One further matter that is unnecessarily unclear is whether the Applicant accepts that co-located aquaculture would comprise Enhancement. Given that the Applicant is now fully aware of the roll-out of co-located aquaculture in European waters, it would appear that the Applicant is reluctant to accept that co-located aquaculture should be acknowledged as Enhancement. The Applicant's words in this regard are revealing: '*At this stage of the Project…it is not reasonably possible to understand what, if any, specific enhancement measures might be possible….'*

54 BML confesses to being baffled, given that the Applicant has now designed its mitigation proposals, by the Applicant's suggestion, that it is too early to provide Enhancement. But, perhaps BML ought not be taking the Applicant's representations at face value, when the reality of the situation appears to be that the Applicant, like the rest of the OWF industry, appears to have thought it could get away with not having to provide Enhancement or, for that matter, properly understood co-existence and co-location. If that was indeed the Applicant's approach, it has now been found out.

55 Consequently, it now must now be clear to the ExA (as it has been to BML) that the Applicant has failed the test set out in Paragraph 2.8.251. This failure by the Applicant was and remains completely unnecessary and is curable. However, until such time as this failure is remedied, it will have severe consequences in that it places the lawful grant by the Secretary of State of a DCO out of reach. This is something that the ExA is going to need to grapple with head on.

Applicant's Response to ExQ3 Questions (REP5a-056)

56 The only relevant ExQ3 questions for BML are in Section 5 on 'Commercial Fisheries', namely questions 3CF2 (on which BML has no further comment) and 3CF3 (Pages 31 – 34) and BML's commentary on 3CF3 is dealt with below.

57 **ExQ3 3CF3** – the Applicant does not distinguish between mitigation and enhancement measures in its response, despite many other DCOs undertaking both mitigation and then separate enhancements to very positive effect. Their only

commitment (within the Design Statement Item DC23 on page 56 (REP5a-008) to just ‘consider’ enhancement measures and only where possible – in BML’s view this constitutes no commitment at all and is unlikely to assuage the commercial fishing representatives; and, provides no comfort at all for aquaculture. The Applicant further maintains that sufficient mitigation has been employed during construction.

58 It is clear that the Applicant does not consider that the NPS EN-3 Paragraph 2.8.251 imposes any need to provide enhancement – BML totally disagrees with this interpretation and requests the ExA support BML’s interpretation.

PART THREE: ALL OTHER MATTERS

1 INTRODUCTION, INCLUDING PROCEDURAL MATTERS

1 BML appreciates the Examining Authority's (ExA) use of their discretion in their acceptance of BML's D5 submission made on 11 March 2025. BML notes that the 23 April 2025 is the end of the Examination, with changes to the Examination timetable issued on 17 March 2025 in the ExA's Rule 8(3) Letter.

2 This Part Three of the Deadline 6 (D6) submission includes in Section 2 comments on the D5 and D5a 'tracked' versions of six key and highly relevant documents – the Schedule of Mitigation Rev05 and Rev06 (**REP5-021 and REP5a-022**); the In Principle Monitoring Plan Rev04 and Rev05 (**REP5-027 and REP5a-028**); the Commitments Register Rev03 and Rev04 (**REP5-051 and REV5a-041**); the Outline Fisheries Liaison and Co-Existence Plan Rev04 and Rev05 (OFLCP) (**REP5-025 and REV5a-026**); the draft DCO Rev05 and Rev06 (**REP5-003 and REV5a-003**); and, the Schedule of Changes to the Draft DCO Rev05 and Rev06 (**REP5-006 and REV5a-006**).

3 In addition, this Part Three of the D6 submission comments on other selected submissions from the Applicant: the Applicant's Responses to D4 Submissions from IPs **(REP5-060);** the Applicant's Responses to ExQ2 Rev01 **(REP5-070**); the SoCG with the National Federation of Fisherman's Organisations and Welsh Fisheries Association Rev04 (**REP5a-034**); and, the Applicant's comments on ExQ2 Responses and D5 submissions Rev01 (**REP5a-059**). However, part of the Applicant's Response to ExQ3 (**REP5a-056**) are dealt with above in Part Two.

4 Finally and in addition, BML offer comments on the two latest submissions from the Marine Maritime Organisation (MMO), namely their D5a submission (**REP5a-056**) and D5a summary submission (**REP5a-057**).

5 Also, as in BML's D3, D4 and D5 submissions, in the ExA's 'Initial Assessment of Principal Issues' (within the Rule 6 Letter issued on 23 September 2024, Appendix C (**PD-007**)), BML notes that it is unfortunate that co-location or aquaculture provision (and the consequences for the lawful granting of a DCO) was not covered and has not been updated accordingly. It is noted that the ExA's assessment of those principal issues was only an 'initial' assessment that must be finalised for the purposes of reporting to the Secretary of State. BML submits that the issues of policy compliance (i.e. whether the Applicant has made adequate provision in terms of co-location (including for aquaculture)) should be considered as a 'Principal Issue' as part of the subsequent Recommendations of the ExA after the end of the Examination.

6 For the avoidance of doubt, BML relies on all of its previous written submissions to the Examination, as well as in this submission. Crucially, and as explained in more detail in BML's written submissions, the Scheme is not compliant with policy in terms of its failure to have made adequate (indeed, any) provision for aquaculture within it. This has flowed from a prior failure to have carried out adequate consultation with the aquaculture community and industry. BML considers that these failures can and should be rectified by making the proposed modifications to the DCO and the control documents that BML contend for. The ExA should recommend these changes to the Secretary of State in order to render the scheme consentable in the context of S104 of the Planning Act 2008.

7 It should be noted and will become apparent in the subsequent Sections 2 and 3 below, that the Applicant's amendments to the key documents reviewed are largely cosmetic and refuse to account for any comments made by BML in its various submissions. This complete failure by the Applicant either to engage or accommodate comments is stark.

Structure and Content of Part Three of this D6 Submission

8 Part Three of this D6 submission provides comments as set out below together with additional commentary of key aspects of the current DCO application, under sub-headings:

d) Section 2 – Commentary on the Applicant's Main D5 and D5a Submissions (largely Applicant amendments);
e) Section 3 – Commentary on the Applicant's other relevant D5 and D5a submissions, particularly regarding ExQ2 responses;
f) Section 4 – Update and Commentary on the Technical Engagement between BML and the Applicant; and,
g) Section 5 – Final Commentary and Questions for the ExA.

2 COMMENTARIES ON THE APPLICANT'S KEY D5 AND D5A SUBMISSIONS (AMENDMENTS)

Schedule of Mitigation (Rev05 and Rev06) (REP5-021 and REP5a-022)

9 Once again, the minor changes and changes in sections do not require BML's comments and so are not included below; noting that there are only minor changes to this document anyway. However, the following inadequate commitments to Commercial Fisheries at Ref. Nos. 13.1 – 13.5 should be noted and the fact that once again no further changes have been made to these 5 commitments since D2, despite BML's technical comments at D3, D4 and D5.

10 Also, as noted by BML within its D3 and D4 submissions, the latest version of the OFLCP does not appear to be secured within this Schedule of Mitigation for this DCO. This continues to remain as a concern. Notwithstanding this, BML has no ability, except through this DCO process, to ensure that the OFLCP is adequate or covers any provision for aquaculture or commitment to be consulted through the dML process, even through the agency of other representative bodies for aquaculture.

11 The D5a Rev06 version makes a two main changes/additions in Section 7.7 and 12.1, but none to the 'Commercial Fisheries', Section 13 (Pages 45 – 48), despite BML's previous comments.

In Principle Monitoring Plan Rev04 and Rev05 (REP5-027 and REP5a-028)

12 As noted in its D5 submission, this document was reviewed by BML before in its D4 submission and relates solely to arrangements for monitoring measures and is intended to be a framework for discussions with competent authorities, such as the MMO, SNCBs, MCA and other statutory bodies. As before, BML notes that this document is not referred to within the Schedule of Mitigation, even under Section 13 on commercial fisheries. Again, this remains a serious omission. Furthermore,

this document does not additionally provide for future activities to be monitored, only existing commercial fisheries and marine ecology.

13 Section 2.7 relates to commercial fisheries and it is noted that reporting of fish landings by port is only annually post completion. Furthermore, it is not clear if effects on commercial fisheries operations will be monitored and if deleteriously affected if any mitigating actions will be undertaken – this is considered an omission. BML note that this Section 2.7 did not have any changes since its earlier version.

14 The D5a Rev05 version makes changes/additions in some of the ecology sections, but none to the 'Commercial Fisheries', Section 2.7 (Pages 37 – 41), despite BML's previous comments.

Commitments Register Rev03 and Rev04 (REP5-051 and REP5a-041)

15 Again, it is not clear how it relates to the Schedule of Mitigation or In Principle Monitoring Plan and the relationship is not explained in any of these documents by the Applicant in any introduction. It only contains two commitments relating to commercial fisheries and none for aquaculture, i.e. fisheries liaison and the FLCP (Ref. Nos.C034 and C035) and these are not adequate and have not changed since the earlier version.

16 The D5a Rev04 version makes a number of minor changes/additions, but none to the fisheries liaison and the FLCP parts (Ref. Nos.C034 and C035), despite BML's previous comments.

Outline Fisheries Liaison and Co-Existence Plan Rev04 and Rev05 (OFLCP) (REP5-025 and REP5a-026)

17 Once again, this document continues to actively promote both co-existence and co-location throughout, but without any significant proposals to actually do this commitment. However, the proposals simply amount to the largely unchanged 'Co-existence and Mitigation Measures' (Section 3.2) and a Commercial Fisheries Working Group (CFWG) in Section 3.2.1, in which aquaculture is not represented. All changes are considered minor and not adequate.

18 There remains very little provision for aquaculture co-existence or particularly co-location, with such provisions being restricted only to the very limited co-existence measures related only to existing commercial fisheries.

19 The D5a Rev05 version makes a number of minor changes/additions (including commitment to annual reviews of the FLCPs), but none to the fisheries overview/liaison and co-existence parts (Sections 3.1 and 3.2), despite BML's previous comments.

Draft DCO Rev05 and Rev06 (REP5-003 and REP5a-003) and Schedule of Changes to the Draft DCO Rev05 and Rev06 (REP5-006 and REP5a-006)

20 The amendments in this latest version of the draft DCO and included in the Schedule of Changes to the Draft DCO (particularly Section 4 on the latest changes) do not relate to co-existence, co-location or aquaculture. There are many amendments that do not concern BML.

21 BML notes that BML's recommended additions/changes to the draft DCO set out in its D3 submission (**REP3-098**, Section 8) and referred to in its D4 submission (REP4-068, Part 1, Paragraph 22) and D5 submission (**REP5-088**, Paragraphs 17 and Section 4, have not been included (refer particularly to the draft Schedules 2 and 6).

22 The D5a Rev06 versions make a number of changes/additions relating to interpretation and approvals (Articles 2, 16 and 17) and minor changes to Schedules 1 and 2, Schedule 6 and Schedule 8, but none relating to or providing for co-existence, co-location or aquaculture, despite BML's previous comments.

3 COMMENTS ON OTHER RELEVANT APPLICANT D5 AND D5A SUBMISSION DOCUMENTS

Introduction

23 In addition to Section 2 above, BML have restricted itself to commenting only on the relevant Applicant documents and have not commented on other IP submissions at D5 and D5a. Consequently, only five important documents require BML's comments, as set out below.

Applicant's Responses to D4 Submissions from IPs (REP5-060)

24 The Applicant's responses to BML's D4 submission are contained in Section 2.5, page 212, which is merely 0.5 pages and responds to BML's D4 submission of 18 pages, plus four Annexes – the Applicant's justification for not undertaking a point-by-point response is that BML's D4 submission is largely a restatement of arguments made in its D3 submission – a very weak and potentially contrary to policy. Nevertheless, the very limited content is reviewed below, but its length still indicates a serious lack of thorough consideration, which matched with the Applicant's lack of verbal/correspondence technical engagement, clearly indicates completely inadequate engagement in this written response and more generally – this is considered a serious deficiency.

25 The Applicant maintains that BML's D4 submission also contains repeat text from the BML submissions to the Mona and Morgan OWF projects; and, the Applicant further maintains that its position was clearly stated in its response to BML's D3 submission (REP4-058 in Section 2.5 and in REP4-059 at ISH3 ID 7). The Applicant also refers the ExA to its responses to ExQ2 submitted at D5 (**REP5-070**, specifically Question 2CF2 and its associated Appendix confirming from The Crown Estate that it has no power to lease the seabed for aquaculture beyond the 12nm limit (which is dealt with below).

26 Despite these claims, BML maintain that within its D4 submission (**REP4-068**) in Part 1, Part 2 and Part 3 in Sections 3, 4, 5, 6 and 7 there are many new comments that the Applicant should have responded to in its D5 commentary (**REP5-060**). This continued refusal to respond or engage is quite shocking and not reasonable behaviour from any Promoter, especially this Applicant. BML requests that the ExA use its powers to require further information under Rule 17 on all these matters from the Applicant at the earliest opportunity.

BML's Conclusions

27 Once again, the Applicant appears to conveniently ignore the following critical matters: the wealth of published evidence about the value of aquaculture and its compatibility with OWFs; the distinction between co-existence and the more important co-location; the successful practice of aquaculture projects in OWF in several countries in Europe; the need to change TCE leasing practices and TCE's own recent policy change; the lack of engagement with aquaculture representatives or experts in that field; and, the need for strengthening food security in respect of aquaculture. All significant points made by BML in its previous three submissions.

28 The Applicant is extremely dismissive of BML proposals or position on key matters throughout, allowing no opportunity for future engagement – this is in spite of BML's efforts to undertake engagement with the Applicant (refer to its D4 submission in Section 7). Furthermore, the Applicant tries to reinforce its complete 'lock-out' of its Order Limits sole usage for some 60 years. That is significant because as set out above it means that a 'reasonably possible' form of 'enhancement' to the 'fishing industry' in the 'medium to long term' is simply being locked out and sterilised, instead of facilitated.

29 Finally, BML has tried in its D4 submission (**REP4-068**) in Part 1 'Opening Observations', to demonstrate all the problems with the Applicant's approach and to set out the 'Catch -22' that BML finds itself in on all these matters – consistency across all 3 OWF DCO applications, Marine Licencing smokescreen and 'lock-out', TCE's participation, the OFLCP, the DCO as a One-Stop-Shop', competence issues and the position of aquaculture under the UN Convention of the Sea, 1982.

Applicant's Responses to ExQ2 Rev01 (REP5-070)

30 Section 2 sets out the Applicant's comments on all relevant ExQ2 questions and Item 5 deals with Commercial Fisheries. Question 2CF2 (Pages 38-39) dealing with BML and relates to the North West Inshore and Offshore Marine Plan. Finally, Appendix A, is a response from The Crown Estate, and is dealt with above in Part One, as it is such a fundamental matter.

31 **Commercial Fishery** – the Applicant maintains that aquaculture does not constitutes a commercial fishery or fishing activity for the purposes of NPS EN-3 and refers to some other submission documents for support – largely arguing that because aquaculture does not exist it cannot be a commercial fishery, which is a complete tautology/*non sequitur*. However, as BML stated and demonstrated in Section 5 and Annexes 1, 2, 3 and 4 of BML's D5 submission (**REP5-088**) aquaculture is clearly a commercial fishing activity as recognised by the MMO and many other international organisations and the UK Government in its North West Inshore and North West Offshore Marine Plan, as well as the Fisheries Act, 2020.

32 **Strategic Areas for Aquaculture** – the Applicant further maintains that their Order Limits do not include any spatially defined strategic area of sustainable aquaculture production – this was thoroughly dealt with and debunked in BML's D5 submission in Section 5 (**REP4-068**). Also, the Applicant incorrectly refers to the CEFAS 2019 Report and not the MMO's Final Report of 2021.

33 **Policy Applicability** – finally, the Applicant maintains that Policy NW-AQ-1 of the North West Inshore and North West Offshore Marine Plan, 2021 does not apply as the Order Limits are not within any spatially defined strategic area of sustainable

aquaculture production. Again, BML robustly questioned the validity these areas and the likelihood that they would change in its D4 submission (**REP4-068** in Section 5).

Applicant's SoCG with the National Federation of Fisherman's Organisations (NFFO) and Welsh Fisheries Association (WFA-CPC) (REP5a-034)

34 This is a short document with only 12 relevant pages and its need was set out by the ExA in their Rule 6 letter in Appendix G (Page G4). It is notable that no such need was expressed by the ExA regarding any aquaculture representatives or organisation. This document references the consultation with these bodies in Section 2, which has been missing with any aquaculture representatives or organisation. Table 2.2 sets out matters agreed, not agreed or under discussion, with key matters on commercial fisheries not agreed even at this late stage. Furthermore, aquaculture is not even mentioned.

Applicant's Comments on ExQ2 Responses and D5 submissions (REP5a-059)

35 The Applicant dispenses with the need to comment on BML's D5 submission until D6, thereby deliberately giving BML no opportunity to address the Applicant's comments. This again demonstrates the Applicant's disdain for BML's views and its strategy is one of delay and not resolution or any level of agreement or compromise.

4 UPDATE AND COMMENTARY ON TECHNICAL ENGAGEMENT BETWEEN BML AND THE APPLICANT

Current Engagement between the Applicant and BML

36 BML remains keen to engage with the Applicant on matters set out in its D3, D4 and D5 submissions and in Parts 1 and 2 above and respectfully requests that the ExA seek further information in respect of the issues raised herein, so that the detailed issues in respect of the imperative for the Project to accommodate the co-existence and co-location of the sustainable aquaculture industry can be fully explored and understood and appropriate arrangements for co-located aquaculture secured.

37 As an update to the fact that BML spoke informally with representatives of the Applicant at the ISH3 Hearing and subsequently wrote to the Applicant in an email dated 6 February and, in a reminder, dated 5 March 2025. However, BML still awaits any acknowledgement or a reply, which matters of courtesy aside, clearly demonstrates an unwillingness to engage. For convenience, BML requested in that correspondence further technical engagement with the Applicant and asked 4 questions of the Applicant, as follows:

1 Will the Applicant accept the principal of accommodating aquaculture within the Order Limits and between the turbines in a way that does not impact the operation/maintenance of those turbines?

2 Will the Applicant agree to any technical engagement meetings to achieve a mutually agreed solution to present to ExA, possibly through a SoCG?

3 Will the Applicant consider the proposals for a sub-lease between the Applicant and/or Crown Estate?

4 Will the Applicant consider and accept the proposals for additional wording for the OFLCP and for a new Requirement, as set out in our D3 submission in Section 8?

38 BML considers this continued refusal to engage or discuss any matters is contrary to policy, not in the spirit of natural justice and demonstrates a level of unnecessary arrogance/disdain on the part of the Applicant.

5 FINAL COMMENTARY AND QUESTIONS FOR THE EXA

39 In consideration of the information and commentary above and accounting for BML's D3, D4 and D5 submissions, BML distil, summarise and set out below, in addition to the issues raised at the Conclusion of Part One above, the four main questions that remain and either require the Applicant's response or, BML would submit, further actions from the ExA. These bear repeating and adjusting in light of this submission and are the following:

1 **Technical Engagement** – now technical matters have been raised in both BML's D3, D4 and D5 submissions and at the ISH3 Hearing, these should have been resolved during the Examination. Clearly though, this would have required the Applicant's written support and further actions as set out in BML's D3, D4 and D5 submissions and in view of BML's comments above. The consequence of this not being delivered remains the sterilisation of 87km2 for this project alone, preventing the valuable aquaculture sector from developing offshore (notwithstanding the total of 667km2 sterilisation involved in all three Irish Sea OWF project areas).

2 **DCO Securing Mechanisms** – could the ExA enquire of the Applicant as part of further information or the Applicant themselves explain the reasoning behind not adopting these 3 simple measures (straightforward additional drafting within the OFLCP, additions to Schedule 6 and a new Requirement), if the Applicant in fact continues to decline to provide these recommendations, (as set out in Section 8 of the BML D3 submission (**REP3-098**).

3 **Policy Compliance** – given the Applicant's views on its National Planning Policy compliance, BML's views are set out in Part Two of this D6 submission and in Section 4 in its D4 submission (**REP4-068**), there is clear disagreement that requires resolution. It is clear from Sections 4 and 5 above that BML considers that the Project does not comply with S104(3) and (7) of the PA2008 (as covered in Section 4 above, in particular).

Furthermore, it is now clear if the Applicant considers that the proposed mitigation of commercial fisheries should not and does not comprises enhancement as required by NPS EN-3 (Paragraph 2.8.251). It is notable that the Applicant for the Mona OFW Project has openly acknowledged that also it is not delivering enhancement.

4 **Future Fishing and Aquaculture Activities –** the Applicant was keen to stress at the ISH3 Hearing that it only has considered and should consider recognised fishing activities and was emphatically clear that this did not refer to aquaculture at all. Therefore, should the Applicant now be requested to consider such proactive future proposals more favourably and be asked to set out the relevant consideration and policy/technical obstacles to embracing such a positive view?

ANNEX 1

Crown Estate Marine Lease – Further Mark Up of Proposed Changes

CROWN ESTATE ~~SCOTLAND~~

and

[ ]

LEASE
of
Rights for Wind Farm Site upon Bed of the Sea at [ ]

Contents

Clause

LEASE BETWEEN:

(1) **CROWN ESTATE SCOTLAND** (in Gaelic, Oighreachd a' Chrùin Alba) established as a body corporate in terms of the Crown Estate Scotland Order 2017 (previously carrying on business under the name of Crown Estate Scotland (Interim Management), (in Gaelic, Oighreachd a' Chrùin Alba (Stiùireadh Eadar-amail)) and renamed in terms of the Scottish Crown Estate Act 2019), having its principal office at Quartermile Two, 2nd Floor, 2 Lister Square Edinburgh EH3 9GL and acting in exercise of the powers conferred on it by the Scottish Crown Estate Act 2019 on behalf of Her Majesty The Queen (and its successors **the Landlord);** and

(2) **[ ]** (the **Tenant**).

WHEREAS:

The parties have agreed to enter into this Lease to permit the Tenant to construct an offshore wind farm on the Site in accordance with the Specification prepared by the Tenant in respect of the Tenant's Works;

NOW WITNESSES as follows:

1 Definitions and Interpretation

1.1 In this Lease unless the context otherwise requires:

Acceptable Covenant means an entity with either:

(a) BBB- or higher with Standard & Poor's Rating Group (a division of the McGraw-Hill Group of Companies, Inc.) or Baa3 or higher with Moody's Investor Services Inc. (or, if either cease to exist, an equivalent credit rating from another internationally recognised credit rating agency); or

(b) Net Assets in excess of [*20 x indemnity cap sum*] POUNDS (£[ ]) Sterling (indexed annually upwards only);

Aquaculture means the farming and/or growing of aquatic organisms including (but not limited to) fish, molluscs, crustaceans and aquatic plants;

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Authority means an authority whether statutory public local European international or otherwise government department or agency or a court of competent jurisdiction;

Break Event means where the Tenant's Works or part of them have been destroyed or damaged by an Insured Risk and a funder has elected in accordance with the provisions of a direct agreement between the funder and the Landlord that the insurance monies will be applied in repayment of amounts owing under the funding agreement between the funder and the Tenant rather than in reinstating the Tenant's Works or the part of them damaged or destroyed;

Break Fee means the sum calculated in accordance with Clause 6.4

Cable Corridor means [ ]

Cap means £[ ] ([ ] POUNDS)] *[Note: to be calculated for each project based on potential CES losses]* Sterling as increased by Indexation;

Commencement Date means [ ];

CDM Regulations means the Construction (Design and Management) Regulations 2015;

Change of Control means a change in the Control of the Tenant;

Control has the meaning given in section 450 of the Corporation Tax Act 2010;

Conduit means a pipe drain sewer channel gutter cable wire or other conduit for the passage or transmission of water soil gas oil air smoke electricity communications information light or other thing and all ancillary structures and equipment in on or under the Site;

CPS means the Contracted Position Statement accepted by the Landlord in terms of the Option Agreement contained in Schedule Part 11;

Data means primary data, observations and metadata gathered and stored by or on behalf of the Tenant in relation to meteorological, aural, biological, sea user and geotechnical, geophysical, bathymetric, oceanographic, sedimentological, cultural and heritage investigations and monitoring on the Site or surrounding areas;

Development means the installation by or on behalf of the Tenant upon the Site of an offshore wind farm including (without limitation) wind turbine generators, cables between them, substation(s) energy storage equipment and supporting platforms and structures and ancillary structures and having an installed carrying capacity of not less than and no more than that specified in the Specification;

EML Consultant means a firm of insurance advisers of international repute with experience of the offshore wind industry jointly appointed by the Landlord and the Tenant in accordance with Schedule Part 5;

EML Study means a study performed by the EML Consultant pursuant to the terms of this Lease;

Estimated Maximum Loss means the estimated maximum loss arising from the worst-case credible scenario that could be expected to affect the Tenant's Works as determined in accordance with Schedule Part 5;

Force Majeure means fire storm tempest other exceptionally inclement weather conditions war hostilities rebellion revolution insurrection military or usurped power civil war labour lock-out strikes local combination of workmen and other industrial disputes riot civil commotion disorder decree of Government delay by a local authority or statutory undertaker in carrying out work in pursuance of its statutory obligations or failure by such authority to carry out such work or if the tests and procedures required to demonstrate that the Specified Works are capable of commercial operation cannot be carried out as a result of the Supply Cables not being connected or fully operational or any other cause or circumstance provided that in the case of any of the foregoing events, the event:

a) adversely affects the completion of the installation of the Specified Works; and

b) cannot be reasonably avoided or provided against by the Tenant or its contractors or professional team.

Funder means a bank or other financial institutions providing funding to the Tenant to implement the Development;

Generator Cables means the Conduits owned by the Tenant in on or under the Site for the passage of electricity generated by each of the Turbines to an offshore substation or other point of connection to the Supply Cables;

Implementation Date means the date the Tenant commences the installation of the Specified Works;

Index means the Consumer Prices Index (CPI) (or any identical index published under a different title) published by the Office of National Statistics or any successor body upon which the duties in connection with such an index devolve;

Indexed shall have the meaning given to it in clause 9;

Indexation shall have the meaning given to it in clause 9;

Insolvency Event means, with respect to the Tenant or any Security Provider, that it:

a) is dissolved (other than pursuant to a consolidation, amalgamation or merger);

b) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;

c) makes a general assignment, arrangement or composition with or for the benefit of its creditors;

d) institutes or has instituted against it, by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organisation or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation by it or such regulator, supervisor or similar official;

e) has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition is instituted or presented by a person or entity not described in paragraph d) above and:

    i) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation; or

    ii) is not dismissed, discharged, stayed or restrained in each case within thirty (30) Working Days of the institution or presentation thereof;

f) has exercised in respect of it one or more of the stabilisation powers pursuant to Part 1 of the Banking Act 2009 and/or has instituted against it a bank insolvency proceeding pursuant to Part 2 of the Banking Act 2009 or a bank administration proceeding pursuant to Part 3 of the Banking Act 2009;

g) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger);

h) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets (other than, for so long as it is required by law or regulation not to be publicly disclosed, any such appointment which is to be made, or is made, by a person or entity described in paragraph (d) above);

i) has a secured party take possession of all or substantially all its assets or has an execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within thirty (30) Working Days thereafter;

j) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in paragraphs a) to i) above; or

k) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts

Intra Group Reorganisation means a Change of Control as a result of an intragroup reorganisation of the direct or indirect shareholders of the Tenant which has been intimated in writing to the Landlord;

Insured Risks means fire lightning explosion earthquake aircraft and other aerial devices dropped from them riot civil commotion storm impact by vessels subsidence landslip heave malicious damage terrorism and mechanical breakdown and such other risks as the Tenant may insure against and such other risks as the Landlord may reasonably require the Tenant to insure against;

Legal Obligation means an obligation imposed by or under or a requirement of any of the following (in so far as it relates to the Site or to their occupation or use or to the Tenant's Works or to the exercise of the Rights or to any substance or article upon in under or over the Site but irrespective of the person on whom such obligation is imposed or such requirement is made):

(a) any present or future international convention or other international obligation or present or future legislation (whether an Act of Parliament European Union legislation or otherwise); or

(b) any statutory instrument by law regulation direction order requirement notice plan code of practice or guidance note made under or pursuant to any of the matters referred to in clause (a) or by any Authority; or

(c) any of the matters referred to in Schedule Part 1; or

(d) any condition of a Necessary Consent;

Necessary Consents means:

(a) all consents licences permissions orders exemptions and approvals required from any Authority (and shall include for the avoidance of doubt all assessments which may be required to be undertaken before the issue of any of the foregoing); and

(b) those matters specified to be Necessary Consents in Schedule Part 3.

Net Assets means the fixed and current assets less the aggregate of the liabilities of the relevant entity based on financial statements prepared in accordance with the appropriate accounting policies and practices and as evidenced by its latest externally audited accounts;

Non-Statutory Decommissioning Programme means a programme for decommissioning activities for the removal of any equipment to be installed by the Tenant during the term of any Lease on Scottish Crown Estate Property and the restoration of any seabed and/or foreshore which does not fall within any Statutory Decommissioning Programme

OFGEM means the Office of the Gas and Electricity Markets Authority in the United Kingdom (or its successor Authority);

OFTO means:

(a) the offshore transmission system owner appointed and licensed by OFGEM to acquire or (as the case may be) install and own the Supply Cables forming part of the offshore electricity transmission system; or

(b) the Tenant where it has elected (in accordance with the relevant regulations and/or OFGEM guidance or policy) to install the Supply Cables forming part of the offshore electricity transmission system and it has notified the Landlord of such election.

[OFTO Works means the [Substation and ancillary structures equipment and Conduits (excluding Generator Cables) within the Substation Site] and] [●] Supply Cable(s) within the Designated Area together with any ancillary works owned and operated by the OFTO ***– note: to be adjusted to reflect requirements***]

Oil and Gas Works means any pipelines platforms wellheads or other works for the exploration for or exploitation of oil and gas in respect of which the consents of the Secretary of State required under a licence issued pursuant to the Petroleum Act 1998 have been given;

Option Agreement means the option agreement dated [ ] made between the Landlord and the OFTO;

Plan means the plan attached to this Lease in Schedule Part 8;

~~Renewable~~ Exclusive Economic ~~Energy~~ **Zone** means an area designated by an Order in Council made pursuant to Section ~~84~~41(~~4~~3) ~~Energy~~ Marine & Coastal Access Act ~~2004~~ 2009 within which the rights to which Section ~~84~~ 41 ~~Energy~~ Marine & Coastal Access Act 200~~4~~9 applies are exercisable, including any modification to the boundaries of that area as may from time to time be made by legislation or as may from time to time otherwise arise;

Rent means either (i) the Output Rent ascertained and payable as provided in Part 4 of the Schedule or (ii) from the Review Date, the Revenue Rent in the event of the Landlord so electing in terms of paragraph 7 of Part 4 of the Schedule;

E~~R~~EZ Site means that part of the bed of the sea within the Site which from time to time lies within an ~~Renewable Energy~~Exclusive Economic Zone and references to the ~~REZ~~ EEZ Site include reference to any part of it which accommodate the Tenant's Works and Generator Cables together with any supporting structures or platforms for any supply transmission equipment;

Rights means the rights set out in Part 1 of the Schedule;

Scottish Crown Estate Property means any interest in land to which section 90B(5) of the Scotland Act 1998 applies;

Security Document means a guarantee or other form of credit support provided by the Tenant in a form as determined by the Landlord acting reasonably which may take the form of:

(i) a guarantee from a guarantor, or guarantors, with an Acceptable Covenant; and/or

(ii) a letter of credit or bond from a bank, financial institution or other organisation with an Acceptable Covenant;

and reference to Security Document shall include any permitted substitute security for the Tenant's obligations under this Lease;

Security Provider means a guarantor or any other bank, financial institution or other organisation with an Acceptable Covenant, providing security under any Security Document;

[Substation means the substation from time to time on the Substation Site;]

Site means the area shown for identification shaded pink on the Plan and more particularly described in the attached co-ordinates contained in Schedule Part 9 accommodating the Specified Works and references to the Site include reference to any part of it [but excluding for the avoidance of doubt the Sub-station Site ***– note: include only if lease and OFTO lease granted simultaneously***];

Specification means the specification prepared by the Tenant of the Tenant's Works attached to this Lease in Schedule Part 10;

Specified Works means *inter alia* [ ] Turbines together having a projected annual output of [ ] megawatt hours, scour protection material, energy storage equipment, substations and supporting structures and platforms, anemometry equipment, sub-structures, Generator Cables and Conduits within the Site (but excluding the Supply Cable(s)), the Specified Works being more particularly described in the Specification;

Statement of Commitment means a statement in the form contained in Schedule Part 8 (*Statement of Commitment*);

Statutory Decommissioning Programme means a decommissioning programme applicable to the Tenant's Works approved by the Secretary of State under the Energy Act 2004 including any modifications or conditions which the Secretary of State may from time to time specify;

[**Substation Site** means the part of the bed of the sea shown coloured [ ] on the Plan and references to the Substation Site includes references to any part of it]

Supply Cables means Conduits, substations and ancillary equipment owned by the OFTO for the passage or transmission of electricity generated by the Tenant's Works or otherwise required for the operation of the Tenant's Works (but excluding the Generator Cables);

Tenant where the context admits includes the Tenant's successors in title as tenant under this Lease;

Tenant's Works means the Specified Works, all renewals or replacements of them and all alterations or additions to them;

Term means a term of sixty (60) years commencing on (and including) the Commencement Date;

Termination of the Term means Termination of the Term of this Lease by expiry re-entry notice surrender or otherwise;

Territorial Limit means the seaward limit from time to time of the territorial seas adjacent to Great Britain;

Terrorism Estimated Maximum Loss means the estimated maximum loss arising from the worst-case terrorist scenario that could be expected to affect the Tenant's Works as determined in accordance with Part 5 of the Schedule;

Turbine means a wind turbine generator including (without limitation) foundations and/or other method of attachment to the seabed, tower and blades.

VAT means value added tax or other similar tax and unless otherwise expressly stated all Rent and other sums payable by the Tenant under this Lease are exclusive of any VAT charged or chargeable and the Tenant shall pay such VAT in addition to and at the same time as the sum in question;

Working Day means any day except Saturday Sunday and bank or other public holidays in Scotland and England;

Works Completion Date means the date on which occurs the satisfactory completion of such procedures and tests as from time to time constitute usual industry standards and practices to demonstrate that the whole of the Tenant's Works are capable of commercial operation.

1.2 The expression "alteration" when used in respect of the Tenant's Works includes (without limitation) removal of the Tenant's Works or any part of them.

1.3 The expression "decommission" when used in respect of the Tenant's Works has the meaning given in section 104 Energy Act 2004.

1.4 Words importing one gender include other genders.

1.5 Words importing the singular include the plural and vice versa.

1.6 References to persons include bodies corporate and vice versa.

1.7 Obligations of a party comprising more than one person are obligations of such persons jointly and severally.

1.8 Undertakings by the Landlord or implied on behalf of the Landlord are with effect from the date on which the Site ceases to form part of Scottish Crown Estate Property such undertakings shall be deemed to be made by the person from time to time who owns the Site and all liability on the part of Her Majesty and Her Successors or the Landlord in respect of any such undertakings shall cease as from such date.

1.9 An undertaking or obligation of the Landlord is made separately with Her Majesty and Her Successors and the Landlord and any person charged with the management of Scottish Crown Estate Property and the person from time to time that owns the Site.

1.10 An undertaking by the Tenant not to do something shall be construed as including an undertaking not to permit or knowingly to suffer it to be done by any other person.

1.11 A consent or approval to be given by the Landlord is not effective for the purposes of this Lease unless it is in writing and signed by or on behalf of the Landlord.

1.12 Reference to a statute directive or regulation includes any amendment modification extension consolidation or re-enactment of it and reference to any statute or directive includes any statutory instrument regulation or order made under it for the time being in force.

1.13 References to numbered clauses and schedules are references to the relevant clause or schedule to this Lease and references in any schedule to numbered paragraphs are references to the numbered paragraphs of that schedule.

1.14 The clause headings do not affect the construction of this Lease.

2 Demise

2.1 In consideration of the Tenant paying the Rent in accordance with the provisions of Part 4 of the Schedule the Landlord hereby grants and the Tenant accepts this Lease of the Site ***[Note: If the site is wholly within the REZ Site then only Rights are granted]*** and the grant of the Rights from the Commencement Date for the Term

2.2 EXCEPT AND RESERVING the matters set out in Part 2 of the Schedule.

2.3 TO HOLD the Rights to the Tenant for the Term.

2.4 SUBJECT TO:

2.4.1 the public rights of navigation and fishing;

2.4.2 the matters referred to in Part 3 of the Schedule;

2.4.3 the rights of states or their nationals under rules of international law; and

2.4.4 all other rights, servitudes, easements, wayleaves and quasi easements, licences, exercisable over the Site.

2.5 This Lease is warranted by the Landlord from fact and deed only and the Tenant will have no claim against the Landlord or Her Majesty in respect of any loss or damage caused by the exercise of any of the rights hereby reserved and the Landlord does not warrant that the Rights and the Site may lawfully be used or are otherwise suitable for any purpose authorised under this Lease.

3 Tenant's Obligations

The Tenant undertakes to the Landlord to observe and perform the obligations in this clause 3.

3.1 **Rent and other payments**

3.1.1 To pay the Rent in accordance with the terms of this Lease without deduction or set off (so long as the Site forms part of the Scottish Crown Estate) to the Landlord by electronic transfer to any account nominated by the Landlord and notified to the Tenant.

3.1.2 To observe and perform such of the provisions contained in Schedule Part 4 as are expressed as obligations on the Tenant's part.

3.1.3 If any Rent or other sum becoming payable under this Lease by the Tenant to the Landlord remains unpaid for more than twenty one (21) days after becoming due (whether formally demanded or not) then the Tenant shall (if required but without prejudice to the Landlord's right of termination or any other right or remedy of the Landlord) as from the date on which it becomes due until the date of actual payment pay interest on it (as well after as before any judgement) at the rate of three per cent (3%) per annum above the base lending rate from time to time of the Royal Bank of Scotland plc (or such other bank as the Landlord nominates from time to time) or if such base rates cease to be published at any time such other comparable rate of interest as the Landlord designates and the interest shall be deemed to be part of the Rent and recoverable in like manner as rent in arrears but shall not itself bear interest.

3.1.4 To pay all existing and future rates taxes assessments impositions duties charges and outgoings whatsoever payable whether by the owner or occupier in respect of the Tenant's Works or the exercise of the Rights except for taxes (other than VAT) payable by the Landlord on the receipt of the Rent or on any dealing with the Landlord's heritable interest as proprietor of the subjects of this Lease.

3.1.5 To pay and indemnify the Landlord against:

(a) all VAT which is chargeable on the Rent or any other sum payable by the Tenant under this Lease upon receipt of a valid VAT invoice addressed to the Tenant; and

(b) all VAT incurred in relation to any costs or expenses which the Tenant is obliged to pay or in respect of which it is required to indemnify the Landlord under the terms of this Lease save where such VAT is recoverable or available for set off by the Landlord as input tax.

3.2 **Installation of Specified Works**

3.2.1 To use reasonable endeavours to procure that the Specified Works are designed using the reasonable skill care and diligence expected of appropriate professional designers experienced in designing projects of a similar size scope and complexity having due regard to the industry's knowledge and standards at the time of design and installation of the Specified Works.

3.2.2 To give to the Landlord at least seven (7) days prior written notice of the Implementation Date.

3.2.3 To obtain each Necessary Consent required for the installation and operation of the Specified Works as soon as it is required and to give all notices required to be given in connection with it.

3.2.4 To ensure that the Works Completion Date occurs by the sixth (6th) anniversary of the Commencement Date notwithstanding any event of Force Majeure.

3.2.5 To provide the Landlord, within fifteen (15) Working Days of receipt by the Tenant, with copies of the results of any tests carried out by or on behalf of the Tenant, its contractors and any OFTO that confirms that the Tenant's Works have been constructed satisfactorily in accordance with the Necessary Consents and the Specification.

3.2.6 In the event that any test carried out by the Tenant pursuant to clause 3.2.4 evidences that the Tenant's Works are not in accordance with the Necessary Consents and the Specification or are substandard or defective, the Tenant shall at its sole cost comply with the reasonable recommendations of the Landlord to remedy such defects or to ensure that the Tenant's Works comply with the Specification.

3.2.7 To notify the Landlord in writing immediately the Works Completion Date occurs and to provide the Landlord with such evidence as the Landlord may reasonably require to prove it occurred on the date notified.

3.2.8 As soon as reasonably practicable to provide to the Landlord a copy of any notice which must be given by any Authority before the operation of the Specified Works may lawfully commence and not to commence the operation of the Specified Works before such notice is given.

3.2.9 To provide to the Landlord from time to time on reasonable written request details of the consultants and contractors engaged by the Tenant and the principal suppliers of goods and services to the Tenant and the principal sub-contractors having design responsibility in connection with the Specified Works.

3.2.10 To provide to the Landlord as soon as reasonably practicable after the Works Completion Date plans and co-ordinates showing the location of the Specified Works as installed.

3.3 **Alterations**

3.3.1 Not to construct install erect fix or place on in over or under the Site any building erection structure works Conduit or materials except:

(a) the Specified Works;

(b) any renewal or replacement of the Specified Works (in materially the same form and layout); and

(c) any alteration or addition to the Tenant's Works in accordance with clause 3.3.2.

3.3.2 Not to make any alteration or addition to the Tenant's Works unless:

(a) the alteration/addition comprises the alteration or addition of Turbines and ancillary equipment structures and Conduits within the Site;

(b) the Tenant has obtained all Necessary Consents for the alteration/addition;

(c) the alteration/addition will not result in a reduction in the output capacity of the Tenant's Works below that stated in the definition of Specified Works other than:

(i) a temporary and unavoidable reduction while the alteration/addition is carried out;

(ii) a reduction (either temporary or permanent) in order to comply with a Legal Obligation or a proper health and safety requirement which cannot otherwise reasonably be complied with; or

(iii) the removal of Tenant's Works in respect of which clause 3.6.3 applies;

(d) the Tenant has submitted to the Landlord detailed plans and specifications showing the proposed alteration/addition; and

(e) the Tenant has obtained the Landlord's consent to carry out the alteration/addition (such consent not to be unreasonably withheld or delayed).

3.3.3 To comply with the provisions of clauses 3.2.1, 3.2.3, 3.2.4, 3.2.8 and 3.2.10 (mutatis mutandis) in respect of any renewal or replacement of the Specified Works or any alteration or addition to the Tenant's Works in so far as applicable.

3.3.4 Not to place affix or display any sign advertisement notice flag poster or other notification whatsoever within the Site except for such warning or other notices relating to the operation or use of the Tenant's Works as may either be required under any Legal Obligation or may be approved by the Landlord (such approval not to be unreasonably withheld or delayed).

3.4 **CDM Regulations**

3.4.1 The Tenant warrants that it has the competence to perform the duties imposed on a client by the CDM Regulations.

3.4.2 To comply with the provisions of the CDM Regulations in respect of the Tenant's Works including without limitation all requirements relating to the provision and maintenance of a health and safety file and to provide on request to the Landlord a copy of the health and safety file and any documents within it.

3.4.3 To supply all information to the Landlord that the Landlord reasonably requires to comply with the Landlord's obligations (if any) under the CDM Regulations.

3.4.4 Prior to commencing any Tenant's Works to confirm in writing to the Landlord who is to be the client for the purposes of the CDM Regulations in respect of those Tenant's Works which the parties agree, for the avoidance of doubt, shall not be the Landlord.

3.5 **Seabed Provisions**

3.5.1 Not to dig extract or remove any sand stone beach shingle or other minerals or mineral substances from the Site except in so far as is reasonably necessary for the installation of the Specified Works permitted under this Lease and the exercise of the Rights.

3.5.2 Not to cause waste spoil or destruction on the Site except in so far as is reasonably necessary for the installation of the Specified Works permitted under this Lease and the exercise of the Rights.

3.5.3 As soon as reasonably practicable following any disturbance of the seabed within the Site in the installation of the Specified Works permitted under this Lease or the exercise of the Rights to restore the same to a safe and (allowing for the presence of the Specified Works) proper condition and in accordance with all Legal Obligations.

3.5.4 Not to damage or interfere with the Supply Cables and Conduits referred to in Schedule Part 2.

3.6 **Repair**

3.6.1 To keep the Site and the Tenant's Works in good and safe repair and condition.

3.6.2 To keep the Tenant's Works properly maintained and in good working order.

3.6.3 The Tenant shall not be liable to comply with clauses 3.6.1 and 3.6.2 in respect of any part of the Tenant's Works which has broken down or been damaged to the extent that and for as long as it remains the case that it would not be economic in the reasonable opinion of a prudent operator of a project of similar size scope and complexity to the Tenant's Works to replace or repair the part of the Tenant's Works which is broken down or damaged taking into account the remainder of the design life of that part of the Tenant's Works, the unexpired residue of the Term and any notice given by the Tenant under clause 6 **Provided That**:

(a) the Tenant shall not be relieved from liability by this clause 3.6.3 to the extent that the breakdown or damage is a consequence of any failure by the Tenant to comply with its obligations under this clause 3.6 prior to the date of breakdown or damage; and

(b) the Tenant shall remain liable to keep any part of the Tenant's Works to which this clause 3.6.3 applies in safe repair and condition.

3.7 **Legal Obligations**

3.7.1 At the Tenant's own expense to observe and comply with all Legal Obligations and not to do or omit to do in relation to the Tenant's Works or the exercise of the Rights anything by reason of which the Landlord may incur any liability under a Legal Obligation whether for penalties damages compensation costs or otherwise.

3.7.2 To do all works and things and to bear and pay all expenses required or imposed by any Legal Obligation and to use all reasonable endeavours to obtain all Necessary Consents required from time to time in order to install or operate the Tenant's Works.

3.7.3 If the Tenant receives from an Authority formal notice of a Legal Obligation forthwith to produce a copy to the Landlord and if such Legal Obligation is in the Landlord's reasonable opinion contrary to the Landlord's interests (but without prejudice to the requirements of clause 3.7.1 and 3.7.2) to make such objection representation or appeal against such Legal Obligation as the Landlord reasonably requires but at the Landlord's cost (except where such notice arises from the act neglect or default of the Tenant in which event any objection representation or appeal shall be made at the Tenant's cost).

3.7.4 Not to do or omit to do anything which may cause any Necessary Consent which has been obtained for the installation or operation of the Tenant's Works to be modified or revoked without the consent of the Landlord (which shall not be unreasonably withheld or delayed).

3.7.5 Following the Termination of the Term (unless a new lease is granted to the Tenant) the Tenant shall at any time if so required by the Landlord use reasonable endeavours (subject to reimbursement of the Tenant's reasonable and proper costs of doing so) to procure that any Necessary Consent for the installation and operation of the Tenant's Works (which does not automatically enure for the benefit of the Site) is transferred (in so far as it is transferable) to or is reissued or amended to be in favour of any person to whom a lease or option agreement is granted by the Landlord in respect of the Site.

3.7.6 Clauses 3.7.4 and 3.7.5 shall remain in full force and effect notwithstanding the Termination of the Term.

3.8 **Use and Operation**

3.8.1 After the Works Completion Date to keep the Tenant's Works in operation for the purpose of generating electricity at all times during the Term except:

(a) insofar as the Tenant is prevented from doing so by an event or circumstance which is beyond its reasonable control including (without limitation) unsuitable weather conditions and safety reasons;

(b) to the extent that temporary cessation of operation is necessary to carry out any inspection testing maintenance alteration repair enhancement or renewal of the Tenant's Works in accordance with the terms of this Lease;

(c) in respect of any part of the Tenant's Works to which clause 3.6.3 applies;

(d) to the extent and for such time only as National Grid - Electricity System Operator (or any successor organisation) requests the Tenant to cease or constrain the generation of electricity by the Tenant's Works; or

(e) during the period reasonably required by the Tenant to decommission the Tenant's Works immediately prior to Termination of the Term;

Provided That in the circumstances set out in clauses 3.8.1(a) and (b) the Tenant shall use all reasonable endeavours to bring the Tenant's Works back into operation as soon as reasonably possible

3.8.2 Not to use the Site or exercise the Rights for any purpose except the installation of the Tenant's Works permitted under this Lease and the generation and storage of electricity by the Tenant's Works.

3.8.3 Not to do any act or allow any substance or article to remain on in under or over the Site or to exercise the Rights in a manner which:

(a) may be or become or cause a danger nuisance (other than a nuisance which is not actionable by reason of statutory authorisation) damage or injury to the Landlord or any other person or premises; or

(b) may cause pollution or harm to the environment or human health (except in so far as such pollution or harm is lawful by reason of the Necessary Consents for the purpose).

3.9 **Diversion**

To observe and perform the Tenant's obligations in respect of any diversion of any Generator Cables required under paragraphs 3 and 4 of Schedule Part 2.

3.10 **Alienation**

3.10.1 Not to assign or grant a charge over the whole or part of the Tenant's interest in the Lease and not to sublet part with or share the possession of or grant any licence in respect of the whole or part of the Tenant's interest in the Lease nor hold the Lease on trust for any other person;

3.10.2 Not to assign the whole of the Tenant's interest in the Lease without the consent of the Landlord such consent not to be unreasonably withheld or delayed provided that:

(a) the Landlord shall not be regarded as unreasonably withholding its consent if it withholds it on the ground of any of the circumstances set out in clause 3.10.4; and

(b) the Landlord shall not be regarded as giving its consent subject to unreasonable conditions if it gives its consent subject to any of the conditions set out in clause 3.10.5.

3.10.3 The provisos in clause 3.10.2 (a) and (b) shall operate without prejudice to the entitlement of the Landlord to withhold its consent on any other ground or grounds where such withholding of consent would not be unreasonable or to impose any further or subsequent condition or conditions upon the grant of consent where the imposition of such condition or conditions would not be unreasonable

3.10.4 The circumstances referred to in clause 3.10.2(a) are:

(a) where in the reasonable opinion of the Landlord the proposed assignee is not of sufficient financial standing to enable it to comply with the Tenant's obligations under this Lease and a valid Security Document is not agreed to be provided to the Landlord from an agreed Security Provider; and

(b) the proposed assignee is not resident in the United Kingdom or in a jurisdiction where reciprocal enforcement of judgements exists.

3.10.5 The conditions referred to in clause 3.10.2(b) are:

(a) that prior to the assignation the Tenant pays all arrears of Rent and other sums made payable under this Lease;

(b) that the proposed assignee executes and delivers an undertaking to the Landlord in such form as the Landlord may reasonably require to pay the Rent and observe and perform the covenants and the other provisions of this Lease to be observed and performed by the Tenant;

(c) that, where the proposed assignee is not incorporated in the United Kingdom, the proposed assignee procures a legal opinion letter from a firm of solicitors in the relevant jurisdiction addressed to and approved by the Landlord (acting reasonably) and provides to the Landlord an irrevocable address for service in the United Kingdom for notices under this Lease and proceedings with solicitors or other agents approved by the Landlord (acting reasonably);

(d) that all Necessary Consents for the installation and operation of the Tenant's Works are transferred or granted to the proposed assignee on or before the completion of the proposed assignation; and

(e) where the Landlord requires, the provision of a suitable Security Document.

3.10.6 Not to grant a charge over the whole of the Tenant's interest in this Lease without the consent of the Landlord such consent not to be unreasonably withheld provided that the consent of the Landlord shall not be required for a charge over the whole of the Tenant's interest in the Rights in favour of a reputable bank or other reputable and substantial financial institution provided that any chargee exercising a power of sale (or otherwise dealing with the Rights) shall be subject to the same terms and conditions relating to underletting or assignation as are set out in this clause 3.10.

3.10.7 Within one (1) month from their respective dates to send to the Landlord copies of all assignations of the Tenant's interest in the Lease, orders of court and other instruments affecting the devolution of this Lease or the Term and charges over it.

3.10.8 Any Change of Control (other than an Intra Group Reorganisation which has been notified to the Landlord in writing) of the Tenant is prohibited without the Landlord's prior written consent which shall not be unreasonably withheld or delayed. In deciding whether or not to grant their consent the Landlord shall have regard to the following factors (considered individually and collectively):

(a) the impact of the Change of Control on the ability of the Tenant to timeously and safely progress the Development and the ability of the Tenant to comply with its obligations under this Lease in a timely and safe manner;

(b) the selection process and factors taken into account by the Landlord in deciding to award the Option Agreement to the Tenant, including any special factors attributable to any shareholder whose ownership share of the Tenant will be reduced as a result of the Change of Control;

(c) the impact of the Change of Control on the financial resources available to the Tenant to enable it to perform its obligations under this Lease;

(d) whether the Change of Control would have an adverse effect on the capacity of the Tenant or otherwise available to the Tenant to enable it to perform its obligations under this Lease;

(e) whether the Change of Control would have an adverse effect on the experience and capability of the Tenant or otherwise available to the Tenant to enable it to perform its obligations under this Lease;

(f) whether the Tenant is in breach of its obligations under this Lease or any ancillary documents thereto;

(g) that the entity taking on Control has delivered a Statement of Commitment to the Landlord validly signed by an officer of the relevant entity; and

(h) such other material factors (not specified above) that may reasonably appear to the Landlord or are identified by the Tenant to be relevant at the time which may positively or negatively impact on the Landlord's assessment as to whether or not to grant consent to the Change of Control.

3.10.9 The Tenant may (but without prejudice to the other provisions of this Lease), permit any OFTO to carry out activities on the Site in connection with the transmission of electricity by the OFTO Works and the interface of the OFTO Works and the Tenant's Works including, without limitation, any of the following activities for those purposes:

(a) installing, using, commissioning, maintaining, inspecting, accessing, removing, operating, modifying, altering, repairing and decommissioning equipment comprising part of the OFTO Works on the Site; and

(b) providing services to the OFTO

but that subject to any such activities being carried out in accordance with the terms of the relevant interface agreement between the Tenant and the OFTO and no relationship of landlord and tenant being created or allowed to arise.

3.10A **Under-letting of parts for the purposes of Aquaculture**

1. Notwithstanding any other provision of this Lease including (but not limited to) clauses 3.8 and 3.10, this clause 3.10A shall have effect.

2. The Tenant may underlet part or parts of the Site for the purposes of Aquaculture in accordance with this clause 3.10A and with the consent of the Landlord (such consent not to be unreasonably withheld or delayed).

3. In the exercise of its consenting powers pursuant to clause 3.10A.2, the Landlord shall have regard to relevant policy measures promoting and otherwise dealing with co-existence and co-location as they apply to offshore windfarms.

4. The Tenant must not underlet part of the Site at a fine or premium.

5. In relation to any underlease granted by the Tenant, the Tenant must:

   a. not vary the terms of the underlease nor accept a surrender of the underlease without the consent of the Landlord (such consent not to be unreasonably withheld or delayed); and

   b. enforce the tenant covenants in the underlease and not waive any of them.

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3.11 **Indemnity**

3.11.1 To indemnify and keep the Landlord indemnified against all actions proceedings claims and demands brought or made and all proper costs and expenses (including reasonable legal fees and expenses) and all losses damages and liabilities incurred suffered or arising directly or indirectly in respect of or otherwise in connection with:

(a) the grant of this Lease

(b) the exercise or purported exercise of the Rights;

(c) the installation existence or use of the Tenant's Works;

(d) the state of repair and condition of the Site and the Tenant's Works;

(e) any act neglect or default of the Tenant or anyone deriving title through or under the Tenant or anyone exercising the Rights with the express or implied authority of such persons;

(f) any breach of any covenant or other provision of this Lease to be observed and performed by the Tenant; or

(g) any Tenant's Works remaining on in or under the Site and/or the Cable Corridor after the Termination of the Term (whether or not in breach of clause 3.16 and whether or not the Tenant has been negligent) including (without limitation) any removal or disposal of those Tenant's Works pursuant to clause 10.3.2.

3.11.2 The following provisions apply to clause 3.11.1:

(a) clause 3.11.1 shall not apply to the extent that any such actions proceedings claims and demands are brought or made or any losses damages costs expenses and liabilities are incurred or suffered as a consequence of the breach by the Landlord of its obligations under this Lease or the negligence of the Landlord or its servants agents and contractors;

(b) the Landlord shall take reasonable steps to mitigate its losses in respect of which it claims an indemnity under clause 3.11.1;

(c) the Landlord shall not make any admission of liability nor compromise or settle any actions proceedings claims and demands in respect of which it claims an indemnity under clause 3.11.1 without first notifying the Tenant and having due regard to the Tenant's timely representations;

(d) the Tenant may with the consent of the Landlord (which shall not be unreasonably withheld) conduct on the Landlord's behalf any proceedings in respect of which the Landlord claims an indemnity under clause 3.11.1 in which case:

(i) the Tenant shall give full indemnity and security to the Landlord in relation to all costs expenses damages and liabilities incurred suffered or arising from such proceedings; and

(ii) the Tenant shall act so as to minimise any liability or other adverse effects on the Landlord;

(e) clause 3.11.1 shall remain in full force and effect notwithstanding the Termination of the Term; and

(f) the Landlord shall not be entitled under clause 3.11.1 to an indemnity in respect of the Landlord's loss of use loss of contracts and/or any other indirect loss of the Landlord but this limitation shall not apply to any other person's losses and shall not limit any other right or remedy of the Landlord apart from clause 3.11.1.

3.11.3 Notwithstanding the other terms of this Lease, the Tenant's liability to the Landlord but only in respect of actions, proceedings, claims and demands brought or made and all proper costs or expenses and all losses, damages and liabilities incurred suffered or arising directly or indirectly as referred to in clause 3.11.1 (a) to (f) shall not exceed the sum of [ ] POUNDS (£[ ]) Sterling (as indexed annually), in aggregate, exclusive of all if any VAT which shall be payable in addition if applicable but declaring that the Tenant's liability to the Landlord shall not be limited in any way in respect of:

(a) death or personal injury caused by the Tenant's negligence or that of its directors, officers, employees, advisors, agents, consultants or contractors (including sub-contractors); and

(b) Fraud or fraudulent misrepresentation by the Tenant or its officers or employees; and

(c) any liability which cannot be excluded or limited by any laws and regulations.

3.11.4 Clauses 3.11.1 and 3.11.2 shall remain in full force and effect notwithstanding the Termination of the Term for a period of 5 years after the Termination of the Term.

3.12 **Costs**

3.12.1 To pay and indemnify the Landlord against all proper (and in the case of clause 3.11.1(a) reasonable) fees charges disbursements costs and expenses connected with incidental to consequent upon and (where appropriate) in proper contemplation of:

(a) an application for the Landlord's consent (whether or not the consent is given or the application is withdrawn) unless such consent is unlawfully withheld or is subject to an unlawful qualification or condition because it is unreasonable or otherwise;

(b) the inspection of the Site in accordance with paragraph 1.3 of Schedule Part 2 (where such inspection reveals a breach of the Tenant's covenants in this Lease) and the superintendence of any works required to remedy any breach of the Tenant's obligations under this Lease;

(c) the recovery of arrears of Rent or other sums payable under this Lease; or

(d) the enforcement of any obligation of the Tenant under this Lease.

3.12.2 Clause 3.12.1 shall remain in full force and effect notwithstanding the Termination of the Term.

3.13 **Insurance**

3.13.1 To effect and maintain the following insurances:

(a) insurance of the Tenant's Works against destruction or damage by the Insured Risks in a sum equal to or in excess of the Estimated Maximum Loss (as Indexed) and Terrorism Estimated Maximum Loss (as Indexed) in accordance with normal insurance practice for offshore wind farms from time to time, approved by the Landlord (acting reasonably); and

(b) third party and public liability insurance in respect of the Tenant's Works and the exercise of the Rights in the sum of £25,000,000, or in such other sum as the Landlord may from time to time reasonably require, in respect of each and every occurrence (except for pollution and product cover which may be on an annual aggregate basis if unavailable on an each and every occurrence basis), on terms in accordance with normal insurance practice for offshore wind farms from time to time.

3.13.2 The insurances required by clause 3.13.1 shall:

(a) be with an insurer holding a credit rating of at least A- with Standard & Poor's Rating Group (or an equivalent credit rating from another internationally recognised credit rating agency):

(b) name the Landlord as co-insured;

(c) contain waiver of subrogation, separate policy provision and non-vitiation endorsements in a form acceptable to the Landlord (acting reasonably); and

(d) be on terms in accordance with normal insurance practice for offshore wind farms from time to time (including the level of any deductible) approved by the Landlord (acting reasonably).

3.13.3 The Tenant shall not be obliged to insure under clause 3.13.1(a) if and to the extent that such insurance is not available in the European insurance market on commercially reasonable terms or is only available at uneconomic rates.

3.13.4 To produce to the Landlord upon request from time to time (but no more frequently than once every twelve (12) months) a copy of or full details of each policy of insurance and evidence that each policy is in force.

3.13.5 Except to the extent clause 3.6.3 applies, if the Tenant's Works or any part of them are damaged or destroyed by an Insured Risk to apply for and use reasonable endeavours to obtain all Necessary Consents to reinstate the Tenant's Works and as soon as reasonably practicable after they are obtained to apply the insurance monies received under the policy of insurance in reinstating the Tenant's Works with all reasonable speed making up any shortfall out of its own resources.

3.13.6 To pay to the Landlord the premium and other costs which the Landlord may incur in effecting and maintaining any insurance which the Tenant fails to effect or maintain in accordance with the provisions of this clause 3.13.

3.13.7 To observe and perform the terms of any insurance policy effected pursuant to this clause 3.13 and all requirements from time to time of the insurers and not to do or fail to do anything which shall or may cause any such policy to be void or voidable or any monies payable under it to be irrecoverable.

3.14 **Health and Safety Reporting**

3.14.1 In this clause 3.14 the following expressions shall have the following meanings:

Health and Safety Incident means any incident which is reportable under this Lease at clause 3.14.2;

Health and Safety Requirements means all applicable health and safety obligations of the Tenant deriving from Legal Obligations and this Lease.

HSI Notification means the form of notification set out at Schedule Part 6 to this Lease.

RIDDOR Reportable Incident means a Health and Safety Incident giving rise to reporting requirement under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013;

Serious Incident means any fatal RIDDOR Reportable Incident or Health and Safety Incident which involves serious threat to life, harm or damage to the environment or property including but not limited to vessel collisions, structural collapses, explosions or fires, releases of flammable liquids and gases, hazardous escapes of substances.

Incident Reporting

3.14.2 The Tenant shall notify the Landlord of the following incidents occurring at the Site using the HSI Notification as follows:

(a) in relation to a non-fatal RIDDOR Reportable Incident within one (1) month; and

(b) in relation to a Serious Incident as soon as reasonably practicable and, in any event, within forty-eight (48) hours.

3.14.3 The Tenant shall co-operate with the Landlord's reasonable written requests for information relating to any Health and Safety Incident at any time, save that the Tenant shall in no event be required to disclose any documentation or other information which is subject to legal privilege.

3.14.4 In the event of a Serious Incident occurring:

(a) the Tenant must comply with its reporting obligations pursuant to Clause 3.14.2(b);

(b) the Tenant shall notify the Landlord in the event that it proposes to release a press/public statement in connection with the same and shall provide a copy to the Landlord for information or in the event that it is not practicable to notify the Landlord in advance the Tenant shall notify the Landlord as soon as reasonably practicable following release of the press/public statement;

(c) the Landlord shall notify the Tenant in the event that it wishes to release a press/public statement in connection with the same and shall provide a draft copy in advance of release to the Tenant for review and approval and the Landlord shall not be entitled to so release a press/public statement without the prior written approval of the Tenant (not to be unreasonably withheld or delayed) save where the Landlord considers acting reasonably and in good faith, that a press/public statement urgently requires to be made and that the approval of the Tenant may not be obtained timeously.

3.15 **Encroachments**

To use reasonable endeavours to prevent all encroachments and unlawful acts on the Site which may prejudice the Landlord's title to them and if any claim is made to the Premises or to any right profit or easement in or out of or affecting them forthwith to give notice of it to the Landlord and not to admit or acknowledge it in any way whatsoever**.**

3.16 **Decommissioning**

3.16.1 Prior to the Termination of the Term:

(a) to decommission the Tenant's Works and to restore the Site in accordance with the Statutory Decommissioning Programme; and

(b) if and to the extent that the Statutory Decommissioning Programme does not apply to any element of the Tenant's Works, to remove those Tenant's Works (unless the Landlord agrees otherwise in writing) in accordance with the Non-Statutory Decommissioning Programme

in both cases in accordance with all Legal Obligations;

3.16.2 On the Termination of the Term to deliver up the Site to the Landlord in good and safe order and condition in accordance with the Tenant's covenants in this Lease; and

3.16.3 To comply with the provisions of the Statutory Decommissioning Programme and all other Legal Obligations relating to the Tenant's Works which continue to apply after the Tenant has complied with clause 3.16.1 (including (without limitation) those relating to post decommissioning monitoring maintenance and management of the Site) and this obligation shall continue in full force and effect after the Termination of the Term for as long as any such provision of the Statutory Decommissioning Programme or Legal Obligation continues to apply.

3.17 **Data**

3.17.1 If the Landlord, acting in good faith, considers that it would be beneficial to the development of the offshore wind energy industry in Scotland, the Tenant shall provide the Data to the Landlord.

3.17.2 The Data shall be provided as follows:

(a) in reports provided at such intervals as the Landlord may from time to time reasonably require (but no more frequently than annually) the first report during the Term to contain Data gathered since the Commencement Date and the subsequent reports to contain Data gathered since the previous report;

(b) the Data shall be provided in each report in any format which the Landlord reasonably require from time to time and which:

(i) uses appropriate standards and protocols for data (including metadata) handling and archiving;

(ii) is in digital format which can be transmitted electronically;

(iii) can be entered into geographical information systems; and

(iv) is either geographically or library referenced;

and for the avoidance of doubt the Tenant acknowledges and agrees that it has no interest or right (including copyright and database rights) in any format or database in which Data is put stored or processed whether by the Tenant pursuant to its obligation under this clause 3.17, by the Landlord.

3.17.3 Subject to clause 4.4 the Tenant grants to the Landlord (and shall procure all necessary third party consents to enable it to do so) a perpetual non-exclusive right and licence to use and make publicly available for any purpose or in any manner or form Data provided to them pursuant to this clause 3.17.

3.17.4 This clause 3.17 shall remain in full force and effect notwithstanding the Termination of the Term in respect of Data gathered in connection with monitoring carried out in connection with the Tenant's obligations under clause 3.17.3.

3.18 **Bribery**

The Tenant shall comply and use all reasonable endeavours to ensure that any person employed by or acting on behalf of the Tenant or any of their representatives comply, whether with or without the knowledge of the Tenant, with all the requirements of the Bribery Act 2010 and any form of Guidance issued in respect of the Bribery Act 2010.

3.19 **Disposal Premium**

The Tenant shall pay any Disposal Premium (as defined in the Option Agreement) that falls due after the Commencement Date all in terms of the Option Agreement.

4 Landlord's Obligations

4.1 The Landlord undertakes to the Tenant that the Landlord shall not:

4.1.1 exercise the rights reserved in paragraph 1.2 of Schedule Part 2 to install Conduits other than to an OFTO in respect of the Supply Cables;

4.1.2 carry out or grant any licence or consent for the dredging or removal of minerals within the [Site/REZ Site]; or

4.1.3 install or permit the installation of any wind farm within a distance of five (5) kilometres from the boundary of the Site

without the consent of the Tenant (such consent not to be unreasonably withheld or delayed). [***note: to be discussed if phased projects***]

4.2 Clause 4.1 shall not apply to the exercise of any right granted pursuant to the matters referred to in Schedule Part 3.

4.3 The Landlord undertakes to the Tenant that they will not do or fail to do anything which shall or may cause any policy of insurance maintained under clause 3.13.1(b) to be void or voidable or any monies payable under it to be irrecoverable.

4.4 The Landlord undertakes to the Tenant not to disclose any Data relating to wind resource provided under clause 3.17 to any third party for a period of three (3) years after the date on which that Data was gathered except:

4.4.1 to employees of the Landlord and to government departments agencies or other government bodies and their respective employees;

4.4.2 to national repositories for data provided that any such repository does not publish or distribute the Data in its entirety or only uses the Data in aggregation with other data for the production of charts or for the purposes of research and keeps the source of the Data confidential;

4.4.3 as required by law or parliamentary questions;

4.4.4 where, in the absolute discretion of the Landlord, disclosure is required under the Freedom of Information (Scotland) Act 2002 (**FOISA**), or the Environmental Regulations (Scotland) 2004 (**EIRs**) and the Tenant acknowledges and agrees that the Landlord may, acting in accordance with the codes of practice (**Codes**) issued and revised from time to time under Section 60 of the FOISA and regulation 18 of the EIRs, disclose such data either in certain circumstances as described in the Codes, without consulting the Tenant, or following consultation with the Tenant and taking its views into account in accordance with the Codes;

4.4.5 in so far as already in the public domain through no default of the Landlord; or

4.4.6 as agreed by the Tenant;

and where disclosure is made under clause 4.4.1 or 4.4.2 the Landlord shall notify the person to whom the information is disclosed of the confidentiality of the information and shall take reasonable steps to ensure that such person observes the restrictions on disclosure in this clause 4.4.

4.5 The Landlord covenants with the Tenant that it shall compensate the Tenant for any actual direct loss, costs and expenses (including any liability for loss of income incurred by the Tenant as a result of the Landlord requiring an OFTO to divert any Supply Cables (which at the time of the diversion are actually transmitting electricity generated by the Tenant's Works or otherwise required for the operation of the Tenant's Works) or any part of such Supply Cable (and which loss could not have been reasonably avoided or is not too remote) with the Tenant taking all reasonable and appropriate steps to mitigate against such loss.

4.6 Clause 4.5 shall not apply where the Landlord requires an OFTO to divert any Supply Cables or any part of a Supply Cable which, at the time of the diversion, are not actually transmitting electricity generated by the Tenant's Works nor otherwise required for the operation of the Tenant's Works.

4.7 The Landlord's obligations under this clause 4 shall cease upon Termination of the Term.

5 Termination on default

5.1 The Landlord may at any time after the occurrence of any of the following events exercise any of the rights set out in clause 5.3:

5.1.1 if any Rent remains unpaid twenty-one (21) days after it is due (whether formally demanded or not);

5.1.2 if any undertaking or provision in this Lease which is to be observed or performed by the Tenant is not observed or performed;

5.1.3 if the Works Completion Date has not occurred by the sixth (6th) anniversary of the Commencement Date whether or not the Tenant is in breach of any covenant or provision in this Lease and whether or not there is or has been an event of Force Majeure;

5.1.4 the occurrence of an Insolvency Event in respect of either the Tenant or any Security Provider;

5.1.5 any Disposal Premium (as defined in the Option Agreement) that may become due in terms of the Option Agreement after the Commencement Date remains unpaid twenty- one (21) days after it is due (whether formally demanded or not); or

5.1.6 any Security Document ceases to be valid, binding and enforceable for any reason or, if applicable, the Security Provider ceases to hold an Acceptable Covenant and the Tenant has not procured a replacement Security Document in accordance with clause 8 within thirty (30) Working Days.

5.2 the Tenant, or any person employed by or acting on behalf of the Tenant (whether or not with the Tenant's knowledge), has offered or given or agreed to give to any person any gift or consideration of any kind as an inducement or reward for doing or refraining from doing or for having done or refrained from doing any action in relation to the obtaining or complying with the Tenant's obligations under the Lease or any other contract with the Landlord.

5.3 Subject to the terms of clause 5.4 of the Lease, the Landlord may at any time after the occurrence of the events detailed in Clause 5.1.1 to 5.1.5 bring this Lease to an end on giving written notice to that effect to the Tenant whereupon the Lease shall cease and terminate (but without prejudice to any rights and remedies of the Landlord in respect of any arrears of Rent or any antecedent breach of this Lease and the continuing operation of any provision of this Lease which is expressed to continue to apply or remain in force and effect after or notwithstanding termination of the Lease) but which irritancy is hereby declared to be contractual and not penal and will not be purgeable at the Bar.

5.4 In the case of the occurrences detailed at Clauses 5.1.2 to 5.1.5 the Landlord will not be entitled to terminate the Lease as aforesaid unless it will have first given written notice of the breach to the Tenant and each Security Provider and to every creditor in any then existing standard security or floating charge (so far as the grant of such standard security or floating charge has been notified to the Landlord) affecting the Lease prescribing a time which is reasonable in the circumstances (such circumstances not including the financial position of the Tenant) within which such breach must be remedied and the Tenant (or any such creditor or Security Provider) will have failed to remedy the breach within the time prescribed in the notice and declaring that where the breach is the failure to pay any sum of money, a reasonable time will be a period of not less than fifteen (15) Working Days and that in the case of a breach of clause 5.1.2 will be not less than three (3) months and (b) in the case of the Tenant going into liquidation or suffering an administrative receiver, receiver or an administrator to be appointed the Landlord will allow the liquidator or administrative receiver, receiver or administrator (as the case may be) and any such creditor as aforesaid a period of one year in which to dispose of the Tenant's interest in the Lease and will only be entitled to terminate the Lease if the liquidator or administrative receiver, receiver or administrator or such creditor as the case may be will have failed to dispose of the Tenant's interest at the end of the said period provided always that the liquidator or administrative receiver, receiver or the administrator or such creditor as the case may be will accept in probative writing within one (1) month of the date of appointment or of such creditor's entry into possession of the Site and implement full responsibility for payment of the Rent (whether due in respect of a period occurring before or after the date of liquidation or receivership or administration or entering into possession as the case may be) and for the performance of all other obligations of the Tenant under the Lease from the date of liquidation or receivership or administration or the date of such creditor's entry into possession as the case may be to the date of disposal or termination of the Lease including settlement of any arrears of the

rents and the performance of any outstanding obligations which may subsist at the date of liquidation or receivership or administration or such creditor's entry into possession as the case may be and will if requested by the Landlord find caution for such payment and performance in an amount acceptable to the Landlord. And it is hereby declared that the Landlord will deal with any request for consent to assign the Lease made by such liquidator, administrative receiver, administrator or creditor as the case may be in the same manner as if the request had been made by the Tenant. The provisions relating to a liquidator, administrative receiver or administrator hereinbefore narrated will apply mutatis mutandis to a trustee in sequestration and a trustee under a trust deed for the benefit of creditors if the Tenant is an individual or individuals or a partnership or an unincorporated body.

6 Tenant's Right of Termination

6.1 The Tenant may terminate this Lease after the Works Completion Date and after a Break Event occurs on not less than twelve (12) months and not more than five (5) years written notice given to the Landlord within twelve (12) months after the Break Event occurs and specifying the date on which the Tenant intends this Lease to terminate (**Intended Date of Termination**).

6.2 The Tenant may terminate this Lease on or at any time after the 22nd anniversary of the Works Completion Date but in any event before the 37th anniversary of the Works Completion Date by serving on the Landlord not more than 5 years and not less than 2 years written notice which may be served on or at any time after the 20th anniversary of the Works Completion Date but must always be served before the 35th anniversary of the Works Completion Date specifying the proposed date of termination (**Intended Date of Termination**) but such Intended Date of Termination shall never be earlier than the 22nd anniversary of the Works Completion Date.

6.3 This Lease shall only terminate as a result of notice given by the Tenant under clause 6.1 or 6.2 on the date specified in the notice as the Intended Date of Termination if on that Intended Date of Termination the Tenant has:

6.3.1 paid all Rent due under this Lease up to (and including) the Intended Date of Termination;

6.3.2 complied with clauses 3.16.1 and 3.16.2 in all material respects;

6.3.3 given vacant possession of the Site to the Landlord; and

6.3.4 in respect of any termination of this Lease pursuant to Clause 6.2, the Tenant has paid (in cleared funds) the Break Fee to the Landlord on or before the Intended Date of Termination.

6.4 Any Break Fee under this Lease shall be calculated in accordance with the following formula:

BF = (5-N) x Minimum Rent

Where

BF = Break Fee

N = Notice Period; and

Minimum Rent = means the net present value of the annual rent calculated and based upon the Rent payable by the Tenant in the Generation Period immediately preceding the date of the notice served by the Tenant pursuant to clause 6.2 assuming that the Output is twenty five per cent (25%) of the Minimum Output (as defined in Schedule Part 4) and which may be expressed as (Rent for that Generation Period x 4) with such aggregate sum being discounted by five per cent (5%) per annum per year of Minimum Rent

calculated pursuant to this Clause 6.4 and payable by the Tenant pursuant to Clause 6.3.4. Schedule Part 7 (*Break Fee – Worked Example*) provides worked examples showing how the Break Fee will be calculated

6.5 If a valid notice is given by the Tenant under clause 6.1 or 6.2 and this Lease does not determine on the Intended Date of Termination specified in the notice because of the Tenant's failure to comply with any of the conditions set out in clause 3 then:

6.5.1 the Tenant may determine this Lease on giving written notice to the Landlord at any time after the Intended Date of Termination specifying a revised intended date of termination (**Revised Intended Date of Termination**) (which notice is not required to be of any particular length) but this Lease shall only determine as a result of notice given by the Tenant under this clause 6.5.1 if on the Revised Intended Date of Termination the Tenant has paid all Rent due under this Lease up to the Revised Intended Date of Termination and has complied with the conditions set out in clauses 6.3.2 and 6.3.3; and

6.5.2 the Landlord may terminate this Lease with immediate effect on giving written notice to the Tenant at any time after the Intended Date of Termination specified in a notice given by the Tenant under clause 6.1 or 6.2.

6.6 The Landlord may in its absolute discretion waive compliance with all or any of the conditions or obligations set out in clause 6.2 but unless otherwise expressly agreed in writing such waiver shall not release the Tenant from liability to comply with the relevant condition or obligation.

6.7 Upon termination of this Lease under this clause 6 the Term shall cease and determine but without prejudice to either party's rights and remedies in respect of any antecedent breach by the other of this Lease and the continuing operation of any provision of this Lease which is expressed to continue to apply or remain in force and effect after or notwithstanding Termination of the Term.

6.8 Any notice given under this clause 6 shall be irrevocable.

6.9 Time is of the essence in respect of this clause 6.

7 Landlord's Right of Termination for Oil and Gas Works

7.1 The Landlord may at any time and from time to time during the Term terminate this Lease in respect of the Site or any part or parts of it by giving reasonable prior written notice to the Tenant specifying the Site or the part or the parts of it in respect of which the notice is given.

7.2 The Landlord shall not give notice under clause 7.1 unless the Secretary of State for the purposes of the Petroleum Act 1998 has requested the Landlord to determine this Lease in respect of the Site or the part or parts of it specified in the notice because the Site or the part or parts of it specified in the notice are required for Oil and Gas Works or rights are required over the Site or the part or parts of it specified in the notice in connection with Oil and Gas Works.

7.3 If notice is given under clause 7.1 in respect of the whole Site then upon the expiry of that notice this Lease shall determine but without prejudice to the rights and remedies of the Landlord in respect of any antecedent breach by the Tenant of its obligations under this Lease.

7.4 If notice is given under clause 7.1 in respect of a part or parts of the Site then upon expiry of that notice:

7.4.1 this Lease shall terminate in respect of the part or parts of the Site specified in the notice;

7.4.2 this Lease shall from that date take effect as if the part or parts of the Site specified in the notice were no longer part of the Site and/or REZ Site (as the case may be); and

7.4.3 such termination shall be without prejudice to:

(a) the rights and remedies of the Landlord in respect of any antecedent breach by the Landlord of its obligations under this Lease in respect of the part or parts of the Site specified in the notice; and

(b) the continuing operation of this Lease in respect of the remainder of the Site.

7.5 The Tenant shall comply with the obligations under clauses 3.16.1 and 3.16.2 in respect of the Site or such part or parts of it as are specified in a notice given under clause 7.1 prior to the expiry of that notice.

7.6 Except as provided in clause 7.7 termination under this clause 7 does not give rise to any abatement of the Rent or liability of the Landlord to pay compensation to the Tenant for such termination.

7.7 Upon termination of this Lease in respect of a part or parts of the Site pursuant to a notice given under this clause 7 the Minimum Output shall be reduced by such proportion as shall be fair and reasonable (if any) having regard to the proportion of the Tenant's Works which the Tenant is required to remove as a consequence of that notice and the proportion of the Tenant's Works remaining.

7.8 Any difference arising between the Landlord and the Tenant as to the reduction in the Minimum Output pursuant to clause 7.7 may be referred by either the Landlord or the Tenant on notice to the other for determination by an independent electrical engineer acting as an expert as provided in clause 10.2 and who shall be nominated by the Landlord and approved by the Tenant (such approval not to be unreasonably withheld) or in default of agreement be nominated by the President of the Institution of Engineering and Technology or other acting chief officer for the time being on the application of either the Landlord or the Tenant.

7.9 The Tenant shall enter into such deeds and documents as the Landlord may reasonably require to give effect to any notice given under clause 7.1.

8 Replacement Security Document

8.1 On each anniversary of the Commencement Date the Tenant shall (if requested by the Landlord) deliver evidence in a form satisfactory to the Landlord (acting reasonably) that the Security Provider continues to have an Acceptable Covenant.

8.2 If a Security Document ceases to be valid, binding or enforceable for any reason or the Security Provider ceases to have an Acceptable Covenant then the Tenant shall provide the Landlord with a replacement Security Document (which shall be subject to a maximum value or cap on liability no less than the Cap) within thirty (30) Working Days of any Security Document ceasing to be valid, binding or enforceable or the Security Provider ceasing to have an Acceptable Covenant.

9 Indexation

9.1 Where in this Lease an amount is to be increased by **Indexation** or **Indexed** the amount shall be that amount multiplied by (CPI1 ÷ CPI2), where:

CPI1 is the higher of:

(a) the value of the Index published in respect of the month two (2) months prior to the relevant calculation date; and

(b) the highest value of the index published after the date of this Lease; and

CPI2 is [***to be the same as CPI2 in the Option Agreement***]

9.2 If the reference base used to compile the Index changes after the date of this Lease the figure taken to be shown in the Index after the change is to be the figure that would have been shown in the Index if the reference base current at the date of this Lease had been retained.

9.3 If after the date of this Lease:

9.3.1 the Index ceases to be published; or

9.3.2 it otherwise becomes impossible to operate the formula in clause 9.1 by reference to the Index

the Landlord and Tenant shall consult together with a view to agreeing an alternative index or method of adjusting the amounts stated to Indexed which as closely as possible gives effect to the purpose and intent of the parties as set out in this Agreement but in the event of any failure to agree or if any other dispute or difference arises between the Landlord and Tenant with respect to the calculation of the amounts stated to Indexed either party may require the matter to be determined by an expert to be appointed either by agreement between the parties or, in the absence of agreement, by the President of the Royal Institution of Chartered Surveyors (or the next senior officer).

10 Miscellaneous

10.1 Except where and to the extent that any statutory provision prohibits the Tenant's right to compensation being reduced or excluded by agreement the Tenant shall not be entitled on quitting the Site to claim any compensation from the Landlord on any ground.

10.2 If there is any dispute or matter in this Lease expressed to be referable to an expert for determination:

10.2.1 the relevant expert shall be instructed to accept written representations and counter representations within such time as he shall direct as being reasonable having regard to the nature of the dispute or matter and the need for its timely resolution and in any event shall be instructed to seek to reach his decision within twenty eight (28) days (or such further time as he shall determine to be reasonable having regard to the nature of the dispute or matter) of his appointment;

10.2.2 the costs of the reference to the relevant expert and of his determination (including his own fees and expenses the fees and expenses of any other professional consulted in accordance with clause 10.2.3 and the costs of the Landlord and the Tenant) shall lie in his award;

10.2.3 the relevant expert shall be entitled to seek the opinion of another professional of an appropriate different experience and qualification if he shall be concerned that he lacks relevant or sufficient experience or expertise;

10.2.4 the relevant expert shall be required to give reasons for his decision and his decision will be final and binding save in case of manifest error; and

10.2.5 if a relevant expert shall die or otherwise be incapable of resolving the dispute either the Landlord or the Tenant may request (in default of agreement) a replacement person and the foregoing will apply.

10.3 The following provisions apply in respect of the Tenant’s Works:

10.3.1 the Tenant’s Works are the property of the Tenant and shall remain the property of the Tenant notwithstanding Termination of the Term; and

10.3.2 where any of the Tenant’s Works remain on in or under the Site and/or the Cable Corridor after the Termination of the Term (whether or not in breach of clause 3.16) the Landlord may (save where prohibited by a Statutory Decommissioning Programme) in its absolute

discretion retain remove and dispose of those Tenant's Works as it sees fit without any liability whatsoever to the Tenant and without prejudice to the Landlord's rights and remedies in respect of any breach by the Tenant of clause 3.16 and the continuing operation of clause 3.11.

10.4 The Landlord shall incur no liability to the Tenant by reason of any approval given to or inspection made of the Tenant's Works or any drawing plan or specification of them nor shall any such approval or inspection in any way relieve the Tenant from its obligations under this Lease.

10.5 Any notice must be in writing and will be properly given if sent by Recorded Delivery or Registered post in the case of a notice by the Tenant to the Landlord addressed to them at Quartermile Two, 2nd Floor, 2 Lister Square, Edinburgh EH3 9GL (or at such other address as the Landlord may from time to time intimate in writing to the Tenant) and in the case of the Tenant and any Security Provider to its registered office or last known place of business if such registered office or last known place of business is Scotland, England or Wales or otherwise and in the case of the Security Provider only to any agent specified in the relevant Security Document declaring that all notices will be deemed to be received at the same time two (2) Working Days after posting and any omission to send by recorded delivery or registered post will not be pleadable where the notice has received an acknowledgement.

10.6 Nothing contained or implied in this Lease gives the Tenant the benefit of or the right to enforce or prevent the release or modification of any covenant agreement or condition relating to other premises.

10.7 It is not intended that any third party shall be entitled to enforce any term of this Lease pursuant to the Contracts (Rights of Third Parties) (Scotland) Act 2017.

11 Supply Chain and Contracted Position Statement

Supply Chain

11.1 In order to maximise efficiencies in the supply chain (whether on a local or national basis) required for the construction and subsequent maintenance and operation of the Tenant's Works to be constructed in terms of this Lease, the Tenant (whether alone or in partnership with other offshore wind farm developers) shall

11.1.1 use reasonable endeavours to engage with and meet regularly local and national business forums relevant supply chain organisation(s) and relevant economic development agencies with a view to ensuring their requirements for the efficient facilitation of the construction and subsequent maintenance and operation of the Tenant's Works are understood by such forums and organisations and to inform them of progress, concerns and opportunities regarding their region or companies which they account manage; and

11.1.2 advertise all opportunities for sub-contractors and suppliers in a way which ensures suppliers for which the opportunities may be relevant, are aware of procurement activities related to the Development.

11.2 Where applicable, the Tenant shall provide the Landlord with all Supply Chain Plan information at the time it is submitted as part of the Contract for Difference eligibility process.

Contracted Position Statement

11.3 Within two (2) weeks of every 2nd anniversary of the Commencement Date until the 6th anniversary thereof, the Tenant shall provide the Landlord with a written report on the delivery of the CPS Commitments contained within the CPS and thereafter the Tenant

shall provide such written report every five (5) years commencing on the 10th anniversary of the Commencement Date.

11.4 The report referred to in clause 11.3 shall be in a form approved by the Landlord and which aligns with other relevant supply chain measures across the UK, such as supply chain plans linked to Contracts for Difference (as defined in Schedule Part 4) and the Offshore Wind: Sector Deal published by the Department for Business, Energy & Industrial Strategy on 7 March 2019.

11.5 The Landlord may publish information from the report referred to in clause 11.3 as the Landlord considers appropriate.

12 Proper Law

12.1 This Lease shall be governed by and construed in accordance with the Laws of ~~Scotland~~ England and Wales insofar as they apply to Wales and the Site is to be regarded as if it were incorporated in the body of a county of ~~Scotland~~Wales.

12.2 The Tenant irrevocably agrees for the exclusive benefit of the Landlord that the courts of ~~Scotland~~ England and Wales shall have jurisdiction over any claim or matter arising under or in connection with this Lease and that accordingly any proceedings in respect of any such claim or matter may be brought in such courts. Nothing in this clause shall limit the right of the Landlord to take proceedings against the Tenant in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction or jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction or jurisdictions.

13 Further Assurance

The Parties agree that each shall and shall use reasonable endeavours to procure that any third party shall execute such documents and perform such acts as may be required to implement the OFTO regime or any equivalent replacement regime.

14 Direct Agreement

14.1 The Landlord acknowledges that the Tenant may require funding from a Funder to implement the Development and in arranging such finance a Funder may require, as a condition of the availability of that finance to enter into a direct agreement with the Landlord to cover (without limitation) the following principal matters:

14.1.1 an acknowledgement by the Landlord of any security taken by the Funders over the Tenant and its assets (including over the Lease);

14.1.2 an obligation to give notice to the Funder in the terms of clause 5.1 of the Lease;

14.1.3 an obligation on the Landlord not to take any action to wind up, appoint an administrator or sanction a voluntary arrangement (or similar) in relation to the Tenant without first giving a prescribed period of notice to the Funder;

14.1.4 a step in right (without giving rise to any express or implied assignment) to allow the Funder to ensure that the obligations of the Tenant are complied with as to prevent any circumstances arising under which the Landlord could seek to determine) the Lease; and

14.1.5 provisions regulating the application of insurance proceeds in the event that all or part of the Tenant's Works is destroyed or damaged which provisions will permit the Funder to recalculate financial ratios and conduct other economic tests (in respect of which the Funder will take account of the Landlord's reasonable representations) relating to the fundamental financial viability of the Development and fundamental ability of the Development to meet debt service after the occurrence of a major insurable event and will further provide that if the specified economic tests are not satisfied, then any insurance proceeds received in respect of such insurable event shall be applied in

repayment of amounts owing under any funding agreements rather than reinstatement of the relevant part or parts of the Tenant's Works.

14.2 The Landlord further acknowledges that they will act in good faith (at the cost and expense of the Tenant) to negotiate such a direct agreement where reasonably requested by the Tenant.

15 Consent to Registration

The parties hereto consent to registration hereof for preservation and execution: IN WITNESS WHEREOF these presents consisting of this and the …. preceding pages together with the Schedule attached are executed as follows:

They are subscribed for and on behalf of Crown Estate Scotland

At……..
On ……
By
….....Authorised Signatory
….....Full Name
before this witness
….....Witness Signature
….....Witness Full Name
….....Witness Address
……
And they are subscribed for and on behalf of the said [ ]
At……..
On ……
By
….....Director Signature
….....Director Full Name

….....Witness
….....Full Name
….....Witness Address
……

This is the Schedule referred to in the foregoing Lease by Crown Estate Scotland in favour [ ] of the wind farm site on seabed at [ ]

Schedule Part 1 - Rights

1 The following rights are granted to the Tenant:

1.1 the exclusive right to install use operate inspect maintain repair renew and remove Tenant's Works within the Site together with such ancillary rights as may be necessary to enable the Tenant to comply with its obligations under this Lease in respect of the Site;

1.2 the rights granted under paragraph 1.1 in respect of the ~~REZ~~ EEZ Site shall not exceed the rights exercisable by virtue of any Order or Orders in Council from time to time made pursuant to Section ~~84~~41(34) ~~Energy~~ Marine & Coastal Access Act 200~~94~~ designating the ~~Renewable Energy~~Exclusive Economic Zone in which the ~~REZ~~ EEZ Site is located;

1.3 to install Generator Cables and to use inspect maintain repair renew and remove Generator Cables from time to time laid by the Tenant on in under or over the Site and to divert any Generator Cables from time to time laid by the Tenant where entitled to do under this Lease; and

1.4 to connect any Generator Cables to any transmission or substation equipment within the Site and to inspect maintain repair renew and remove any such connection for the purposes of carrying out any routine maintenance or repair work.

Schedule Part 2 - Exceptions and Reservations

1 The following are excepted and reserved to the Landlord and all others from time to time authorised by the Landlord (including, without limitation, any OFTO) or otherwise entitled:

1.1 all mines minerals and mineral substances within the Site;

1.2 the right to install and use (without interruption or interference save for routine maintenance or repair work) within the Site one or more substations (or supporting platforms including the footings of any such platform to accommodate any substation) and Supply Cables and any required Conduits for the purposes of transmitting electricity generated by the Tenant's Works or by any other wind farm or otherwise and to connect into and use any Conduits belonging to the Tenant and to use connect into inspect maintain repair renew and remove any such substations, Supply Cables and Conduits (not forming part of the Tenant's Works); and

1.3 the rights to:

1.3.1 enter the Site to exercise the rights referred to in paragraphs 1.2, 1.3.2 and 1.3.3;

1.3.2 inspect the Site and the Tenant's Works; and

1.3.3 carry out scientific research within the Site.

1.4 the right to install works on the seabed outside the Site in such manner as it sees fit irrespective of whether the works affect or diminish the light air or wind which may now or at any time be enjoyed by the Site or the Tenant's Works subject only to the Landlord complying with the obligations under clause 4 (where relevant) provided that the Landlord will not install or suffer or permit the installation of any wind farm within an area of 2.5 km from the boundary of the Tenant's Works as shown on the plan provided pursuant to clause 8.1 of the Option Agreement (the **Exclusion Zone**) and where there is to be an adjacent wind farm the Landlord shall procure that a similar exclusion zone be included for such wind farm so that the total exclusion zone is 5 km provided further that this exclusion shall not apply where the Landlord, the Tenant and any relevant third party agree an alternative arrangement which would permit such use of the Exclusion Zone.

2 The rights granted under paragraphs 1.1 and 1.3 of Schedule Part 1 are subject to the following:

2.1 the right of the Landlord to carry out and grant leases licences and consents for the carrying out of works on in over or under the Site are subject only to the Landlord complying with the obligations under clause 4 (where relevant);

2.2 the rights of the Landlord under paragraph 3;

2.3 the Tenant complying with its obligations under clauses 3.2, 3.3 and 3.5; and

2.4 where the relevant works are not carried out by or on behalf of the OFTO for the purpose of accepting and transmitting electricity generated by the Tenant's Works, the Landlord shall pay to the Tenant reasonable compensation for any loss of income which the Tenant sustains as a direct consequence of such works and which could not have reasonably been avoided

2.5 The Landlord's rights under paragraph 3 of this Part of the Schedule

3 The Landlord may from time to time upon giving at least twelve (12) months' notice to the Tenant:

3.1 require the Tenant to divert any or all Generator Cables and Conduits within the Site to such alternative position or positions within the Site as the Landlord may reasonably require; and/or

3.2 require the OFTO to divert any or all Supply Cables and Conduits within the Site (and the Cable Corridor) to such alternative position or positions within the Site (and the Cable Corridor) as the Landlord may reasonably require; and/or

3.3 require the OFTO to alter the position of the Site (and the Cable Corridor) and divert the Conduits and Supply Cables within it to such alternative positions within the Site (and the new Cable Corridor) as the Landlord may reasonably require.

4 Where the Landlord exercises its rights under paragraph 3:

4.1 the Tenant shall carry out the diversion required under paragraph 3 prior to expiry of the notice given under paragraph 3; and

4.2 the Landlord shall pay to the Tenant the costs and expenses reasonably incurred by the Tenant in carrying out such diversion under paragraph 3 and reasonable compensation for any loss of income which the Tenant sustains as a direct consequence of any such diversion and which could not have reasonably been avoided.

5 The exceptions and reservations under paragraph 1 are subject to the following terms:

5.1 in exercising the rights under paragraph 1.3 and/or 1.4, the Landlord shall take all reasonable steps not to interrupt the operation of the Tenant's Works and shall make good any damage caused to the Tenant's Works in the exercise of the rights as soon as reasonably practicable and to the reasonable satisfaction of the Tenant or if the Tenant shall reasonably require the Tenant may after giving written notice to the Landlord make good the damage to the Tenant's Works caused by the exercise of the rights under paragraph 1.3 or 1.4 and the Landlord shall reimburse the Tenant for all reasonable costs and expenses incurred by the Tenant in making good the damage to the Tenant's Works;

5.2 when exercising the right under paragraph 1.3.2, the Landlord shall where it is reasonably practical to do so take reasonable steps to enable the Tenant to provide a representative in whose presence the inspection is to be carried out;

5.3 when exercising the right under paragraph 1.3.2, the Landlord shall where it is reasonably practical to do so engage for the purpose one of the contractors on the approved list of contractors from time to time supplied by the Tenant to the Landlord or (where it is not practicable to do so or no list is provided) use all reasonable endeavours to engage a contractor experienced in offshore wind farm developments for the purpose;

5.4 the Landlord shall exercise the rights under paragraph 1.3.3 in accordance with a method statement which has been approved by the Tenant (such approval not to be unreasonably withheld); and

5.5 where the rights referred to in paragraph 1.3.1 are exercised in respect of a Conduit installed pursuant to a consent under clause 4.1.1 then the terms of the consent shall apply in place of paragraph 1.2.

Schedule Part 3 - Title Matters

Part 1

The following are licences and leases granted by the Landlord where the Landlord have given undertakings to obtain the consent of the licensee/tenant specified below or where agreement with an existing tenant or licensee (in a form reasonably acceptable to the Landlord (acting reasonably) is required to allow co-location of uses or rights (each such consent being a Necessary Consent for the purpose of this Agreement):

Date	Tenant/Licensee	Works

Part 2

The following are licences and leases granted by the Landlord where no consent need be obtained from the licensee/tenants specified below before the Specified Works are carried out in the vicinity of the works specified below:

Date	Tenant/Licensee	Works

Part 3

The following are works that are not authorised by the Landlord to the extent that they lie outside the Territorial Limit of the United Kingdom but of which the Landlord are aware and in respect of which consent from the owners and/or operators of such works may need to be obtained:

[ ]

Schedule Part 4 - Rent

1 **Definitions and Interpretation**

In this part of the Schedule:

Contract for Difference means a Contract for Difference which is entered into pursuant to a direction made by the Secretary of State under Section 10 of the Energy Act 2013 (or any replacement support scheme which may be receivable by the Tenant);

Fee means the sum of £1.07 (Indexed on the Commencement Date and each anniversary of that date thereafter);

Forecasted Output means the anticipated Output in megawatt hours of electricity that may be generated by the Tenant's Works in each Forecast Year (or part thereof);

Forecast Year means each year of the Term commencing on 1 April

Generation Certificate means a certificate signed by a duly authorised officer of the Tenant addressed to the Landlord certifying for the relevant Generation Period:

1. the Output; and

2. the Output Rent payable

Generation Date means the date on which the Tenant's Works or any part of them first commence to generate and export electricity;

Generation Period means a period of 3 months commencing on (and including) 1 January, 1 April, 1 July and 1 October in each year provided that:

1. the first Generation Period shall be the period commencing on (and including) the Generation Date up to following first following 1 January,1 April, 1 July or 1 October; and

2. the last Generation Period shall be the period commencing on (and including) the last 1 January, 1 April, 1 July or 1 October during the Term up to the Termination of the Term;

Minimum Output means (subject to paragraph 4 [●] [***Note: this will be seventy per cent (70%) of the annual Projected Output fixed under clause [8.5 and 8.6] of the Option Agreement***] megawatt hours as revised from time to time under paragraph 4;

Output means the greater of:

1. either the amount in megawatt hours of Loss Adjusted Metered Output (as reported by Elexon) generated by the Tenant's Works during the relevant Generation Period or, where there is no Contract for Difference receivable by the Tenant in respect of the Tenant's Works, the amount of Net Electrical Output during the relevant Generation Period; and

2. twenty-five per cent (25%) of the Minimum Output;

Net Electrical Output means the amount in megawatt hours of electricity generated by the Tenant's Works during the relevant Generation Period less the amount in megawatt hours of electricity generated by the Tenant's Works but used by the Tenant in the operation of the Tenant's Works;

Output Rent means, for each Generation Period the sum calculated by the formula:

R = Fee x Output

Output Rent Commencement Date means the date forty eight (48) months after the Commencement Date

Payment Date means (subject to paragraphs 2.3 and [*link to review if reviewed*]) the date fourteen (14) days after the end of each Generation Period;

Records means all meter readings and other documents and records (including computer tapes discs and other storage systems) which are or ought in the reasonable opinion of the Landlord to be kept by the Tenant or its predecessors in title for the purpose of ascertaining the Output or that are or may in the reasonable opinion of the Landlord be relevant for that purpose;

Review Date means the date of the end of the Generation Period in which the thirtieth (30th) anniversary of the Commencement Date occurs

2 Output Rent

The Output Rent shall be ascertained and paid as provided in this paragraph 2;

2.1 From the Commencement Date, the Tenant shall pay to the Landlord rent in the sum of £1 per annum (if demanded).

2.2 From the earlier of (i) the Generation Date and (ii) the Output Rent Commencement Date up to (but excluding) the Review Date, the Tenant shall pay the Output Rent for each Generation Period in arrears on the Payment Date immediately following the relevant Generation Period.

2.3 The following provisions apply to the calculation and payment of the Output Rent for the last Generation Period (whether at expiry or earlier termination of this Lease or the Landlord electing to review the rent in accordance with paragraph 7):

2.3.1 where the first and/or last Generation Periods are not a period of three months (3), the Minimum Output shall be the figure which bears the same proportion to the figure stated in the definition of Minimum Output above (as revised from time to time under paragraph 4) as the number of days in the first and/or last Generation Periods (as the case may be) bears to 91.25; and

2.3.2 for the last Generation Period (where it is not a period of three (3) months), the Payment Date shall be the last day of that Generation Period.

3 **Certificates and Records of Output**

3.1 The Tenant shall notify the Landlord immediately that the Generation Date has occurred and provide such evidence as the Landlord may reasonably require to prove that it occurred on the date so notified.

3.2 On or before each Payment Date the Tenant shall deliver to the Landlord a Generation Certificate for the Generation Period which has just ended.

3.3 The Tenant warrants to the Landlord that each Generation Certificate will be true and accurate in all respects.

3.4 The Tenant shall maintain the Records fully and accurately throughout the Term and shall make them available for inspection at all reasonable times by an employee of the Landlord.

3.5 The Landlord may at its discretion cause an audit of the Records to be made by a professionally qualified person appointed by the Landlord and if it is established by such

audit that the Output for any Generation Period or the Gross Revenue for any Period has been understated then the cost of the audit shall be borne by the Tenant.

3.6 If it shall appear from any such inspection or audit or from any other circumstances that any further Output Rent for a Generation Period (or the Revenue Rent if applicable in terms of paragraph 7 below) for any Period is payable then such Output Rent shall be paid by the Tenant on demand and for the purpose of clause 3.1.3 of the foregoing Lease, such further Output Rent (or Revenue Rent if applicable) shall be deemed to have been due on the Payment Date (or Revenue Rent Payment Date if applicable) immediately following the Generation Period for which such further Output Rent (or Period for which such further Revenue Rent if applicable) should have been paid.

3.7 If any dispute or question shall arise between the Landlord and the Tenant with respect to the amount of the Output Rent (or Revenue Rent), either of them may by notice to the other require the matter in dispute to be determined by an independent chartered accountant acting as an expert as provided in clause 10.2 and who shall be nominated by the Landlord and approved by the Tenant (such approval not to be unreasonably withheld) or in default of agreement be nominated by the President of the Institute of Chartered Accountants of Scotland or other acting chief officer for the time being on the application of either the Landlord or the Tenant

4 **Increase in Minimum Output**

4.1 If and each time the Tenant carries out any alterations or additions to the Tenant's Works the Minimum Output shall be revised in accordance with this paragraph 4.

4.2 The Minimum Output figure used in calculating the Rent for each Generation Period commencing after the carrying out of the alteration or addition shall be the Minimum Output figure applying immediately prior to the carrying out of those alterations or additions or (if greater) seventy per cent (70%) of the anticipated annual electricity production of the Tenant's Works following the carrying out of the alteration or addition expressed in megawatt hours.

4.3 The Tenant shall provide to the Landlord such evidence and analysis of that evidence of the anticipated annual electricity production of the Tenant's Works following the carrying out of the alterations or additions to the Tenant's Works as the Landlord reasonably requires.

4.4 Any difference arising between the Landlord and the Tenant as to the anticipated annual electricity production of the Tenant's Works following the carrying out of the alterations or additions may be referred by either the Landlord or the Tenant on notice to the other for determination by an independent electrical engineer acting as an expert as provided in clause 10.2 and who shall be nominated by the Landlord and approved by the Tenant (such approval not to be unreasonably withheld) or in default of agreement be nominated by the President of the Institute of Engineering and Technology or other acting chief officer for the time being on the application of either the Landlord or the Tenant.

4.5 This paragraph 4 does not apply to any removal of the Tenant's Works or part of them required pursuant to clause 3.16.

5 **Late Ascertainment of Output Rent (or Revenue Rent if applicable)**

Where the Output Rent or Revenue Rent applicable to any Generation Period or Period (as applicable) is not ascertained before the relevant Payment Date or Revenue Rent Payment Date (as applicable), interest shall be paid on any Output Rent or Revenue Rent Payment Date (as applicable) payable in accordance with clause 3.1.3 of the foregoing Lease from the due date until actual receipt by the Landlord.

6 **Forecasted Output**

6.1 At least eighteen (18) months prior to the date on which, in the Tenant's reasonable opinion the Generation Date will fall, the Tenant shall provide to the Landlord a written estimate of the Forecasted Output calculated on a month to month basis for the period commencing on the anticipated Generation Date to the following 31 March;

6.2 On or prior to 1 August in every year throughout the Term commencing in the year the Generation Date is forecasted to occur in terms of paragraph 6.1, the Tenant shall provide to the Landlord a written estimate of the Forecasted Output calculated on a month to month basis for the immediately following Forecast Year (or part thereof in the final year of the Lease if applicable).

7 **Rent Review**

7.1 In this paragraph 7:

Base Rent means the average of the Output Rent payable by the Tenant in the 5 calendar years immediately preceding the Review Date (apportioned on an annual/daily basis if necessary for any such year) as agreed between the Landlord and the Tenant or in the event of dispute with respect to the calculation of the Base Rent either of them may by notice to the other require the matter to be determined by an independent chartered accountant acting as an expert as provided in clause 10.2 and who shall be nominated by the Landlord and approved by the Tenant (such approval not to be unreasonably withheld) or in default of agreement be nominated by the President of the Institute of Chartered Accountants of Scotland or other acting chief officer for the time being on the application of either the Landlord or the Tenant

Base Rent Commencement Date means in the event of the Landlord electing to review the Rent in accordance with this paragraph 7, the Review Date;

Base Rent Payment Dates means [ ], [ ], [ ] and [ ] [*insert dates every 3 months starting on the Review Date*] commencing on the Base Rent Commencement Date;

Certificate means, in relation to each Period, a certificate of Gross Revenue for that Period;

Gross Revenue means the gross income received or receivable by Tenant during the relevant Period for the electricity generated by the Tenant's Works and/or at the Site including but not limited to income received from (i) a Contract for Difference or any replacement support scheme which is received by the Tenant in respect of the Tenant's Works from time to time and/or (ii) the sale of electricity, (less any sum which the Tenant is obliged to pay to (a) the relevant counterparty under a Contract for Difference or (b) any other party under any replacement support scheme which is received by the Tenant in respect of the Tenant's Works from time to time) (iii) in the event of cessation of or constraint on the generation of electricity by the Tenant's Works (either partial or complete) as a direct consequence of the Tenant complying with a request made by National Grid Electricity Transmission plc or their successors ("NGET") to cease or constrain the generation of electricity by the Wind Farm in accordance with NGET's or their foresaids' role in procuring balancing services or equivalent replacement or similar

scheme that provides income to the Tenant, any income received by the Tenant to the extent directly attributable to the cessation or constraint on the generation of electricity by the Tenant's Works as a result of such request by NGET or their foresaids less (a) any VAT and (b) the cost of any electricity imported to the Tenant's Works and (iv) the storage of electricity at the Site;

Gross Revenue Certificate means a certificate prepared by the Tenant or auditors of the Tenant and furnished by the Tenant to the Landlord specifying the amount of and giving all relevant details of the Gross Revenue and the Revenue Rent payable in respect of the relevant Period which certificate shall contain all reasonably necessary information as the Landlord and his professional advisors may reasonably require to enable the Landlord to cross check and calculate the Gross Revenue and the Revenue Rent payable and how same has been attained and calculated;

Period means each year of this Lease, starting on the Base Rent Commencement Date, except that the last Period shall start on the relevant anniversary of the Rent Commencement Date and end on the last day of this Lease;

Revenue Rent means, for each Period, the greater of (i) £1 and (ii) two per cent (2%) of the Gross Revenue for the relevant Period, less the Base Rent paid for that Period;

Revenue Rent Payment Date means the date [20] Working Days after the end of each Period;

Records means all documents and records (including computer tapes discs and other storage systems) which are or ought in the reasonable opinion of the Landlord to be kept by the Tenant or its predecessors in title for the purpose of ascertaining the Gross Revenue or that are or may in the reasonable opinion of the Landlord be relevant for that purpose.

7.2 At least six (6) months prior to the Review Date the Tenant shall provide to the Landlord a statement setting out the Tenant's projection of the Revenue Rent ("Revenue Rent Statement") containing such information as is reasonably required by the Landlord to allow the Landlord to reach a decision as to whether to continue to receive the Output Rent or to change to the Revenue Rent. The Tenant shall act reasonably and diligently in preparing such Revenue Rent Statement.

7.3 Within three (3) months of the Review Date (or if later within three months of receipt by the Landlord of the Revenue Rent Statement) the Landlord shall give written notice to the Tenant as to whether it elects to receive the Output Rent or the Revenue Rent in respect of the period from the Review Date for the remainder of the Term. In the event that the Landlord does not give written notice to the Tenant as aforesaid, provided that the Tenant has provided the Revenue Rent Statement timeously, the Landlord shall be deemed to have elected to continue to receive the Output Rent for the remainder of the Term.

7.4 If the Landlord has elected (or is deemed to have elected) to receive the Revenue Rent from the Review Date then the Tenant shall pay the Base Rent quarterly in advance in equal instalments on the Base Rent Payment Dates commencing on the Base Rent Commencement Date.

7.5 Within twenty (20) Working Days of the end of each Period the Tenant shall provide a Gross Revenue Certificate to the Landlord and if the Revenue Rent for the relevant Period exceeded the Base Rent then the Tenant shall pay to the Landlord a sum which represents the amount by which the Revenue Rent exceeded the Base Rent for relevant Period within forty (40) Working Days of the end of the relevant Period. Any payments received or receivable by the Tenant following termination of the Lease will be treated as having been received in the last year of the Lease and the Tenant shall account to the Landlord for any additional Revenue Rent arising as a result of such payments.

7.6 The Tenant warrants to the Landlord that each Gross Revenue Certificate will be true and accurate in all respects.

8 **Miscellaneous**

8.1 Time shall not be of the essence for the purposes of this Part of the Schedule unless otherwise expressly stated.

8.2 The provisions of this Part of the Schedule shall continue to apply notwithstanding the expiry or earlier termination of the Lease

8.3 All figures stated in this Part of the Schedule are exclusive of VAT which shall, if appropriate, be payable in addition thereto in exchange for a valid VAT invoice.

Schedule Part 5 - Determination and Review of Estimated Maximum Losses

2 Initial Estimated Maximum Losses under this Lease

(a) Within fourteen (14) days of the Commencement Date the Tenant shall appoint an EML Consultant to perform an EML Study in order to derive the Estimated Maximum Loss and the Terrorism Estimated Maximum Loss. The Tenant shall deliver the completed EML Study to the Landlord.

(b) The appointment of an EML Consultant and any EML Study delivered by the EML Consultant will not discharge the Tenant's obligations under paragraph 1(a) unless the identity of the EML Consultant and his terms of appointment have been approved by the Landlord (such approval not to be unreasonably withheld).

(c) In performing the EML Study the EML Consultant shall be required to:

(i) act impartially;

(ii) have due regard to the Tenant's Works and the location of the Tenant's Works;

(iii) use the "as low as reasonably practicable principle";

(iv) have due regard to "Sue and Labour", "Removal of Wreck" and "Vessel Costs"; and

(v) include all ancillary costs, professional fees and VAT.

(d) The Estimated Maximum Loss and Terrorism Estimated Maximum Loss as derived from an EML Study shall be final and binding upon the Tenant and the Landlord save in the case of manifest error or fraud.

(e) The cost of appointing the EML Consultant under this paragraph 2 shall be borne solely by the Tenant.

(f) Following a determination under this paragraph 2, the Estimated Maximum Loss and Terrorism Estimated Maximum Loss for the purposes of clause 3.13.1(a) shall be the amount so determined by the EML Consultant.

3 Reviewing the Estimated Maximum Losses

(a) On one occasion during each five (5) year period during the Term, either party may by notice to the other propose that an EML Consultant is appointed to perform a further EML Study to assess the Estimated Maximum Loss and Terrorism Estimated Maximum Loss at that time.

(b) Any notice under paragraph 2(a) shall propose the identity of the EMC Consultant and the terms of appointment of the EMC Consultant.

(c) Within thirty (30) days of such request (save where there is a dispute concerning the identity and/or terms of the appointment), the Tenant shall appoint the EML Consultant to perform a further EML Study. In performing that EML Study the EML Consultant shall be required to act in the same manner as that set out in paragraph 1(c)(i) to paragraph 1(c)(v) (inclusive).

(d) The Estimated Maximum Loss and Terrorism Estimated Maximum Loss as derived from that EML Study shall be final and binding on the Landlord and the Tenant, save in the case of manifest error or fraud.

(e) The cost of appointing the EML Consultant shall be borne by the Party which requested that the EML Study be performed.

(f) Following a determination under this paragraph 2, the Estimated Maximum Loss and Terrorism Estimated Maximum Loss for the purposes of 3.13.1(a) shall be adjusted to the amount so determined by the EML Consultant.

Schedule Part 6 - Form of HSI Notification

Details of business or undertaking notifying the incident		
Legal name of business:		
Name of site:		
Business address:		
Contact phone number:	Work hours:	Mobile:
Business email address:		

Incident details		
Incident type		
This is to notify of :	☐ Serious Incident	☐ Non-fatal RIDDOR Reportable Incident
Provide a brief explanation of the type of incident (i.e. fall from height, vessel collision):		
Incident date, time and location		
Date of incident:	Location of incident:	
Time of incident:		
Description of the incident Please provide as much detail as possible		
Do you propose to release a press/public statement in connection with the incident? ☐ Yes ☐ No		

Notifier's details			
☐ Mr ☐ Mrs ☐ Miss ☐ Ms	First Name:	Last Name:	
Position at workplace:		Contact phone number:	
Email:			
Is this the person that should be contacted for further information? ☐ Yes ☐ No If no, please provide the name and contact details of the appropriate person should further information be required			
☐ Mr ☐ Mrs ☐ Miss ☐ Ms	First Name:	Last Name:	
Position:		Contact phone number:	

Schedule Part 7 - Break Fee Worked Example

We set out below two worked examples of how a payment will be calculated following the service of a break notice under a lease and in accordance with the following formula:

Any Break Fee under this Lease shall be calculated in accordance with the following formula:

BF = (5 - N) x Minimum Rent

Where:

BF, **N** and **Minimum Rent** have the definitions given to them in Clause 6.

Examples:

1. If five (5) years notice is served then the break fee will be nil because:

BF = (5-5) x Minimum Rent

BF = 0 x Minimum Rent

2. If less than five (5) years notice is given, then a break fee will apply:

Assuming Minimum Rent (on an annual basis) at the point the Break Notice is served is £2,000,000 then, applying a five per cent (5%) discount rate yields the following Break Fees:

Notice Period (Years)	Break Fee (NPV)	Comment
5	£0	See 1. above.
4	£1,904,762	5-4 = 1 years Minimum Rent, discounted at 5% p.a.
3	£3,718,821	5-3 = 2 years Minimum Rent, discounted at 5% p.a.
2	£5,446,496	5-2 = 3 years Minimum Rent, discounted at 5% p.a.
1	£7,091,901	5-1 = 4 years Minimum Rent, discounted at 5% p.a.
0	£8,658,953	5-0 = 5 years Minimum Rent, discounted at 5% p.a.

Schedule Part 8 - Plan

Schedule Part 9 - Co-ordinates

Schedule Part 10 - Specification

Schedule Part 11 - Contracted Position Statement

Schedule Part 12 - Statement of Commitment

Dear Sirs

Statement of Commitments re: [ ] ("**the Development**")

We,
[•] [name, company no. (if applicable) and registered office of organisation] refer to the abovementioned Development and now confirm the following to Crown Estate Scotland:

1. We are aware of, and are willing to participate in the Development which is the subject of this letter. A brief summary of our proposed involvement in the Development is [•];

2. Insofar as information provided in this letter relates to this organisation, we are aware that Crown Estate Scotland are acting in reliance on this information in assessing whether or not to consent to our proposed involvement and confirm that it is comprehensive, accurate and up to date; and

3. The acceptance of our involvement in this Development does not present a reputational risk to Crown Estate Scotland in that neither this company/organisation nor any office holder or person with powers of representation, decision or control within this company/organisation have been convicted of any of the types of unlawful conduct described in full in Appendix 1 to this letter. If at any time this company/organisation or any office holder or person with powers of representation, decision or control within this company/organisation is convicted of an offence under replacement/amendment legislation to that listed in Appendix 1, we understand that this requires to be disclosed to Crown Estate Scotland;

Yours faithfully,

Signed for and on behalf of [•] [name of company/organisation] by:

Please formally sign for and on behalf of your organisation here and provide full details of signature to confirm how your company/organisation is bound by this letter as shown at Appendix 1.

Template Letter Appendix 1 – Reputational confirmation

i) Conspiracy relating to participation in a criminal organisation or an offence relating to involvement in/directing serious organised crime (Criminal Justice and Licensing (Scotland) Act 2010);
ii) Corruption (within the meaning of the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906)
iii) Bribery or corruption (within the meaning of the Criminal Justice (Scotland) Act 2003)
iv) Bribery (within the meaning of the Bribery Act 2010)
v) Cheating the Revenue
vi) Common law fraud
vii) Common law theft/ fraud
viii) Fraudulent trading (within the meaning of the Companies Acts 1985/ 2006)
ix) Fraudulent evasion (within the meaning of the Customs and Excise Management Act 1979 or the VAT Act 1994)
x) Offence re: taxation (Criminal Justice Act 1993)
xi) Common law uttering (Scots law term for fraud)
xii) Common law attempting to pervert the course of justice
xiii) Offences under Counter-Terrorism Act 2008

xiv) Money laundering (within the meaning of the Proceeds of Crime Act 2002)
xv) Proceeds of criminal conduct (within the meaning of the Criminal Justice Act 1988)
xvi) Human trafficking (Human Trafficking and Exploitation (Scotland) Act 2015)
xvii) Proceeds of drug trafficking (Drug Trafficking Act 1994)

Any other offence that is set out as an exclusion ground in the Directive 2014/24/EU of the European Parliament and of the Council on public procurement or any subsequent legislation which replaces that.

ANNEX 2

Excerpts from Geoffrey Marston's book 'The Marginal Seabed', 1981

(Cover, Preface, Acknowledgements, Contents, Notes and Chapters 11, 12 and 13)

Unfortunately Chapter 10 (relating to Pages 240, 241, 244 and 245) cannot be provided at this time, but could be added after the D6 deadline, if permitted by the ExA?

THE MARGINAL SEABED

UNITED KINGDOM LEGAL PRACTICE

GEOFFREY MARSTON

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To my Parents

Arthur and Mabel Marston

Preface

This work is a revised version of a doctoral thesis submitted in 1973 to the University of London. Its primary purpose is to set out, in a relatively condensed form, the practice of the legislature, executive, and judiciary concerning the bed and subsoil of the sea (together referred to as the solum) adjacent to the dry land of the United Kingdom and to its inland waters. Its secondary purpose is to provide a brief analysis of the legal status of such solum in the light of the material above.

The study has been compiled in large measure from official papers available to public scrutiny under the 'Thirty-Year Rule' in the Public Records Act 1967. There is the probability that some relevant papers have not been released to the public archives for one reason or another. There is the certainty that there are more papers of relevance in the public archives which the author has failed to discover.

Two areas of practice are omitted from the scope of this study. First, the work does not cover practice pursuant to the Continental Shelf Act 1964. Secondly, it does not cover practice in former or present British territories outside the United Kingdom. The author is well aware of the legal problems which have arisen in the United States, Canada, and Australia over the marginal sea and solum. It is hoped that the contents of this work will not be irrelevant to persons interested in those problems.

Finally, although the study purports to cover the whole United Kingdom, the author is conscious of his English origin, and apologizes in advance to those in Scotland and Northern Ireland who may find the material on their jurisdictions deficient.

GEOFFREY MARSTON

18 November 1980

Acknowledgements

Chronologically, I ought first to acknowledge my indebtedness to certain persons in the Attorney-General's Department, Canberra, ten years ago, including the late Sir Kenneth Bailey, without whose initiative I might never have become interested in this subject.

I wish to thank the staff, at all levels, of the Public Record Office, London, for their help over the years; the Secretary and Keeper of the Records of the Duchy of Cornwall for permitting me to examine documents in his custody; Dr J. H. Baker, Fellow of St. Catharine's College, Cambridge, for making me an annotated transcription of Hardres' report of the Sutton Marsh case; the Maitland Fund of the University of Cambridge for material help in preparing the final text for publication; and Mrs U. M. Tollman for secretarial assistance.

Transcripts of Crown-copyright records in the Public Record Office appear by permission of the Controller of H.M. Stationery Office.

Finally, I recall the memory of my late friend, Professor D. P. O'Connell, QC, whose writings on this and associated subjects have been a constant source of intellectual challenge to me during the last decade. He read the typescript of an earlier version of this work shortly before his last illness and advised me to seek its publication. It was in Oxford on 11 June 1979, on learning of his untimely passing, that I followed his advice.

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Abbreviations and Notes

Abbreviations of Archival Classes in the Public Record Office, London

ADM	Admiralty
C	Chancery
CO	Colonial Office
COAL	Coal Board (incorporates records of the Coal Commission)
CREST	Crown Estate Office (incorporates records of the Office of Woods, Forests, and Land Revenues)
DPP	Director of Public Prosecutions (incorporates some records of the Treasury Solicitor)
FO	Foreign Office
HO	Home Office
MT	Ministry of Transport (incorporates some records of the Board of Trade)
PRO	Public Record Office (private collections)
SP	State Papers
T	Treasury
TS	Treasury Solicitor

Other Abbreviations

BL	British Library
BYBIL	British Year Book of International Law
C., Cd., Cmd., Cmnd.	Command Papers, successive series
HC Debs.	House of Commons Debates, Parliamentary Debates, 5th series
HL Debs.	House of Lords Debates, Parliamentary Debates, 5th series
HCP	House of Commons Papers

HLP	House of Lords Papers
LQR	Law Quarterly Review
P.Debs.	Parliamentary Debates (prior to 5th series)
UNTS	United Nations Treaty Series

Notes

1. Throughout this work, emphasis is given as in the original document.
2. Some abbreviations in the original documents have been expanded for ease of reading.
3. In references to Parliamentary Papers, both the pagination of the individual paper and the manuscript pagination of the volume containing it are given.

PART TWO

ANALYSIS

CHAPTER XI

The Delimitation of the Marginal Solum

A. The Shoreward Limit

The present work is not concerned with the solum of inland waters as such, i.e. waters that are within a county of one of the constituent parts of the United Kingdom. Nevertheless, in order to determine the shoreward limit of the solum under discussion it is necessary to discover the seaward limit of such inland waters. The two limits will coincide.

The leading case in English law is *Attorney-General* v. *Chambers* in 1854 which concerned the landward limit of the foreshore. There it was stated that 'the medium tides . . . of each quarter of the tidal period afford a criterion which we think best adopted . . . the average of these medium tides in each quarter of a lunar revolution during the year gives the limit, in the absence of all usage, to the rights of the Crown in the seashore'.[1]

This test has been applied in a rough and ready form in cases in which the issue has been the seaward extent of the county. Thus in *R.* v. *Musson*[2] in 1858, which concerned the rating of the Wellington Pier at Great Yarmouth, and in *Embleton* v. *Brown* in 1860, the seaward limit of the county was held to be the 'ordinary' low-water mark. *Coulson & Forbes* states:

> The low water limit of the sea shore or foreshore has not been brought directly in issue as has been the case with the high water mark. In modern practice it has been considered to be the low water mark of the ordinary tides. If this is the correct view, and the seaward line of the foreshore is the limit of the kingdom on the coast, then the land left bare below the low water mark of ordinary tides is not part of the kingdom or within the jurisdiction of the county, and crimes committed there would be committed on the high sea.[4]

The Ordnance Survey accepts that *Chambers* is also relevant for

[1] (1854) 4 De G. M. & G. 206, 215.
[2] (1858) 22 J.P. 609.
[3] (1860) 30 L.J. M.C. 1.
[4] *Coulson & Forbes*, 6th ed., 24.

the seaward limits. In a leaflet—*High and Low Water Marks*—dated June 1965, it stated:

> In 1854 the Lord Chancellor in giving judgment on the limits of foreshore boundaries around England and Wales defined these boundaries as following the High and Low Water Marks of a medium or average tide.

The leaflet goes on to explain that the present nomenclature is Mean Low Water (MLW). After explaining how tidal surveys are made, it concludes that low water presents greater difficulty than high water and 'its definition cannot be guaranteed to the same degree of accuracy'.

In Scotland, the position is different. In *Fisherrow Harbour Commissioners* v. *Musselburgh Real Estate Co. Ltd.*, the Court of Session had to consider the shoreward limit of the foreshore. Pressed to adopt the rule in *Chambers*, the Lord Ordinary, Lord Low, nevertheless held that the foreshore extended to the high-water mark of ordinary spring tides. On appeal, the judgment was affirmed by the Inner House. Lord Young remarked:

> I regard the definition arrived at by our own law as the best, and I therefore consider that uniformity should be attained not by the Scottish authorities adopting the rule on this subject which has been determined in the law of England, but by the English authorities adopting the rule laid down in our own law.[5]

It has been assumed that the same principle applies to the seaward limit of the foreshore in Scotland. In its leaflet, the Ordnance Survey states inaccurately though authoritatively that in Scotland 'there has been no legal definition of foreshore boundaries but ancient custom has decreed that the extent of the foreshore shall be limited by mean spring tides'. This is known as Mean Low Water Springs (MLWS) in the Ordnance Survey.

It is not proposed in this work to enter into the technical complexities which are produced in practice by these judicial utterances. The Ordnance Survey, in the above leaflet, has explained how it constructs the relevant lines for use in its maps and plans. Nor is it proposed to discuss the seaward extent of the powers of various authorities for particular purposes, e.g., water management, planning, land drainage, and public health.[6] The

[5] (1903) 5 F. 387, 394.

[6] See, e.g., Gibson, [1977] *Journal of Planning and Environment Law* 762; Himsworth, ibid., 1.

importance of these matters is great and it would require a separate study to do justice to them.

The problem of accretions, natural and artificial, from the sea to the land has now been dealt with by s. 72 of the Local Government Act 1972, which provides:

> (1) Subject to subsection (3) below, every accretion from the sea, whether natural or artificial, and any part of the sea-shore to the low water-mark, which does not immediately before the passing of this Act form part of a parish shall be annexed to and incorporated with—
> (a) in England, the parish or parishes which the accretion or part of the sea-shore adjoins, and
> (b) in Wales, the community or communities which the accretion or part of the sea-shore adjoins,
> in proportion to the extent of the common boundary.
> (2) Every accretion from the sea or part of the sea-shore which is annexed to and incorporated with a parish or community under this section shall be annexed to and incorporated with the district and county in which that parish or community is situated.
> (3) In England, in so far as the whole or part of any such accretion from the sea or part of the sea-shore as is mentioned in subsection (1) above does not adjoin a parish, it shall be annexed to and incorporated with the district which it adjoins or, if it adjoins more than one district, with those districts in proportion to the extent of the common boundary; and every such accretion or part of the sea-shore which is annexed to and incorporated with a district under this section shall be annexed to and incorporated with the county in which that district is situated.

The low-water mark, however, is not the uniform seaward limit of inland waters. Certain tidal waters, and their solum, are considered to be within the county by virtue of a common law doctrine. Furthermore, certain waters, and their solum, are considered to be under the unrestricted sovereignty of the Crown by virtue of the fact that they lie on the shoreward side of the baseline from which the United Kingdom territorial sea is measured. These situations will be examined separately.

(i) THE COMMON LAW DOCTRINE

This first arose in the context not of property but of 'jurisdiction'. The question was whether certain water areas fell within the ambit of adjudication of the common law courts, particularly in criminal matters. The strict territorial nature of English criminal law, evidenced by the fact that the jury had to be called from the 'pais' or county where the alleged crime was committed, made the

delimitation of the county a matter of extreme importance; once certain water areas had been determined to be within the county, it was assumed without further question that not only was the subjacent soil equally within the county but that both were thereby part of the realm and, consequently, part of the Crown's territorial dominions. Jurisdictional rights, therefore, gave rise to property rights.

The earliest foundation in common law of a rule for these 'inland' tidal waters was a dictum by Stanton J. in about 1314, quoted in *Fitzherbert's Abridgement* as follows:

> Que ceo nest pas saunce [or sauce] de mere ou home puit veier ce que est fait de l'un part de l'eive et de l'auter, come a veier de l'un terre tancque a l'auter, que le coroner viendra en ceo cas et fera son office; auxi come aventer avient en un brace del mere la ou home puit veier de l'un parte tancque a l'auter, de l'averter que en cel lieu avient puit pays avec conisans . . .[7]

The authority of this formulation was weakened in 1618 by Rolle's comment that it was denied by the judges to be the law.[8] Shortly afterwards, Hale reformulated the rule as follows:

> The sea is either that which lies within the body of a county or without.
>
> That arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discerne between shore and shore, is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. 8 E 2 Coron. 399.[9]

F. S. Reilly, in the opinion given in 1864 to the Office of Woods on the seaward extent of the county of Cornwall, stated that the dictum of Stanton J. ' . . . does not seem to rest on any principle, for the observation that a jury of the county will have cognizance of the facts would apply equally with respect to the open sea-shore; so that at that part a county should, be parity of reason, extend seawards far below low-water mark.'[10] He also criticized the ambiguity of Hale's reformulation. The Coleridge arbitral award of 1869 rejected the argument that the marginal solum around the Cornish coasts to a uniform distance was part of the county of Cornwall. There is no reason to consider that a different view would be taken elsewhere in the United Kingdom.

[7] *Fitzherbert's Abridgement, Coron.* 399.
[8] (1618) 2 Rolle 49.
[9] Hale, *De Jure Maris*, Ch. 4.
[10] FO 881/2290, p. 8.

The 'visibility' test of Hale was supplemented in *R.* v. *Cunningham* with a notion that waters (and presumably subjacent soil) were within the county if the local authorities had regarded them to be such by virtue of administrative acts. The case concerned the competence of a court in Glamorgan to try American seamen for alleged offences committed on board an American vessel while it was lying about a quarter of a mile from low-water mark in the Bristol Channel at a spot where the channel was not less than ten miles wide. The Court for Crown Cases Reserved, in a judgment delivered by Cockburn C.J., held that 'looking at the local situation of this sea' the ship was within the county of Glamorgan; the fact that certain islands between which and the shore the ship was lying had always been treated as part of the county was a 'a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded.'[11]

Thus the reasons for the decision remain obscure; the Court did not seem to act upon the fact that the *locus in quo* was within the port of Cardiff as defined by Treasury Warrant although this point had been relied on by the Crown; nor did the Court seem to apply the *intra fauces terrae* test, the vessel being in fact outside the headlands formed on the Glamorgan coast by Lavernock Point and Penarth Head. Sir Hardinge Giffard S.G., who had appeared as counsel for the defendants in *Cunningham*, claimed during the argument in *Keyn* that the earlier case had turned simply on a question of venue since he conceded that the Admiral would have had jurisdiction if this had been alleged by the Crown.[12]

According to the rival contentions in *The Fagernes*, the *locus in quo* was either 10½ or 12½ miles from the English coast and either 9½ or 7½ miles from the Welsh coast, at a point where the Bristol Channel was about 20 miles wide. At first instance, Hill J., 'on common law alone', held the *locus* to be 'within the jurisdiction'.[13] Although it was unnecessary for the Court of Appeal to consider the common law position in view of the opinion they formed of the effect of a statement by the Home Secretary on the extent of the Crown's 'territorial sovereignty', both Bankes and Lawrence L.JJ.

[11] (1859) Bell 72, 86.
[12] DPP 4/13: Transcript, 15 June 1876, p. 220.
[13] [1926] P. 185, 196–7.

stated that they did not agree with the reasoning of Hill J.[14]

The question remains whether there are in the United Kingdom any 'historic bays' or other tidal waters falling outside the *fauces terrae* test of visibility which are inland waters at common law. It might be argued that the 'King's Chambers' are such waters. These Chambers were areas of sea enclosed, by virtue of a decree of James I in 1604, within straight baselines drawn from headland to headland around the coasts of England and Wales (but not Scotland).[15] However, the very fact that the Chambers were proclaimed by James I as late as 1604 would, it is contended, thereby preclude them from being regarded by the common law as inland waters. Furthermore, they were originally proclaimed to delimit areas of neutral waters and no evidence exists to show that they were intended at the time to become part of the county.[16]

The application of specific legislation to adjacent tidal areas has sometimes been looked on as evidence of their incorporation within the county. Although there are local Acts, such as the Herne Bay and Ham oyster fisheries statutes,[17] no general legislation has been passed to constitute all areas of tidal enclosed water as inland waters. There are, nevertheless, statutes dealing with customs, pilotage, and fisheries which provide for the delimitation of particular areas. The most frequently relied on in the present context is the legislation enabling the delimitation of ports. In view of its pretended importance, this will be discussed in Chapter XII below. With regard to the compulsory pilotage areas delimited either by special Act or by Orders made under the Pilotage Act 1913, it is submitted that these are merely *ad hoc* administrative districts which provide no evidence for the incorporation of the water areas and subjacent soil as part of the county. As Hill J. remarked at first instance in *The Fagernes*:

> . . . a provision that a ship entering a port must take a pilot at such and such a place does not, in my view, throw any light on the question whether that place is within the territory of the state which owns the port.[18]

[14] [1927] P. 311, 323 (per Bankes L.J.), 329 (per Lawrence L.J.).

[15] A map, taken from Selden, which shows the Chambers is printed in Fulton, 121. See also Grant, (1915) 31 *LQR* 410.

[16] Atkin L.J. in *The Fagernes* [1927] P. 311, 326, indicated that he was not prepared to declare the King's Chambers dead. In the Anglo-Norwegian Fisheries Case before the International Court of Justice in 1950 and 1951, the United Kingdom Government claimed on several occasions that the King's Chambers had long snce been abandoned (*Pleadings, Oral Arguments, Documents*, vol. I, 90; vol. II, 451). It also pointed out that the locus in *Keyn* was within a Chamber (vol. I, 91–2).

[17] See Chapter II above.

Similarly, the creation of fishing zones cannot be construed as extending the ambit of inland waters, some of these zones, for example under the Fishery Limits Act 1976, extending beyond the limit currently claimed by the United Kingdom for its territorial sea.

As seen from such cases as *Lord Advocate* v. *Trustees of the Clyde Navigation*, the *intra fauces terrae* rule is applied in Scotland to constitute relatively narrow estuaries and lochs with their solum as part of the county. But the position of larger indentations is as uncertain as in England.[19] The problem was discussed to some extent in the cases of *Peters* v. *Olsen* in 1905[20] and *Mortensen* v. *Peters* in 1906,[21] although in both cases the court decided on grounds independent of property rights in the waters concerned. Both cases involved an appeal against the jurisdiction of the Dornoch Sheriff Court in prosecutions of the foreign masters of foreign trawlers who had used a certain type of trawl in a zone delimited by a regulation made under the Herring Fishery (Scotland) Act 1889 and subsequent Acts. The use of the particular trawl was stated to be forbidden. In the earlier case, the vessel was, or might have been, about 4½ miles from land in the Dornoch Firth, while in *Mortensen* v. *Peters* it was about 5 miles from land in the Moray Firth. In both cases, the High Court of Justiciary affirmed the jurisdiction of the Sheriff Court on finding that the vessels were using the forbidden type of trawl within the zone as delimited. In so doing, the judges all stated or implied that the cases turned on the construction of the legislation and bye-laws promulgated thereunder; the Lord Justice-General, Lord Dunedin, for example, remarked in *Mortensen* v. *Peters* that his decision in favour of the competence of the Scottish courts did not mean that the Moray Firth was for every purpose within the 'territorial sovereignty'.[22] In the same case, however, Lord Salvesen declared that the Act of 1889 was 'an assertion by the British Parliament . . . of their right . . . to treat [the area delimited] as within the

[18] [1926] P. 185, 196–7.

[19] So is that of the Solway Firth: *Annandale & Eskdale District Council* v. *North West Water Authority* [1978] S.C. 187.

[20] (1905) 4 Adam's Justiciary Reports 608.

[21] (1906) 8 F. 93.

[22] Ibid., 102. He cited the view of the Scottish institutional writer, Bell, that 'the Sovereign . . . is proprietor of the narrow seas within cannon shot of the land, and the firths, gulfs, and bays around the Kingdom'.

territory over which the jurisdiction of the Scottish courts extends'.[23]

In conclusion, it appears that at common law the areas of tidal water below low-water mark classified as inland waters are strictly limited in extent. It is still an open question, for example, whether waters situated between an off-shore island and the mainland fall into the category of inland waters at all. This uncertainty in the common law position led the Minister for Local Government and Development to declare in the House of Commons on 13 April 1972:

> Generally, the local government areas extend to low water mark, but certain waters have been recognised as parts of counties by decisions of the courts. There have been specific decisions extended to Poole Harbour, Milford Haven, the Solent, Humber and the Bristol Channel, but the precise areas to which they extend are uncertain.[24]

Accordingly, s. 71 of the Local Government Act 1972 was framed to deal with the problem in England and Wales:

> (1) A Commission may at any time review so much of the boundary of any county as lies below the high-water mark of medium tides and does not form a common boundary with another county and may make proposals to the Secretary of State for making alterations to any part of the boundary so as to include in the county any area of the sea which at the date of the proposals is not, in whole or in part, comprised in any other county or to exclude from the county any area of the sea which at that date is comprised in the county.
>
> (2) The Secretary of State may direct a Commission to conduct a review under this section of a particular boundary or not to undertake during a specified period such a review of a particular boundary, and may give a Commission directions for their guidance in conducting a review and making proposals under this section. . . .
>
> (4) The Secretary of State may if he thinks fit by order give effect to any proposals made to him under this section, either as submitted to him or with modifications.
>
> (5) A statutory instrument containing an order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

[23] Ibid., 108.

[24] 834 *HC Debs.*, col. 1443. The Minister did not name the decisions but it is suggested that they are: *R.* v. *Forty-Nine Casks of Brandy* (1836) 3 Hagg. Adm. 257 (Poole Harbour); *R.* v. *Bruce* (1812) 2 Leach 1093 and *Mure* v. *Hore* (1877) 41 J.P. 471 (Milford Haven); *The Lord of the Isles* (1832) referred to in *The Public Opinion* (1832) 2 Hagg. Adm. 398 (Solent); *The Public Opinion* (Humber); *R.* v. *Cunningham* (1859) Bell 72 (Bristol Channel).

(ii) THE TERRITORIAL SEA BASELINE

The rules for the determination of the baseline of the territorial sea are in large part now embodied in the 1958 Convention on the Territorial Sea and the Contiguous Zone. Article 3 provides that, except where otherwise provided in the instrument, the 'normal baseline' is the low-water line along the coast; by Article 10, this rule applies also to islands which are above water at high tide. Article 7 provides for the position of bays, which are defined as well-marked indentations not being mere curvatures of the coast. Where such an indentation fulfils the technical requirements of the Article for being a 'bay' then a closing line, not exceeding 24 miles in length, may be drawn across 'its natural entrance points' or, if these are more than 24 miles apart, across the interior of the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length. By virtue of Article 5(1), waters on the landward side of the baseline of the territorial sea form part of the 'internal waters' of the State.

The principal derogations from the 'normal baseline' and '24 mile' rules come firstly in Article 4, which provides that straight baselines may be drawn 'in localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity'; the drawing of such baselines must not 'depart to any appreciable extent from the general direction of the coast'. The second derogation comes in Article 11 which provides that the low-water line on a low-tide elevation may be used as the baseline, provided the low-tide elevation is situated 'wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island'.

Finally, the provisions of the Convention are stated in Article 7(6) not to apply to so-called 'historic' bays, nor, it would appear from a resolution adopted by the United Nations Conference on 27 April 1958, to other 'historic waters'.

The question is to what extent, if at all, have these rules replaced or supplemented the common law rules regarding inland waters. In particular, are the waters and their solum shoreward of the baseline now within the county?

The Convention's provisions on the determination of the baseline of the territorial sea were incorporated, in a redrafted form, into the Territorial Waters Order in Council effective on 30 September 1964 and now slightly amended by an Order effective on 18 June 1979. The 'general purport' of the 1964 instrument is

set out in an explanatory note attached to but forming no part of it:

> This Order establishes the baseline from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured. This, generally, is low-water line round the coast, including the coast of all islands, but between Cape Wrath and the Mull of Kintyre a series of straight lines joining specified points lying generally on the seaward side of the islands lying off the coast are used, and where there are well defined bays elsewhere lines not exceeding 24 miles in length drawn across the bays are used.[25]

The Order does not make specific mention of the Convention nor does it specify the legal status of the waters and subjacent soil enclosed within the baselines. Although it provides for effect to be given to low-tide elevations wholly or partly 'within the breadth of sea which would be territorial sea if all low-tide elevations were disregarded for the purpose of the measurement of the breadth thereof',[26] it makes no special provision for the determination of the baseline across the mouth of a river, whereas Article 13 of the Convention provides for a mandatory straight line when a river flows 'directly into the sea'.[27]

Is the outer line of delimitation of inland waters now concurrent with the baseline of the territorial sea as determined by the provisions of the 1958 Convention and the 1964 and 1979 Orders in Council? This is not an idle question; in *Post Office* v. *Estuary Radio Ltd.*, Diplock L.J., on behalf of the Court of Appeal, said:

> It is common ground that the area included in the internal waters of the United Kingdom under the Convention, at any rate as respects 'bays', is greater than that previously claimed by the Crown.[28]

From a chart showing the three-mile belt of the United Kingdom as measured from the baselines in accordance with the 1958 Convention,[29] it appears that the Hydrographic Department of the Admiralty considers that, for example, the spot in the Bristol Channel which two Lords Justices in *The Fagernes* in 1927 thought

[25] Statutory Instruments, 1965, Part III, section 2, p. 6452A. The Order is not a Statutory Instrument but is promulgated by Her Majesty 'by virtue and in exercise of all the powers enabling Her in That Behalf'. The 1979 Order has not yet been printed in the Statutory Instruments series.

[26] It was on the strength of this provision that the Kent Justices in *Lye* found that Red Sands Tower was within territorial waters.

[27] In *Post Office* v. *Estuary Radio Ltd.* [1967] 1 W.L.R. 847, O'Connor J. at first instance held that the Thames estuary was rather 'an indentation of the coast' and formed as to some part of its extent a 'bay'.

[28] [1968] 2 Q.B. 740, 756.

[29] The chart is reproduced in (1964) 3 *International Legal Materials* 494–5.

was outside inland and even territorial waters is now within the above baselines; similarly, the spot in the Solent, held by Romilly M.R. in 1861 to be 'high seas',[30] is equally within the new baselines. As for Red Sands Tower, held by the Queen's Bench Division and the Court of Appeal in 1967 to be within internal waters on the basis of the 1964 Order,[31] this feature is probably outside the county on the common law test.

In the absence of authority, it is submitted that the Convention and the Orders in Council have not altered the area of tidal waters, and the solum thereof, which is within the county. Thus there is a basic difference between the tidal waters within the county (inland waters), and the tidal waters on the shoreward side of the baseline of the territorial sea (internal waters).[32] Nowhere would this be more obvious than in those areas where straight baselines have been constructed by the Orders, i.e., the west coast of Scotland. The waters and solum of the Minches, for example, though internal waters, would not necessarily thereby become inland waters, part of the nearby counties of Scotland.

Two arguments can be advanced to support this contention. Firstly, it would seem contrary to basic principle that as the legislature has specifically provided a complex mechanism for changing the seaward boundaries of the local government areas in s. 71 of the Local Government Act 1972, the Crown could still do this by a stroke of its prerogative pen. It seems a classic case of a statute abrogating any prerogative power there might previously have been to delimit the county.[33] Secondly, the low-water mark for the purposes of the baseline of the territorial sea is unlikely to be the Mean Low Water line (MLW) or the Mean Low Water Springs (MLWS) of common law and the Ordnance Survey, but rather the chart datum of the Admiralty which is the line of lowest astronomical tide (LAT), the lowest predictable tide under average meteorological conditions. Thus the baseline of the territorial sea will be seawards of the limit of inland waters except in places where the land ends in a vertical cliff.

[30] *The Eclipse and the Saxonia* (1862) 15 Moo. P.C. 262.

[31] *Post Office* v. *Estuary Radio Ltd.* [1967] 1 W.L.R. 847 (Q.B.D.), [1968] 2 Q.B. 740 (C.A.) The tower was some 4.9 miles from the nearest point on the low-water line on the coast though within 3 miles of a low-tide elevation which itself was within 3 miles of the low-water line on the coast.

[32] This distinction is crucial in the context of the federal/provincial dispute over Georgia Strait in Canada. See *Reference re Ownership of the Bed of the Strait of Georgia and related areas*(1976) 1 B.C.L.R. 97.

[33] *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508.

B. The Seaward Limit

It will assist clarity here if the traditional claim of the Crown is discussed separately from the claim flowing from the public international law concept of territorial sea.

(i) THE TRADITIONAL CLAIM

The early authorities did not think that the extent seawards of the Crown's alleged rights in the soil of the marginal sea were other than co-extensive with its alleged rights in the waters of that sea. The location of the areas of sea in which the Crown claimed rights are vague. Often they were spoken of as the 'Four Seas' or *quatuor maria*. As late as 14 February 1878, Lord Cairns L.C., after mention of Bracton and Selden, declared in the House of Lords that the 'four seas' were the British Channel, the seas on the west and east coasts of Scotland and the German Ocean.[34] Another description of the sea areas in question was in terms of the 'narrow seas'. This term was used in particular to describe the claim to the English Channel. Thus on 29 May 1557, the Queen, Mary Tudor, wrote to Lord Admiral William Howard that the 'narrow seas' lay between the North Foreland and the Cape of Cornwall on the side of England and between Flushing and Guernsey on the side of France.[35] More widely used were the terms 'British Seas' or the 'seas of England'. Thus in the roll *De Superioritate Maris Angliae et Jure Officii Admirallatus in eodem*, written, according to Fulton, between 1304 and 1307, the following passage appeared:

> That whereas the Kings of England by right of the said kingdom, from a time whereof there is no memorial to the contrary, had been in peaceable possession of the sovereign lordship of the sea of England and of the isles within the same . . .[36]

The extent of these seas was equally in doubt and conflicting views were given. In 1575, Plowden, appearing as counsel in the case of *Sir John Constable*, claimed that the 'bounds of England' extended to the middle of the adjoining sea, though the 'exclusive jurisdiction' of the Queen extended over the whole sea between England and both France and Ireland, 'but in other places, as towards Spain, she has only the moiety'.[37] According to Fulton, the first writer who appeared to attempt the definition of the

[34] 237 *P.Debs.*, 3rd series, col. 1606.
[35] SP 11/10, fo. 80.
[36] Fulton, 45–6.
[37] Moore, 227–8; see Chapter I above.

'English seas' was the scholar and mystic Dr John Dee. In a work published in 1577[38] Dee claimed that the surrounding seas half way to the shores of foreign princes were the Queen's 'peculiar seas' and that when both coasts of the sea were possessed by the Queen, 'her peculiar jurisdiction and sea royalty' extended over the whole breadth of the sea, even if the distance were one thousand miles or more. In a later treatise, addressed to Dyer and dated 1597,[39] Dee declared that the whole sea between the south coast of England and the north coast of France—Picardy, Normandy, and Brittany—was under the Queen's 'sea-jurisdiction and sovereignty absolute' inasmuch as she was a real monarch of France by direct inheritance and prior conquest. Dee also claimed sovereignty for the Queen in the sea to the west of England and Ireland, the sea around Scotland, 'at least to the mid-sea' between Scotland and the coasts of Norway and Denmark, and 'half seas over' between England and the coasts of Denmark, Friesland, and Holland.

Such wide claims, reminiscent of those by the Crowns of Spain and Portugal, and of various States in the Mediterranean, do not seem to have been espoused by the Crown itself at this period. In instructions sent to the English representatives at negotiations with Denmark at Bremen in 1602, the Queen declared that 'property of sea in some small distance from the coast may yield some oversight and jurisdiction' yet fishing and passage should not be forbidden by the prince holding the coast.[40]

With the ascent of the Stuart Kings, wide claims by the Crown became common and these were reflected by the writers. In Scotland, Welwood and Craig both claimed that the open sea appertained to the adjacent State as a general rule of international law. In England, John Selden ended his work *Mare Clausum*, first released in 1635, as follows:

> It is certainly true, according to the mass of evidence set out above, that the very shores or ports of the neighbouring sovereigns on the other side of the sea are the bounds of the maritime dominion of Britain, to the southwards and eastwards; but in the vast ocean to the north and west they are to be placed at the farthest extent of the most spacious seas which are possessed by the English, Scots and Irish.[41]

[38] Dee, *The Brytish Monarchie*; Fulton, 99–103.
[39] Fulton, 103–4.
[40] *Rymer's Foedera*, vol. 16, 433.
[41] As quoted in Fulton, 374.

Hale, in his preliminary treatise written about 1636, referred to 'the sea, at lest so much thereof as adjoines nearer to our cost then to any other foren cost: as it is within the Kinges jurisdiction'.[42]

Various declarations of the extent of the 'British Seas' were made by the Admiralty Judges,[43] while in *R.* v. *Vaughan* in 1696 an alternative count in the indictment stated that the accused performed overt acts 'upon the high seas about fourteen leagues from Deal and within the dominion of the Crown of England and within the jurisdiction of the Admiralty of England'.[44] Furthermore, the term 'British Seas' continued to be inserted in treaties negotiated by Britain, although without any declaration of their extent.[45]

In a memorandum of 18 January 1815, concerning the sovereignty of the sea and the right of salute, John Wilson Croker, First Secretary to the Admiralty, stated:

> What are the British Seas?
>
> A majority of Authorities state them to be all the Seas contained to the eastward, by the meridian of Cape Finisterre and the latitude of the Cape of the land van Staten in Norway, but it is curious and *not much*, I think, to the *credit* of the then Court of Admiralty that on the conclusion of the Spanish Treaty 1719 when captures in the British Seas were to be restored after 14 days, the judge (Sir Nath. Lloyd) held (in the case of three Spanish Merchantmen taken within Cape Finisterre but beyond the chops of the Channel) that the Sovereignty extended to Cape Finisterre yet the British Seas intended by the Treaty were the Channel only and the ships were accordingly condemned as good prize.
>
> It will have been observed that Sir William Temple and King William use the term 'narrow seas', now, it appears from the numerous patents of the Admirals and Vice Admirals of the Narrow Seas that the limits of these Seas are distinctly defined to be from the Thames to the Island of Scilly and in a proclamation of 1702 of Colours to be worn by Merchantmen, the British Seas seem by implication to be restricted to the Channel, and Sir Philip Meadows says of the old definition of *from Cape Finisterre to the Nase* that 'it is too wide for dominion and too narrow for respect'.[46]

Scepticism over the wide extent of the 'British Seas' increased

[42] Moore, 358.

[43] See Wynne, *Life of Sir Leoline Jenkins*, vol. II, 699–700; Marsden, *The Law and Custom of the Sea*, vol. II, 231–2, 256–7.

[44] (1696) 13 Howell's State Trials 485, 488.

[45] See Marston, (1980) 11 *Cambrian Law Review* 62.

[46] Printed in *The Naval Miscellany*, vol. III, 289–329, at 298, from ADM 7/667. In a footnote, Croker admitted that he meant Sir H. Penrice, not Sir Nath. Lloyd.

with the advance of the nineteenth century. With regard to the 'Hovering Acts', which rendered liable to forfeiture, in certain circumstances, foreign ships coming within a hundred leagues of the British coasts, the Law Officers, Robinson K.A., Copley A.G., and Wetherell S.G., advised the Foreign Office on 21 May 1825: 'Can it be supposed that England pretends to claim a property in the Sea to the distance of 100 leagues from her Shores? or to the distance of eight or four leagues?'[47]

The Crown clearly did not consider that such strictures applied to its solum claim. The extent of this was stated, for the first time divorced from considerations of the superjacent waters, in the Crown's *Preliminary Case* in the first Cornwall submarine mines arbitration in 1856; there it claimed, on the authority of Plowden's argument in *Sir John Constable's Case* and of *Comyn's Digest* that

> [t]he jurisdiction and consequent ownership of the Crown, as Lord of the Sea, has been defined, with respect to the British Channel, to extend midway between England and France, and to the middle of the sea between England and Spain.[48]

Sir John Patteson's award itself made no mention of the seaward extent of the minerals below low-water mark awarded to the Crown.

The second Cornwall submarine mines arbitration could very easily have been the occasion for the extent of the Crown's particular claim to the solum to be defined. This was not to be so, however, since the Duchy of Cornwall, which delivered the first statement in the proceedings, claimed that the 'full limit on the open coast of the fundus below low water-mark, which the Sovereign might grant to an ordinary subject, as part of the maritime territories of the Realm' appeared to extend to three geographical miles off the shores of the Kingdom in general. This, in its first alternative submission, was the seaward extent of the county. In its *Reply*, the Duchy developed its argument on this point, citing numerous ancient authorities, some of which claimed vast distances, but concluding that

> . . . the proprietary or territorial ownership of the Crown in the soil of the sea, adjoining the English coasts, (irrespective of the maritime jurisdiction or authority which would equally prevail within such limited area as beyond it) would be confined to the limit of a maritime league, or

[47] FO 83/2266; *Law Officers' Opinions to the Foreign Office 1793–1860*, vol. 30, 346.

[48] See Chapter IV above.

three miles from the shore, alluded to in the introduction to 'Angell on Tide Waters' as the limits of a nation's *territory*, and referred to by Chief Justice Erle, in the case of the 'Free Fishers of Whitstable v. Gann', as the extent to which the sovereign might grant the soil of the sea, even to an ordinary subject.

The Duchy then referred to the argument of the defendant in *Attorney-General* v. *Tomsett*[49] which, it maintained, erred in asserting that the Downs were not part of the Realm of England, though part of the Dominions of the King of England like the colonies. In the Duchy's view, the 'comparatively reasonable distance' of three miles was under the proprietary or territorial ownership of the Crown, while the dominion over the sea beyond 'might well be compared to that exercised over the Colonies, or any other part of the Crown dependencies, not forming an integral part of the Realm of England'.

In its *Rejoinder*, the Crown pointed out that the Duchy, by arguing that the proprietary right 'even of the Sovereign' was *confined* to a distance of three miles from the shore, and furthermore that this area was within the county, would leave nothing for the Cornwall Submarine Mines Act 1858 to operate upon, since that Act specifically assigned to the Crown 'all Mines and Minerals lying below Low-Water Mark under the open Sea adjacent to but not being Part of the County of Cornwall'. The Crown went on:

> It is common ground to both the Duchy and the Crown that the jurisdiction and interest of the King [sic] extends to three miles at the least from the shore; and for the purposes of the present argument, the Crown may admit that a subject may hold by grant from itself not only lands between high and low water mark, but also lands below low-water mark.

The case of *R.* v. *Keyn* in 1876 provoked several remarks regarding the extent of the 'British Seas'. During the first hearing of the appeal, the Solicitor-General, Sir Hardinge Giffard, declared:

> The extent to which other nations were agreed that this territorial limit extends to the distance of a cannon shot, is a matter settled I admit between nation and nation now. But if it is said that the existence of this territory of England is a matter of international law, I respectfully say that it is not so, that the claim of this country (which was a far wider claim than it is now) was to exercise a territorial dominion over it

[49] (1835) 2 C.M. & R. 170.

> because it *was* part of this country; and was what this country claimed to be part of its own territorial dominion, and that other nations have conceded to the extent of the three miles. It is known historically that it was claimed to a much wider extent, and for this purpose it is enough for me to contend for what is the international limit.[50]

Later in the same argument, the Solicitor-General maintained that the three-mile belt was the 'modern version' of the 'Four Seas'.[51]

During his judgment, Cockburn C.J., who throughout the second hearing of the appeal had shown his contempt for the limits claimed by Selden and his followers, declared:

> All these vain and extravagant pretensions have long since given way to the influence of reason and common sense. If, indeed, the sovereignty thus asserted had a real existence, and could now be maintained, it would of course, independently of any question as to the three-mile zone, be conclusive of the present case. But the claim to such sovereignty, at all times unfounded, has long since been abandoned.[52]

Two of the dissenting judges commented equally unfavourably on the extent of the traditional claim. Amphlett J.A. considered that 'these extravagant claims ... have been long since abandoned',[53] while Grove J., if not repudiating them categorically, implied that they belonged to the past rather than the present.[54] Lord Coleridge C.J., without making reference to the old claims, cautiously stated that the 'property of the State and Crown of England' extended 'at least so far beyond the line of low water' as to include the place where the collision took place.[55]

The Territorial Waters Jurisdiction Act 1878, though confined in its operation to 'any part of the open sea within one marine league of the coast measured from low-water mark', declares in its preamble that

> ... the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions.

[50] DPP 4/12: Transcript, 6 May 1876, p. 174.
[51] Ibid., Transcript, 19 May 1876, p. 172.
[52] (1876) 2 Ex.D. 63, 175.
[53] Ibid., 119.
[54] Ibid., 109.
[55] Ibid., 155.

In his speech in the House of Lords on 14 February 1878 introducing the Bill which became the above Act, Lord Cairns L.C. stated that 'as years went on and commerce extended, definitions as to distance were adopted; but the principle of the claim to a jurisdiction over the waters round the Kingdom was never given up'.[56]

In various other Parliamentary speeches, high Government spokesmen continued to declare that this 'jurisdiction' was not confined to a marine league. Thus on 6 May 1895 Lord Halsbury L.C., after pointing out that as Solicitor-General at the time he had been responsible for introducing the Territorial Waters Jurisdiction Bill in the Commons, declared that care had been taken in that measure to avoid measurements as to the territorial limit. 'The distance was left at such limit as was necessary for the defence of the Realm. Then the exact limit was given for the particular purpose in view'.[57] In the same debate, the Foreign Secretary, the Marquis of Salisbury, stated that 'great care had been taken [in preparing the Sea Fisheries Regulation (Scotland) Act 1895] not to name three miles as the territorial limit. The limit depended on the distance to which a cannon-shot could go'.[58]

All the above Parliamentary statements, however, were uttered in the context of the waters of the marginal belt and usually of 'jurisdiction' rather than property rights in it; they were not necessarily intended to refer to the subjacent soil. It will indeed have been noticed in the earlier part of this work that, in granting licences to lay cables on the bed of the sea, the Crown always stated that these were to extend 'so far as British territory extended', without any specific distance being indicated.[59] In the course of the discussions set out in Chapter VII above between the Commissioner of Woods, Charles Gore, and the Treasury in 1875 concerning the Channel tunnel scheme, the former declared that the exact seaward limit of the boundary of England was 'open to question'; he thought that 'for 3 miles at the least the Tunnel will be constructed through substrata belonging to the Crown of England'. Similarly, the British members of the Joint Commission on the tunnel scheme wrote a few months later that the Crown's right of property in the soil of the bed of the sea extended to a distance of three miles at least from the shore, and, on the basis of

[56] 237 *P.Debs.*, 3rd series, col. 1606.
[57] 33 *P.Debs.*, 4th series, col. 504.
[58] Ibid.
[59] See Chapter II above.

occupation and accretion, would extend further with the construction of the tunnel; they were of the opinion that the tunnel would thus be 'situate in England'. In the Crown informations filed in the subsequent abortive proceedings, no distance was specified as the extent of the Crown's claim, although the President of the Board of Trade declared in the Commons in 1884 that 'nobody disputed the right of the Crown to the *solum* of the sea within the three-mile limit'.[60] Brickdale, on the other hand, thought in 1893 that the bed of the sea to an 'undefined distance' belonged to the Crown.[61] The leases of submarine strata made by the Office of Woods frequently used the distance of three miles as the seaward extent of the strata leased, but in 1880 the Office first leased then sold the mineral substances to a distance of ten miles from the coast of Cumberland.[62]

As well as general statements disclaiming sovereignty over the waters beyond the marginal belt,[63] there is evidence that the Crown has abandoned its traditional claim to the solum beyond the limit of the territorial sea. The Easington lease of 1938 was based on occupation not existing property. Moreover, in a written answer in the House of Commons on 21 December 1955, the Joint Under-Secretary of State at the Foreign Office remarked that 'Her Majesty's Government have not as yet put forward any claim to the seabed and subsoil outside territorial waters in the English Channel'.[64] This area was *par excellence* the location of the traditional claim.

A more drastic argument might be advanced to support the above view. By virtue of Article 2(1) of the 1958 Convention on the Continental Shelf, the United Kingdom *qua* contracting Party has 'sovereign rights' not 'sovereignty' over the shelf appertaining to it, rights which are confined 'for the purpose of exploring it and exploiting its natural resources'. The Continental Shelf Act 1964, enacted to implement the relevant provisions of the Convention, applies 'outside territorial waters'. It makes no specific provision for the saving of rights, if any, which may flow from the prerogative of the Crown, and, indeed, during the passage of the Bill through Parliament, the Crown indicated that it was putting its 'preroga-

[60] See Chapter VII above.
[61] See Chapter VIII above.
[62] Ibid. It is uncertain whether the area was considered to be within the Solway Firth and thus under inland waters, or whether the whole of the channel between Cumberland and the Isle of Man was still considered to be an 'inland sea'.
[63] E.g., 546 *HC Debs.*, Written Answers, col. *169* (28 November 1955).
[64] 547 *HC Debs.*, Written Answers, col. *328*.

tive and interest' so far as affected by the Bill at the disposal of Parliament.[65] There is thus the possibility of arguing that, since 'sovereign rights' are a lesser quantum than 'sovereignty' and *a fortiori* less than 'property', the Crown, by ratifying the Convention, has by implication abandoned in favour of the Convention régime whatever rights in municipal law it might previously have been able to claim in the submarine soil beyond the present limits of the territorial sea. Thus, if tomorrow the Crown were to claim a territorial sea of twelve international nautical miles in breadth, then the status in public law of the bed and subsoil of the nine extra miles so claimed would flow solely from the declaration of extension and not from any earlier title. In the absence of any judicial pronouncement on the effects of the Convention and the 1964 Act, it is difficult to assess the likely outcome of such an argument, although it is suggested that the courts are likely to construe strictly a provision which would derogate from the Crown's existing rights and powers.

(ii) THE CLAIM BASED ON THE TERRITORIAL SEA DOCTRINE

It is not proposed to discuss the evolution of the 'three-mile limit' doctrine in international law. It is sufficient to note that the United Kingdom has consistently since at least the eighteen-thirties confined its claim to 'sovereignty' to a belt of sea of a marine league (now three international nautical miles) when dealing with other States. Indeed, a glance at the open archives of the British Government shows that the policy followed, particularly under the pressure of the Admiralty, has been to confine the area of water under sovereignty to a minimum. There is little evidence, however, until the pioneering article of Sir Cecil Hurst in the early nineteen-twenties, that the extent of sovereignty over the marginal submarine soil was thoroughly considered.[66]

The problem today is that there does not seem to be any rule of customary international law regarding the maximum breadth of the territorial sea as this concept is defined in Articles 1 and 2 of the Convention on the Territorial Sea and the Contiguous Zone. This Convention provides nothing on the point and the 1960 United Nations Conference failed to reach agreement. Claims of up to 200 miles have been made by some States, which, when coupled with liberal application of the straight baseline system to

[65] 254 *HL Debs.*, col. 392 (19 December 1963).
[66] See Marston, (1975–6) 48 *BYBIL* 321.

archipelagic areas or deeply indented coasts have the potential to appropriate vast areas of the sea, including bed and subsoil, as 'territorial sea' subject to State sovereignty. It cannot now be invalid for the United Kingdom, by a stroke of the royal pen wielded by an anonymous functionary, to extend tomorrow to at least twelve miles the breadth of its territorial sea, and thus vest in the Crown Estate property rights in the solum thereof. The power in the Sea Fisheries (Shellfish) Act 1967 to confer a several fishery to a distance of six miles from the baseline of the territorial sea indicates that the legislature took the view that the Crown's property in the solum might already extend so far.[67]

The Downward Limit

There is little authority except the Roman law maxim *usque ad inferos* and the rule of land law that the fee simple owner is entitled to land down to the centre of the earth.[68] As the exploration and exploitation of the solum has not yet progressed to the depth that legal problems arise over it, it is proposed to curtail discussion on this last aspect of delimitation.

[67] See *A.G.* v. *Emerson* [1891] A.C. 649.
[68] *Egremont Burial Board* v. *Egremont Iron Ore Company* (1880) 14 Ch.D. 158.

Chapter XII

The Historical and Juridical Bases of the Crown's Claim to the Marginal Solum

A. The Historical Basis

It is clear from the practice described in Chapter VIII above that the Crown today claims to be the owner, *jure coronae*, of the marginal solum beyond the limits of inland waters. From this solum it receives a substantial income. Is the claim a continuation, unchanged in quality though possibly not in extent, of that advanced in the remote past (called for convenience the 'traditional claim'), or is it based on the relatively modern international law doctrine of the territorial sea?

There is a substantial body of opinion which considers that the traditional claim was abandoned, either on the demise of the Stuart dynasty, or later. Cockburn C.J. expressed this most forcefully when he remarked in *Keyn* that 'these assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded . . . when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is gone, the territorial property which was suggested to be consequent upon it must necessarily go with it.'[1] A similar view was advanced by the Judicial Committee of the Privy Council in the British Columbia fisheries case of 1913 where it stated that the 'three-mile limit' owed its origin to 'comparatively modern authorities on public international law'.[2] Furthermore, the Cockburn view has been endorsed by the Supreme Courts of the United States,[3] and of Canada,[4] and by some members of the High Court of Australia.[5]

Some academic writers, too, have followed Sir Alexander Cockburn's interpretation of history. *Coulson & Forbes* continues to

[1] (1876) 2 Ex.D. 63, 196.
[2] [1914] A.C. 153, 174–5.
[3] *United States* v. *California* 332 U.S. 19 (1947), *United States* v. *Texas* 339 U.S. 707 (1950), *United States* v. *Maine & Others* 420 U.S. 515 (1975).
[4] *Reference re Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792.
[5] *New South Wales & Others* v. *Commonwealth of Australia* (1975) 135 C.L.R. 337, 367 (Barwick C.J.), 461–2 (Mason J.). However both left the point undetermined.

declare that in the absence of legislation, the solum is not vested in the Crown 'as against other nations'.[6] Fulton asserted that the old claim to dominion of the British seas 'simply died out and vanished in the lapse of time, without apparently leaving a single juridical or international right behind it'.[7] O'Connell, writing in 1970, stated that 'by 1800 the Crown's traditional claims had been abandoned, and the new doctrine of territorial waters had been substituted for them'.[8]

The evidence of Crown practice set out in the earlier part of the present work, however, gives a different picture. Although there was a period of comparative desuetude during most of the eighteenth century, there is little evidence of outright abandonment of the traditional claim to the solum. In the first place, Crown practice has followed a remarkably consistent pattern. There is not a great deal of difference, for example, between the information against William Hammond in 1575 and that against the Channel tunnel companies in 1882. When the Crown resumed in earnest its foreshore and seabed activities in the early nineteenth century, the authorities invoked in support were Callis and Hale rather than Grotius and Bynkershoek, indicating that the claim was not based on the international law doctrine of territorial sea, a doctrine unknown in English law until a few years previously. Furthermore, there was, and perhaps still is, a reluctance to confine the claim to the 'international' distance of the marine league. Judges in English courts, both before and after *Keyn*, have not doubted the validity of the historical sources of the Crown's claim. In Commonwealth courts, there are still some judges who take a similar attitude.[9]

Some writers have not followed Cockburn's view. Thus Sir Cecil Hurst considered 'that the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea'.[10] O'Connell, moreover, changed his view from that set out above, for in an article published in 1973 he wrote that 'the common law tradition of the Crown's property in the sea descended into the caverns of lawyers' law, where it flowed as strongly as ever until it

[6] Coulson & Forbes, 6th ed., 1952, 9.
[7] Fulton, 538.
[8] O'Connell, *International Law*, vol. I, 470.
[9] *New South Wales & Others* v. *Commonwealth of Australia* (1975) 135 C.L.R. 337, 391–400 (Gibbs J.), 438 (Stephen J.), 487 (Jacobs J.). *Re Monashee Enterprises Ltd.* (1978) 90 D.L.R. (3d) 521, 530 (Supreme Court of British Columbia).
[10] Hurst, (1923–4) 4 *BYBIL* 34, 43.

reappeared on the surface in the nineteenth century in connection with the three-mile limit. This being so, the only possible way of regarding the matter is to suppose that the territorial sea, whatever dimensions it may have at any time possessed, was consistently part of the royal waste.'[11]

A further argument which makes it difficult to accept that the present claim is solely based on the international law concept of territorial sea is that only relatively recently did this latter concept extend to the bed and subsoil. Thus Gidel remarked of the draft rule formulated at the Hague Conference of 1930, which was in similar terms to the 1958 Convention text:

> C'est, semble-t-il, la première fois qu'une disposition a jamais été formulée expressément dans un document international collectif d'ordre positif concernant le sol et le sous-sol de l'espace maritime en général et de la mer territoriale en particulier.[12]

As the Crown has consistently asserted ownership of the solum since the first half of the nineteenth century at the latest, this claim could not have been based during the entire period on sovereignty flowing from an international law source.

The Crown's claim to sovereignty, or at least jurisdiction, over large tracts of sea surrounding the British Isles was relevant in an international context, largely of the flag-salute and the enforcement of hovering legislation over foreign vessels. The Crown's claim to the solum only occasionally, as in the Channel tunnel negotiations, affected foreign States. It was a claim which sounded in municipal law rather than international law. Thus the tacit abandonment of the wide claim in respect of the surrounding waters[13] need not have involved the abandonment of the traditional claim to the solum and the evidence in the first part of this work indicates that it did not.

In conclusion, it is submitted that the traditional claim was not abandoned at any time prior to the reception of the doctrine of territorial sea, nor has it been abandoned since. There appear, therefore, to be at least two separate historical sources of the present-day claim to the solum, the traditional claim and the international law doctrine of territorial sea.

B. The Juridical Basis

[11] O'Connell, (1971) 45 *BYBIL* 303, 319.
[12] Gidel, vol. III, 326. See also Marston, (1975–6) 48 *BYBIL* 321.
[13] On this, see Marston, (1980) 11 *Cambrian Law Review* 62.

(i) STATUTE

The legislature has been reluctant to describe the Crown's interest in the solum outside inland waters. The statute Prerogativa Regis, enacted about 1324, made no mention of it. The reclamation statutes as well as the Great Yarmouth Wellington Pier Act 1855 and the Thames Conservancy Act 1857 contemplated that the Crown might have only a 'claim' to the solum. Even s. 7 of the Crown Lands Act 1866 did not specify what were the 'Parts and Rights and Interests' of the sovereign in the bed of the sea. The Crown Estate Act 1961 does not mention the solum.

Great importance has been placed on the Cornwall Submarine Mines Act 1858 as indicating that the solum is part of the Crown's territories. Thus Lord Coleridge C.J. considered that it was 'the express and definite authority of Parliament for the proposition that the realm does not end with low-water mark, but that the open sea and the bed of it are part of the realm and of the territory of the sovereign'.[14] The Act, however, dealt only with the mines and minerals adjacent to the County of Cornwall and thus cannot be the source of Crown ownership of solum elsewhere. Furthermore, the Act used the contradictory formula 'be it therefore enacted and declared' thus not indicating that the legislature necessarily approved of Sir John Patteson's ruling that the mines and minerals were already vested in the Crown. On the other hand, the provisions of the Act were of great persuasive authority as to the general legal status of the solum and were so applied by the executive to other areas of solum around the coasts.

The Territorial Waters Jurisdiction Act 1878 refers throughout to the 'open sea' and makes no reference to the solum. The preamble, which asserts the Crown's 'rightful jurisdiction' over the open seas adjacent to the coasts of its dominions, cannot, on general principles of statutory construction, have an enacting function. This point was emphasized by the United Kingdom Government in the course of its pleadings before the International Court of Justice in the Anglo-Norwegian Fisheries Case in 1950 where it stated that 'while this recital in the preamble is evidence of views entertained by some people in the United Kingdom at that time, the preamble has no operative force'.[15] The definition of 'territorial waters' in s. 7 of the Act as 'such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part

[14] (1876) 2 Ex. D. 63, 157–8.
[15] Anglo-Norwegian Fisheries Case, *Pleadings, Oral Arguments, Documents*, vol. II, 418. See also to the same effect Blain J. in *R.* v. *Kent Justices, ex parte Lye* [1967] 2 Q.B. 153, 186.

of Her Majesty's dominions, as is deemed by international law to be within the sovereignty of Her Majesty' has led some writers to consider that the Act provides a statutory mandate to assimilate territorial waters with land territory for the purposes of the delimitation of State territory. With respect, the provision cannot have such an effect. The fact that it appears in the definition section indicates that it does not have a wider effect than the enacting sections. These sections, however, provide only for the extension of the Admiral's criminal jurisdiction to foreign ships within a limited distance of the open coast. The Act nowhere constitutes the marginal sea to be British territory and, *a fortiori*, does not constitute it part of the United Kingdom or any part thereof. Furthermore, the expression 'deemed by international law' seems inconsistent with an intention thereby to declare British sovereignty over the marginal sea; it seems more consistent with an intention to leave such declaration to some other instrument. The executive certainly did not consider that the Act had extended the boundary of the United Kingdom. Thus on 20 July 1881, James A.G., Herschell S.G., and A. L. Smith advised the Board of Trade that since *Keyn* and the Act 'the United Kingdom must be held to terminate at low-water mark'.[16] The Territorial Waters Jurisdiction Act 1878 thus seems at the most neutral on the status of the solum of the 'territorial waters', or even on that of the 'three-mile belt' within those territorial waters.

Later statutes which contain references to the solum, such as the Coast Protection Act 1949, are equally incapable of being the source of the Crown's claim. It appears, therefore, that with the possible exception of the mines and minerals to an uncertain distance adjacent to the coasts of Cornwall, the Crown's claim to the solum cannot be based on statute.

(ii) THE ROYAL PREROGATIVE

There is much evidence that the Crown's traditional claim to ownership of the solum is founded on the royal prerogative, described by Dicey as 'the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.'[17] The earliest claims set out in Chapter I above, in 1575 against Hammond and in 1591 against Dulinge, were expressly based on the prerogative. The claim is frequently regarded as a

[16] CO 885/12; see Chapter VI above.
[17] Dicey, 10th ed., 424.

separate and valid head of the prerogative. Thus H. V. Evatt, in his unpublished dissertation on certain aspects of the royal prerogative, classified the ownership of 'the bed of the ocean within territorial limits' as one of the prerogatives in the nature of property.[18] *Halsbury* considers the matter settled: 'By prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast'.[19]

If, however, it were ever authoritatively determined that the traditional claim lapsed with the demise of the Stuart Kings, or if the Crown were now to rely only on the territorial sea doctrine as the historical source, then it would be difficult to support a separate head of the prerogative. Are there any existing heads of the prerogative into which the Crown's claim to ownership of the solum could therefore fall? Two heads in the nature of powers come to mind: (1) the power of the Crown to extend its sovereignty to territory, including maritime territory, over which it has not previously claimed or exercised sovereignty (2) the power to create and delimit ports, and thereby the ownership of the solum therein, to the extent that this power has not been abridged by statute.

(1) *The power to extend sovereignty to territory hitherto outside it*

It is idle to deny that the Crown has such a power. In *Post Office* v. *Estuary Radio Ltd.*, Diplock L.J. for the Court of Appeal stated:

> It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction.[20]

But does the Crown thereby automatically acquire proprietary rights, amounting to ownership? The answer in English (and, outside Orkney and Shetland, Scottish) law is yes. Sir Kenneth Roberts-Wray, former legal adviser to the Colonial and Commonwealth Relations Offices, discusses the distinction between sovereignty and property by relying on the well-known dichotomy of *imperium* and *dominium*. He prefaces his discussion:

> The distinction between these two conceptions has, however, become blurred by the doctrine that the acquisition of sovereignty over a Colony, whether by settlement, cession or conquest, or even of jurisdiction in

[18] Evatt, *Certain Aspects of the Royal Prerogative*, 40.
[19] *Halsbury's Laws of England*, 4th ed., vol. 8, paragraph 1418.
[20] [1968] 2 Q.B. 740, 753.

territory which remains outside the British dominions, imports Crown rights in, or in relation to, the land itself.[21]

There is a great deal of authority, most of it understandably in courts outside the United Kingdom, to support such a proposition.[22] It will suffice to give two illustrations from the High Court of Australia. In *Williams* v. *Attorney-General for New South Wales,* Isaacs J. (as he then was) stated:

> It has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired this feudal principle extended to the lands oversea. The mere fact that men discovered and settled upon the new territory gave them no title to the soil. It belonged to the Crown until the Crown chose to grant it.[23]

In *Randwick Municipality* v. *Rutledge* in 1959, Windeyer J., with Dixon C.J., Fullagar, and Kitto JJ. concurring, asserted that 'on the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown'.[24] Writing later extra-judicially in a general context, Sir Victor Windeyer stated that 'the concept of separate territorial sovereignties remained undisturbed. From it flowed proprietary rights of a state and its subjects. *Imperium* begat *dominium*.'[25]

A particularly illustrative case is the advice of the Judicial Committee of the Privy Council in *Amodu Tijani* v. *Secretary, Southern Nigeria*[26] which concerned the cession by treaty to the British Crown of 'the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging'. The Judicial Committee remarked that '[n]o doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony' but it is clear from the advice that this title did not pass expressly by the treaty of cession, but arose out of the nature of the Crown's relationship to land in the common law feudal system.[27]

[21] Roberts-Wray, 625. See also O'Connell, *International Law*, vol. I, pp. 403–4.

[22] See, e.g., *Attorney-General* v. *Brown* (1847) 1 Legge 312, 316 (Supreme Court of New South Wales); *R. (McIntosh)* v. *Symonds* (1847) N.Z.P.C.C. 387, 388 (Supreme Court of New Zealand).

[23] (1913) 16 C.L.R. 404, 439.

[24] (1959) 102 C.L.R. 54, 71.

[25] Windeyer, (1974) 6 *Federal Law Review* 1, 9.

[26] [1921] 2 A.C. 399.

[27] Ibid., 407.

The question of how the Crown's sovereignty over territory leads necessarily to the Crown's ownership in a proprietary sense has not been the subject of much discussion in respect of territory within the United Kingdom itself. The Crown's acquisition of the islet of Rockall is the most recent instance in which the process would have occurred. The Crown would probably have acquired full proprietary rights amounting to the 'radical title' or ownership on its annexation on 18 September 1955 pursuant to a Royal commission addressed to the captain of a Royal Naval vessel.[28] The Island of Rockall Act 1972, which incorporated the rock into 'that part of the United Kingdom known as Scotland' would thus not have been the root of the Crown's proprietary rights. These rights were described in an entry made by the Crown in the General Register of Saisines in Edinburgh on 16 May 1975 as follows:

> Be it known that the Queen's most excellent Majesty has right to All and Whole the Island of Rockall together with the small islands or rocks adjacent thereto known as Hazelwood Rock and Helen's Reef, all to low water mark together with the whole rights and pertinents thereof, including the fishings, and the mines, metals and minerals in and about same; . . . Which subjects are part of the Crown Estate vested in Her Majesty and Her Royal Predecessors in right of the Crown from time immemorial and from whom or in confirmation of which Her Majesty acquired right by the Island of Rockall Act 1972 . . . which incorporated the said Island of Rockall into that part of the United Kingdom known as Scotland. . . .[29]

Has the Crown expressly extended its sovereignty to the solum adjacent to the coasts of the United Kingdom? According to Anson, the Crown's pleasure may be expressed for administrative purposes in one of three ways:

1. By Order in Council.
2. By order, commission, or warrant under the sign manual.
3. By Proclamations, Writs, Letters Patent, or other documents under the Great Seal.[30]

No such instrument has ever been promulgated formally annexing or declaring the solum to be part of the territorial possessions of the Crown or to be British territory. Is such a formal expression of the Crown's will necessary?

[28] For the text of this commission, see Fisher, *Rockall*, 151.

[29] Gardner, [1976] Scots Law Times 257, 259. The Crown did not therefore claim specifically the ownership of the rock's marginal solum.

[30] *Anson's Law and Custom of the Constitution*, 4th ed., Vol. II, 62.

There is some authority for the view that land can become part of British territory under public law without a formal declaration to that effect by the Crown. Thus the Judicial Committee of the Privy Council in *Attorney-General for British Honduras* v. *Bristowe*[31] in 1880 considered that the Crown had assumed territorial domain in Honduras at the latest in 1817 on the evidence of land grants made by the Crown from that year. This was despite an Imperial Act of 1817, the Murders Abroad Act, which had described the area in question as 'not within the Territory and Dominions of His Majesty'.[32]

Similar situations exercised the minds of the Crown's Law Officers in the nineteenth century in the context of uninhabited guano islands in the Pacific, and it was in the midst of such problems that the key opinion of 16 March 1878 on the ownership of submarine minerals was given to the Office of Woods by Holker and Giffard. It will be recalled that in this opinion the Law Officers stated that

> . . . the mere occupation of [the submarine areas], if they had not been part of Her Majesty's dominions and even without her previous authority that occupation had been by a subject such occupation would at Her Majesty's pleasure have vested the newly occupied territory in right of her Crown and by this we mean not only the right of dominion but the right of property.[33]

The 'guano island' opinions were conveniently collected by McNair in his *International Law Opinions*.[34] He analysed the problems to be: (i) whether the mere fact of the working of guano deposits by private individuals created in their State a title by occupation, (ii) whether a formal declaration of title by occupation should be made by a Government before issuing licences. During the late 1870s, conflicting opinions were given to the Foreign Office on these matters by Holker, Giffard and Deane. Their final opinion cited by McNair, given on 20 January 1880,[35] appeared to take the view that a formal declaration was unnecessary when the island was occupied by British subjects who

[31] (1880) 6 App. Cas. 143.

[32] 57 Geo. 3, c. 53. An opinion was given to the Colonial Office on 14 March 1851 by Dodson Q.A., Romilly A.G., and Cockburn S.G., stating that 'upon the whole' they considered the settlement was already part of Her Majesty's dominions by 1850 (CO 123/94). The settlement was not formally designated a Colony until 1862.

[33] CREST 40/94; See Chapter VI above.

[34] McNair, vol. I, 314–25.

[35] Ibid., 324. Different advice had been given by the same Law Officers on 11 November 1878 (ibid., 320–1) and on 21 March 1879 (ibid., 323).

notify their occupation by 'hoisting the British flag'. In this event, 'the island in question becomes part of Her Majesty's dominions, and will remain part of such dominions so long as Her Majesty shall find it expedient to retain the sovereignty thereto'.

Applying this conclusion to the submarine soil adjacent to the coasts of the United Kingdom, it would follow that mines to the extent of their construction would become British territory since they were apparently constructed by British subjects, and since the Crown, at least from the time of the Patteson award of 1857, issued leases of the strata through which the tunnels were drilled.[36] A similar result would presumably apply to seabed structures or to local occupation for the purpose of exploiting natural resources, e.g., sedentary fisheries. The soil would become British territory by virtue of the occupation, coupled with the will of the Crown to incorporate such soil within its territories. With respect to the structures themselves, separate from the bed on which they rest, Sir Charles Russell, arguing for the British Government in the Behring Sea Arbitration in 1893, considered that lighthouses built on submerged rocks or on piles driven into the bed of the sea would become 'part of the territory' of the State which constructed them.[37] A similar view was expressed by counsel for the Post Office in *R.* v. *Kent Justices, ex parte Lye* with regard to Red Sands Tower, a structure resting on piles affixed to the submarine soil, although he did not argue the point.[38]

The argument set out above is valid only for small areas of the submarine soil under discussion, i.e., those areas where physical occupation of one kind or another has taken place; it is not necessarily applicable to the whole solum as such, irrespective of such local occupation, yet the Crown's traditional claim clearly extends to the whole solum to one distance or another. Could it then be said that, outside the occupied areas, the Crown has a mere paper claim, the frequency of its repetition merely having the effect of adding zero to zero?

An answer to such an objection may be formulated as follows: the prerogative claim of the Crown to the submarine soil is based on the fact that such soil is more than adjacent to the Crown's

[36] See Chapter IV above. The Law Officers in the above opinions do not appear to have considered the motives of the first occupiers. Not all these acted initially in the name of the Crown, e.g., the Channel tunnel companies. Presumably an occupation by British subjects for whatever reason, coupled by a later assertion of title by the Crown, such as by issuing a writ for trespass, would have satisfied the requirements of the Law Officers.

[37] J. B. Moore, *International Arbitrations*, vol. I, 900.

[38] [1967] 2 Q.B. 153, 167.

realm, it is a continuation of the land, necessary to it for reasons of security and defence. Because the Crown may take measures for the defence of the realm, even against the ravages of the sea,[39] so it would seem to have power to hold land to serve as a bulwark of the realm; the submarine soil constitutes such land, held on the basis of 'constructive occupation', or in Hale's words 'a kind of possession', no other State being in a position to control or occupy it. Furthermore, the answer might run, this conclusion is supported by the preamble to the Territorial Waters Jurisdiction Act 1878 which declares that the 'rightful jurisdiction' of the Crown extends, not to a fixed distance, but to 'such a distance as is necessary for the defence and security of [the] dominions'. Whether such a view of the traditional claim to the soil of the marginal sea would be upheld by a United Kingdom court, however, remains to be tested.

But apart from the traditional claim, the Crown can also rely on a claim based on its 'sovereignty' over the solum by virtue either of Article 2 of the Convention on the Territorial Sea and the Contiguous Zone 1958 or of a rule of customary international law to the same effect. The Crown, it is clear, has 'sovereignty' over the solum of the territorial sea by virtue of the Convention or by virtue of a rule of customary international law in similar terms.[40] Has it therefore proprietary rights amounting to ownership in the said solum? According to the argument set out above, Crown ownership would flow automatically from Crown sovereignty. Furthermore, it could be argued that the instrument of ratification deposited by the Crown on 14 March 1960 with the Secretary-General of the United Nations in respect of the above Convention amounted in legal effect to a formal extension of sovereignty to the solum, in so far as sovereignty had not already been extended to it by other means. The principal difficulty in such a contention is that neither the Convention nor customary law lays down a specific breadth of the territorial sea; furthermore, the Convention leaves certain discretions to the coastal State in constructing the baseline from which the territorial sea is measured.[41] It might therefore be wrong to attribute legal effect to an instrument which makes such a vague claim. On the other hand, it might be asserted that thereby the Crown has made a claim to the solum to a breadth

[39] E.g., *Attorney-General* v. *Tomline* (1880) 14 Ch.D. 58, although it was doubted therein whether the power flowed from the prerogative.

[40] See Chapter X above.

[41] E.g., Article 4 (1).

as from time to time it will determine measured from a baseline as from time to time it will determine, and that such an 'ambulatory' claim is sufficiently certain at any one time. In any event, the uncertainty in respect of the baseline has now been resolved by the Territorial Waters Order in Council 1974,[42] in force on 30 September 1964, as amended by the Territorial Waters (Amendment) Order in Council 1979, in force on 18 June 1979.[43]

If the Crown's sovereignty is regarded as flowing from a rule of customary international law, Crown ownership in the solum ought to result by the operation of the same process as decribed above. Sovereignty is necessarily reflected in municipal law as Crown ownership. Here there is the possibility of reinforcing the conclusion by use of the general line of reasoning followed by Lord Denning M.R. and Shaw L.J. in *Trendtex Trading Co. Ltd.* v. *Central Bank of Nigeria*.[44] The customary rule of sovereignty is directly incorporated into municipal law where it can take the form only of proprietary rights amounting to ownership.

Finally, there is authority that notwithstanding the absence of an earlier clear expression of the Crown's will the courts cannot refuse to accept a declaration made before them by the Crown on the extent of its territorial possessions, including the maritime area it claims to be under its sovereignty.[45] Thus in *Post Office* v. *Estuary Radio Ltd.* Diplock L.J. for the Court of Appeal remarked: 'The Queen's courts, upon being informed by Order in Council or by the appropriate Minister or Law Officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it.'[46] In the same judgment, the learned judge considered that the courts would be 'constitutionally bound' to recognize a 'claim' to incorporate maritime areas within the United Kingdom, a statement which, as will be seen in the next chapter, goes even further.[47]

(2) *Ports and the soil thereof*

It has long been a rule of English municipal law that the soil of ports is vested in the Crown. This was expounded at great length by Matthew Hale in *De Portibus Maris*. It is also an uncontested

[42] Statutory Instruments, 1965 (Part III, section 2) p. 6452 A.

[43] Not yet published in the above series.

[44] [1977] Q.B. 529.

[45] See *The Fagernes* [1927] P. 311.

[46] [1968] 2 Q.B. 740, 754.

[47] For a discussion on the Crown's alleged prerogative to delimit the realm, see Edeson, (1973) 89 *LQR* 364.

rule that the Crown has the power to create ports. Thus it is not surprising that a view has arisen that the Crown can vest in itself the property in the soil of ports simply by setting up a port and delimiting its ambit.

One objection to this contention is that the first rule set out above does not apply simply by calling an area of water and subjacent soil a 'port'. Thus in its *Rejoinder* in the arbitration before Sir John Coleridge, the Crown argued against the Duchy that according to Hale only 'havens' and 'creeks' were capable of being held in property, and not 'ports' in the wider sense of that term.[48] The award of the arbitrator by implication negatived the Duchy's wider proposition, though he gave no reasons for his decision.

From the time at least of the statute 13 & 14 Car. 2, c. 11 in 1662, the power to delimit ports has been conferred on Commissioners of the Treasury for the purposes of customs regulation. Until well into the nineteenth century, the Commissioners usually delimited ports according to bearings, often based on the depth of water.[49] From the mid-eighteenth century, however, the ambit of some ports began to be expressed as a fixed distance from the shore, often three leagues, although as early as 17 August 1738 the port of Great Yarmouth was delimited as 'three miles into the sea to be measured from the low water mark of any point of the said shore'. From the eighteen-forties, most ports were delimited in terms of 'three miles from low-water mark out to sea', although some, e.g., Barnstaple and Bideford, were delimited as 'three miles from the headlands'. The result of these mid-nineteenth century delimitations was that all the sea within three miles of the low-water mark everywhere around the coast of the United Kingdom was within the ambit of a 'port'. But there was some reluctance on the part of the executive to press the matter further. In *Attorney-General* v. *Tomsett* in 1835, the Solicitor-General argued inconclusively that a spot two miles from the shore at Dover was within the United Kingdom because it was within the ambit of the port of Dover as delimited by warrant.[50] More than thirty years later in the course of the arbitration before Sir John Coleridge, however, the Crown stated:

The considerations of policy which extend the limits of fiscal ports to

[48] See Chapter IV above. See also *Willets* v. *Newport* (1615) 1 Rolle 250.

[49] Copies of the warrants, classified by ports, are kept in the Library of the Department of Customs and Excise, London. See also Masterson, *Jurisdiction in Marginal Seas*, Part I.

[50] (1835) 2 C.M. & R. 170, 173.

three miles seaward of low-water, do not apply so as to make it desirable to extend the limits of counties to the same distance.[51]

Although it is not clear whether the Crown in this arbitration thought that the delimitation of ports by warrant constituted the waters and subjacent soil *ipso facto* and *ipso jure* part of the United Kingdom though outside the counties, in *Keyn* seven years later it declined to argue the possibility that such delimitations gave power to the Central Criminal Court to adjudicate upon an indictment for manslaughter in respect of an act committed by a foreigner on board a foreign ship within three miles of the coast at Dover. During the first hearing of the appeal by way of case stated, the judges of the Court for Crown Cases Reserved showed their awareness of the system of Treasury warrants. During the opening address of Sir Hardinge Giffard S.G., the following discussion took place:

POLLOCK B. Take the constitution of the very port of Dover. The port of Dover you will find set out by a Commission in the time of Charles the Second.

SOLICITOR-GENERAL Yes, my Lord.

POLLOCK B. And that the port extends to the high seas.

LUSH J. There was a case in this Court some years ago in which the word port in the Act of Parliament was held to extend to the limits to which the authority of the commissioners extended.

SOLICITOR-GENERAL Yes, I believe there is an Act of Parliament which gives the limits I believe the jurisdiction used formerly to be exercised by the Admiral.[52]

During the second hearing, the Crown's position was clearly stated by the Solicitor-General:

If I were able to rely on the word 'port' as decisive of the question of jurisdiction, this particular accident happened in the port of Dover. I cannot say that that gives jurisdiction. I do not think it does, because a port is a thing which Her Majesty may fix within arbitrary limits, and for certain purposes it is binding on her subjects.[53]

In view of this disclaimer, it is hard to understand the remarks made by Lord Cairns L.C. in the House of Lords when intro-

[51] *Rejoinder on behalf of the Crown*, p. 39; see Chapter IV above.

[52] DPP 4/12: transcript 12 May 1876, pp. 99–100. Lush J. was probably referring to *Nicholson* v. *Williams* (1871) L.R. 6 Q.B. 632 in the Exchequer Chamber where it was held (Mellor, Lush and Hannen JJ.) that the word 'port' in 54 Geo. 3, c. 159, s. 14 meant the area within limits assigned by the Commissioners.

[53] DPP 4/13: transcript 17 June 1876, p. 136.

ducing the Territorial Waters Jurisdiction Bill on 14 February 1878. After citing the judgment of Lush J. in *Keyn*, the Lord Chancellor remarked:

> As he [i.e., the Lord Chancellor] understood these words, if Sir Robert Lush had found that, in the particular place Parliament had stepped in and said that that portion of the sea was part of the United Kingdom, he would have been of opinion that the Crown had territorial jurisdiction over it, and that the conviction ought not to be quashed. It was fortunate for the prisoner in the *Franconia* case, though not fortunate for the vindication of the law, that Mr. Justice Lush was under the impression that that had not been done which really had been done.[54]

He then quoted a Treasury Warrant dated March 1848 which declared that the limits of the port of Dover extended to a distance of three miles from low-water mark. Thus he seems to have been of the view that the effect of the Warrant was to constitute the area enclosed as part of the United Kingdom.

Such a view lacks any foundation in the terms of the Customs legislation and, furthermore, the warrants, taken in their context, appear to lack the precision necessary for them to be construed as formal declarations of British territory, even less the extent of the United Kingdom. Three months after Lord Cairns's statement, the Law Officers, Holker A.G. and Giffard S.G., together with Parker Deane, significantly made no comment on a doubt expressed by the Foreign Office on whether the power to delimit ports was not vested in the Commissioners 'for customs purposes only'.[55] More significantly still, later Law Officers, Webster A.G. and Clarke S.G., together with R.S. Wright, in an opinion given to the Board of Trade on 7 June 1888, considered that a number of executive acts with regard to the Goodwin Sands, including the incorporation of the area within a port, were 'some, although far from conclusive, evidence of a dependency' within the meaning of

[54] 237 *P.Debs.*, 3rd series, col. 1604. Lord Cairns L.C. later declared that the judges were not responsible for the oversight. His own attention had been called to the existence of the warrant by a person 'connected with a Public Office' (238 *P.Debs.*, col. 141). The question of Treasury warrants had been discussed in the columns of *The Times* some months earlier in the context of a killing on board an American merchant vessel *New World* which was moored three-quarters of a mile from the nearest low-water mark near the Nore lightship. The 'local authorities' declined jurisdiction (*The Times*, 27 October 1877). This drew a letter from Sherston Baker who argued that the vessel was within the port of London at the relevant time (ibid.). On 29 October 1877 the newspaper carried a letter from one 'W', who drew attention to the Treasury Warrant of 1848 in respect of the port of Dover.

[55] FO 834/12; Foreign Office Confidential Print No. 4280, Opinion No. 58.

the expression 'dependent islands and banks' in the Sea Fisheries Act 1883.[56]

In conclusion, it is submitted that the power to delimit the ambit of ports, whether it be based on statute or on a delegation of the royal prerogative, cannot by itself constitute the waters, bed, and subsoil so enclosed as part of the United Kingdom or even as British territory.[57]

[56] McNair, vol. I, 370. For an extra-judicial opinion to the effect that a Warrant was irrelevant to criminal jurisdiction over a foreigner on board a foreign ship in the Roads off Deal, see Marston, (1972) 88 *LQR* 357, 374–5.

[57] The 'port' theory continued to attract dicta in its support. See, e.g., Lawrence L.J. in *The Fagernes* [1927] P. 311, 329 who considered that the locus in *R.* v. *Cunningham* (1859) Bell 72, was 'within the body of the county of Glamorgan' because it was within the area of the port of Cardiff.

Chapter XIII

The Legal Status of the Marginal Solum

A. On the Basis of the Traditional Claim

On the strength of the evidence set out in the first part of this work and on the argument in Chapter XII above, it seems likely that the courts in the United Kingdom today would uphold the Crown's claim to the ownership *jure coronae* of the marginal solum, either as the residue of the traditional claim or as the necessary consequence of the territorial sea doctrine. It is also likely that the courts would regard the claim as an Act of State, the validity of which they could not question. It is clear that the view of Cockburn C.J. in *Keyn* was made without a full appreciation of the historical background and, in any event, his view has become obsolete in its turn through the development of the international law concept of the territorial sea. This applies also to the doubts of the Judicial Committee of the Privy Council in the British Columbia and Quebec fisheries appeals.

Certain major questions remain unsolved. Of these, the most important is the status in United Kingdom constitutional law of the marginal solum outside inland waters. Three possibilities suggest themselves:

(1) the solum, though Crown property, is no part respectively of England and Wales, Scotland, or Northern Ireland, and is therefore no part of the United Kingdom;

(2) the solum is no part respectively of England and Wales, Scotland, or Northern Ireland, but is an integral part of the United Kingdom;

(3) the solum is part respectively of England and Wales, Scotland, and Northern Ireland, and is therefore an integral part of the United Kingdom.

Sir John Salmond, writing in 1918, was strongly of the opinion that (1) above was the correct answer. He concluded as follows:

> Save in the case of enclosed waters the seaward boundary of every possession of the Crown is at common law low water-mark, and there is no belt of marginal waters forming part of the territory.[1]

[1] Salmond, (1918) 35 *LQR* 235, 249. See also Lord Herschell L.C. in 352 *P. Debs.*, 3rd series, col. 1459 (27 April 1891).

Salmond's main authority for this conclusion was, of course, the decision in *Keyn*, and it was seen in Chapter VI above that the executive took this same view in the years following the case. It was argued above, however, that *Keyn* did not decide that the marginal sea was outside the United Kingdom, at most this being a strong dictum. One must therefore look further than *Keyn* to see whether Salmond's view can be upheld on any ground of principle. For this exercise it is necessary to divide the United Kingdom into its component parts.

(i) ENGLAND AND WALES

It might be argued that basic principle dictates that the marginal solum is as a matter of public law an integral part of the land to which it is adjacent, as an extension under water of such land. There is respectable authority that the marginal sea, including the solum thereof, was regarded from early times as part of the realm of England. Hale's views were particularly clear. In *Pleas of the Crown* he wrote that 'the realm of England comprehends the narrow seas'.[2] In a treatise on the admiralty jurisdiction, unpublished and not cited in *Keyn*, Hale expanded his views:

> And certainly for things done in the narrow seas that belong to and are part of the Dominions of the Crown of England, there seems very little reason to question it, for those offences that are done within the Dominion of the Crown of England are as much contra Pacem Domini Regis as those that are done within the bodies of the Counties and doubtless tryable and determinable by the Courts of the Common Law . . .[3]

[2] Hale, *History of the Pleas of the Crown*, vol. I, 154.

[3] BL, Hargrave MS 137, p. 32. The Hargrave MSS contain two copies of this work, Nos. 93 and 137. No. 137 is the earlier of the two, written probably in the 1730s. It is likely that this is the copy given to Hargrave by George Hardinge, Solicitor to the Queen of George III (*Dictionary of National Biography*, vol. xxiv, p. 22) as part of a gift which also included a copy of *De Jure Maris* (Hargrave MS 97). No. 93 was made for Hargrave with a view to publication. The author is indebted to Dr Stanley Boorman for palaeographic advice on these manuscripts.

The original manuscript of the treatise, like that of *De Jure Maris*, remains undiscovered. Pepys, writing in 1683–seven years after the death of Hale—remarked that the admiralty treatise was said to be in the hand(s?) of Hale's wife (*The Tangier Papers of Samuel Pepys*, 112). As far as is known, the treatise has not been referred to in any United Kingdom court. Its only known citation was by Gray C.J. in the Massachusetts case of *Commonwealth* v. *Macloon* in 1869 (101 Mass. 1; 100 Am. Decs. 89), from a copy made in London for Joseph Story in 1839 and now in Harvard Law School Library (LMS 1148). Gray C.J. cited it for the proposition that 'in the most ancient times of which we have any considerable records, the English courts of common law took jurisdiction of crimes committed at sea, both by English subjects and by foreigners'. Judah Benjamin QC, who throughout his argument in *Keyn* displayed a detailed knowledge of United States admiralty jurisprudence, made no reference to this case.

Later in the same manuscript, Hale wrote:

A few words are necessary touching Jurisdiction [of the] Admiral in the narrow Seas, belonging to the Dominion of the Crown of England, which hath this difference from the former [i.e. the high seas] because those Seas though in a great part out of the Counties yet are parcel of the Realm of England—deins le ligeance de coron d'Engleterre as the old book stiles it.[4]

Coke and Callis had both taken the same view earlier. Coke, in his *Commentary upon Littleton*, commented that 'if a man be upon the sea of England, he is within the kingdom or realme of England, and within the ligeance of the King of England, as of his crowne of England'.[5] Callis in his lectures remarked that 'English seas being within the realm, be within the bounds of my said Statute of Sewers'.[6]

In the nineteenth-century reaffirmation of its claim, the Crown did not specifically aver that the solum was within England or the United Kingdom. The Cornwall submarine mines arbitration before Sir John Coleridge, however, caused the issue to be raised, and with it the two arguments which were to be advanced against the view that the solum is within England or the United Kingdom, namely (1) it lies outside any county (2) it is not subject to the common law. These two arguments are closely linked. The counties of England were in their inception areas of curial competence, particularly for administering the common law of crime. If an act or omission took place outside any county it could not in the normal course be tried by the courts of oyer and terminer appointed to hear and determine 'secundum legem et consuetudinem Angliae', since these courts were usually held under commissions which limited them to trying offences presented by the grand jury of a particular county or group of counties.[7] The sea, outside a narrow concept of inland waters, was not and still is not within any county. Consequently, the argument goes, the open seas outside inland waters are outside the ambit of the common law, and thus incapable of being within the realm of England. It was no doubt because of this train of reasoning that the realm of England was considered to be nothing more than the sum of the

[4] BL, Hargrave MS 137, p. 211.
[5] Coke, *Commentary upon Littleton*, s. 439.
[6] Callis, 42.
[7] See, for example, Lord Diplock's observations in *Treacy* v. *Director of Public Prosecutions* [1971] A.C. 537, 559.

counties. In *R.* v. *Musson* in 1858 Wightman J. is reported to have remarked that 'all the realm of England is within some county',[8] while in 1884 Brett M.R. (ironically one of the strongest dissenters in *Keyn*) declared in a highways case that 'England is divided geographically into counties, at least to this extent, that there is no part of England which is not within a county'.[9]

The Crown, however, did not accept such a concept in its *Rejoinder* in the Coleridge arbitration in 1866.[10] It asserted therein, on the authority of Hale and Callis, that certain places were within the realm of England though outside any county. In particular, it attempted to overcome the argument that the common law did not run outside the county by emphasizing Hale's views in *Pleas of the Crown* that originally 'the King's Bench had usually cognizance of felonies and treasons done upon the narrow seas, though out of the bodies of counties; and it was presented and tried by men of the adjacent counties'.[11]

Moreover, the Crown relied on Hale for the existence of special commissions of oyer and terminer, not limited to particular places within counties.[12] In his admiralty manuscript, Hale went into more detail about special commissions. Writing of the early English jurisdiction over crimes at sea, he stated that 'it is most apparent that Piracies Depredations and Treasons committed upon the Seas were punishable in the King's Courts, 1. In his ordinary Court, the King's Bench. 2. By Special Commissions.'[13] Later in the same work Hale turned to discuss the narrow seas 'out of the confines of Counties':

As to the narrow Seas . . . and any Cause arising thereupon, I say as before touching Jurisdiction upon the great Sea

1. As to Causes Civil that are transitory the Common Law and Admiralty have a concurrent Jurisdiction.
2. As to Criminal Causes entirely arising upon the narrow Seas, though anciently the Court of King's Bench had Jurisdiction of it, as hath been said, yet at this day the Admiral hath an exclusive Jurisdiction of the Common Law.

But yet by Special Commission at this day it seems not unreasonable that it may be determined in the County next adjacent, without the aid of

[8] (1858) 4 Jurist N.S. 111, 112. Contrast the report of the same case in 8 E. & B. 336, where the remark is attributed to counsel.
[9] *Over Darwen (Mayor of)* v. *Lancashire Justices* (1884) 15 Q.B.D. 20.
[10] See Chapter IV above.
[11] Hale, *History of the Pleas of the Crown*, vol. II, 12.
[12] Ibid., 21.
[13] BL, Hargrave MS 137, p. 32.

the Statute of 28 Hen. 8 and the Trial, for ought I know to the contrary, might be by a Jury of the County adjacent, if the Commission be to proceed secundum legem et consuetudinem Regni Angliae. But this it seems will only extend to such as are felonies by the Common Law as murder, etc.[14]

In his memorandum of 10 May 1877 on a draft of a bill to amend the criminal jurisdiction of the Admiral,[15] Henry Thring relied on Hale for the opinion that 'for 300 years last past, there was a common law commission of oyer and terminer, and also a commission of peace and gaol delivery, for all offences against any penal laws on the sea'. He continued:

> . . . Cockburn C.J., in the Franconia case, states that Hale was mistaken, but it may be doubted whether he has given sufficient weight to the ancient power of the Crown to issue, either in the character of admiral or otherwise, special commissions of oyer and terminer.

In *Keyn*, all concerned, including the Crown, agreed that the locality was not within the county of Kent and so the accused could not be tried before a general court of oyer and terminer for that county. There remains a possibility, however, that had *Keyn* been tried under a special commission of oyer and terminer, on an indictment that he had committed the offence within England, the Court for Crown Cases Reserved would have divided in favour of the Crown. Although Cockburn C.J. and his followers would not have changed their decision, since the locality would still in their view have been outside England, one can speculate that at least one judge, possibly Bramwell B., might have crossed the floor.

Against this speculation, one should put the opinion of Salmon L.J. in *R.* v. *Kent Justices, ex parte Lye* in 1967 that the meaning of the term 'United Kingdom' was 'fairly plain', namely the land down to the low-water mark.[16] Furthermore, the sale of submarine minerals to the Lonsdale trustees in 1880 is some evidence that the Crown considered the minerals demised to lie outside England, since by the Act of 1 Anne (St. 1), c. 7, 1702, it was prohibited from alienating Crown land 'within the Kingdom of England, Dominion of Wales or Town of Berwick upon Tweed', a restriction which was not removed until the enactment of s. 1(2) of the Crown Estate Act 1961. Other statutes relevant to this question will be treated later in this chapter.

[14] Ibid., pp. 211–12.
[15] Records of the Office of Parliamentary Counsel; see Chapter VI above.
[16] [1967] 2 Q.B. 153, 179.

It is sometimes asserted that the common law stops with the county at low-water mark because the open seas beyond are under the jurisdiction of the Admiral, and that the two jurisdictions are mutually exclusive. Leaving aside the possibility of a concurrent jurisdiction, for which there is authority in respect of some inland waters,[17] it appears unlikely that the Admiral's jurisdiction, which is confined *ratione materiae* to matters occurring on or in close connection with British ships, applies at all to the subsoil of the marginal sea.

In conclusion, the arguments for declaring the seaward limits of the counties of England to be the limit of the realm of England risk confusing the basic concepts of ambit of law and ambit of curial competence. The confusion stems from the dual meaning of 'common law' in the particular context of the marginal sea. The expression could mean either (1) the corpus of non-statutory law applicable within a certain area, namely that of England and Wales, or (2) the area in which the courts administering such corpus of law have competence. The two areas should, of course, ideally coincide, but it it not impossible that due to historical anomaly or oversight a particular place is within the ambit of the corpus of law but outside the competence of any court. The frequently uttered phrase—the common law stops at the low-water mark—is thus ambiguous. Appropriate in a rough and ready manner to the second meaning, it has come by error to be regarded as relevant also to the first.

(ii) SCOTLAND

In the view of O'Connell, 'the Scottish kings from time immemorial had property in the marginal sea, and differing streams of interpretation in Scotland and the rest of Great Britain are to be expected'.[18] However, O'Connell gave no authority for the first part of this assertion nor did he indicate whether the marginal sea was considered by the Scottish kings to be part of Scotland. Neither *Keyn* nor the two cases decided immediately after it, namely *Harris* v. *Owners of the Franconia* and the *Blackpool Pier Case*, were decisions on Scottish law; nor, furthermore, has the House of Lords on appeals from Scotland, e.g., *Wemyss* and *Parker*, shown itself willing to lay down a rule in the terms stated in the three English cases above.

[17] See, for example, *R.* v. *Bruce* (1812) 2 Leach 1093; *R.* v. *Mannion* (1846) 2 Cox Crim. Cas. 158.
[18] O'Connell, (1958) 34 *BYBIL* 199, 217, n. 2.

A Scottish writer commented:

> It was a general principle of Scots law that a definite maritime territory lay within the realm as distinguished from the 'vast ocean' which was 'common to all mankind'. Within the maritime territory, therefore, the common law was valid and the common law jurisdiction might be exercised over ships even in the first instance provided that the concurrence of the Judge Admiral was obtained. In the maritime territory, therefore, the two jurisdictions were concurrent. In this respect Scots law differs materially from that of England, where the realm and the authority of the common law terminate alike at low-water mark, except in so far as the sea is within the body of a county, and no distinction is drawn between territorial waters and the high seas.[19]

(iii) NORTHERN IRELAND

The problem of the public law status of the marginal sea was raised in the case of *Director of Public Prosecutions for Northern Ireland* v. *McNeill*, decided by the Northern Ireland Court of Appeal in 1975.[20] The respondent, McNeill, was prosecuted on a charge of using a salmon net in the sea in a way prohibited by the Fisheries Act (Northern Ireland) 1966 of the Stormont Parliament. The location of the alleged offence was in the open sea within 150 feet of a vertical rock-face in County Antrim. The resident magistrate held for three reasons that he did not have competence to hear the charge:

(1) the Parliament of Northern Ireland, under the Government of Ireland Act 1920, had jurisdiction over six parliamentary counties and two parliamentary boroughs only, and these administrative areas did not include any part of the open sea;

(2) the 1921 Agreement between Great Britain and Ireland (later scheduled to the Irish Free State (Agreement) Act 1922) had the effect of vesting the territorial waters of the whole of Ireland, including those adjacent to Northern Ireland, in the Government of the Irish Free State;

(3) the 1966 Act could not derive its validity from the Fishery Limits Act 1964 of the United Kingdom Parliament since the latter no longer had rights of legislation in the waters concerned.

The Northern Ireland Court of Appeal reversed the magistrate's ruling on the short ground that a statute of the United Kingdom Parliament was incapable of challenge in any United Kingdom court. The Fishery Limits Act 1964 was thus effective

[19] McMillan, *Scottish Maritime Practice*, 1–2.
[20] [1975] N.I. 177.

and the 1966 Stormont Act valid. Lowry L.C.J. and Jones L.J. went on to discuss the wider issue. Lowry L.C.J. agreed that the counties and boroughs of Northern Ireland did not include the sea and its solum below low-water mark, but he considered that the Northern Ireland Parliament could validly legislate for the 'territorial waters' under its peace, order, and good government power. He denied that the 1921 Agreement had acknowledged that the territorial waters of the whole of Ireland were vested in the Dublin Government, pointing out that the Agreement gave Northern Ireland an election, which it later exercised, to exclude itself from the powers of the Free State Parliament. He concluded that 'once this election was made, it became inconceivable that waters adjacent to County Antrim could be regarded as the territorial waters of a State the powers of whose Parliament and Government no longer extended to County Antrim in particular and Northern Ireland as a whole'.

Jones L.J. first asked himself whether under the 1920 Act Northern Ireland consisted only of the land of the six counties, leaving Southern Ireland with the remainder of the land mass together with the territorial waters around the whole island. He concluded not, maintaining that 'Northern Ireland, as constituted by the 1920 Act, consisted not only of the land mass thereof but also of the former rights of the United Kingdom in the waters surrounding Northern Ireland'. He supported this conclusion by citing a reply given in the House of Commons on 27 November 1922 by the Attorney-General, Sir Douglas Hogg, which endorsed the theory that the territorial waters 'go with' the counties making up Northern Ireland.[21] Even if this were not the case, went on Jones L.J., the rights would have remained 'in the United Kingdom'. It may be significant that Jones L.J. considered that the term 'parliamentary counties' was one 'with internal implications only, generally with reference to electoral matters, and does not bear on the problem with which we are concerned'.

B. On the Basis of the Territorial Sea Doctrine

If the Crown's claim is based solely on the territorial sea doctrine, an additional set of problems arise. Can the Crown, by implied or even express annexation, extend the limit of the United Kingdom? There is high authority that it can. In 1968, Diplock L.J.,

[21] 159 *HC Debs.*, col. 451.

delivering the judgment of the Court of Appeal in *Post Office* v. *Estuary Radio Ltd.*, stated of the 1958 Territorial Sea Convention and the 1964 Territorial Waters Order in Council:

> . . . it is not disputed that, construing the Order in Council in the light of the Convention and the law as it was before the Order in Council came into operation, the Crown, in the exercise of its prerogative powers, was thereby asserting a claim which the courts are constitutionally bound to recognise, to incorporate within the United Kingdom that area of the sea which lies upon the landward side of the baseline (that is, internal waters) and within three nautical miles on the seaward side of the baseline (that is, the territorial sea).[22]

The essential words here are 'within the United Kingdom'. As the waters, beds, and subsoil are juridically inseparable under the public international law concept of 'territorial sea', Diplock L.J. would doubtless have come to the same conclusion if the Court had been dealing with the solum instead of activities on a structure resting on the bed but projecting above the surface of the water. If the Crown does have this power, it will thereby have the power to extend the applicability of the common law to areas once outside its ambit and, furthermore, by the stroke of a pen to extend the territorial scope of United Kingdom statutes. Indeed, the Court of Appeal did not flinch from this result:

> The area to which an Act of Parliament of the United Kingdom applies may vary . . . as the Crown, in the exercise of its prerogative, extends its claim to areas adjacent to the coast of the United Kingdom in which it did not previously assert its sovereignty.[23]

Is there any support for the view that the Crown, quite independently of statute, can extend the area over which the common law and statutes apply *proprio vigore*? When the realm of England has been extended in the past, e.g., by the incorporation of Berwick on Tweed and Wales, it was done by statute.[24] In *Keyn*, some of the majority judges thought that legislation was imperative. Thus Cockburn C.J. stated:

> The law of England knows but of one territory—that which is within the body of a county. All beyond it is the high sea, which is out of the province of English law as applicable to the shore, and to which that law cannot be extended except by legislation.[25]

[22] [1968] 2 Q.B. 740, 754.
[23] Ibid.
[24] 22 Ed. 4, c. 8; 2 Jac. 1, c. 28; 20 Geo. 3, c. 42 (Berwick): 27 Hen. 8, c. 26; 20 Geo. 2, c. 42 (Wales).
[25] (1876) 2 Ex.D. 63, 198.

Similarly, Lush J. declared:

> International law, which, upon this subject at least, has grown up since that period [i.e., the reign of Richard II] cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament.[26]

Even the minority judges did not go so far as to say that the Crown could extend the realm by declaration, it being their view that the marginal sea and subjacent soil was and had always been part of the realm by virtue of the traditional claim. Yet during the argument in *R.* v. *Kent Justices, ex parte Lye*, counsel for the Post Office submitted that the Order in Council was 'legislation' within the scope of the above quotations, while Lord Parker C.J. took the view that the majority judges in *Keyn* had not directed their minds to the possibility of an Order in Council, their point being simply that something was needed to put the territorial waters within the ambit of the criminal law.[27] Moreover, in *Post Office* v. *Estuary Radio Ltd.*, the Court of Appeal considered that the courts would be 'constitutionally bound' to recognize a declaration by the Crown, in the exercise of its prerogative powers, to extend, not merely the area over which it claimed sovereignty, but the United Kingdom.[28]

There are great difficulties in conceding such a power to the Crown. It would mean that in a criminal case where the issue is whether the offence has been committed within the United Kingdom, the Crown could, by declaration, conclusively determine the point in its own favour. Would the Home Office, for example, have issued such a certificate in the *Lye* case if requested to do so by the Post Office? The Law Commission, in its report on the territorial and extra-territorial extent of the criminal law, stated that 'it would be inappropriate for Government Departments to supply evidence directly connected with an issue in a criminal case on which the court must make its own decision as a matter of law and as to which there may be a dispute. There is an understandable reluctance on the part of departments to be involved in the provision of certificates of this character.'[29] The problem has been well put by Edeson:

> While it is not doubted that the Crown has a prerogative power to extend

[26] Ibid., 239.
[27] [1967] 2 Q.B. 153, 160.
[28] [1968] 2 Q.B. 740, 754.
[29] Law Commission Paper No. 91 (1978), 9.

or acquire territory, the view that it can also alter the scope of jurisdictions over offences conferred by statute is inconsistent with the authorities. . . . The wide prerogative power approved by Diplock L.J. seems, moreover, to cut across some of the traditional safeguards that have been built into the common law to check the power of the executive, such as the restrictions on the Act of State doctrine, and the requirements of parliamentary assent to treaties before their provisions can have effect in English law.[30]

At best, it can be said that neither in *The Fagernes*[31] nor in the Territorial Waters Orders in Council has the Crown expressly purported to re-define the limits of the United Kingdom; it is only some judicial statements which have so interpreted the Crown's conduct.

C. The Application of Statutes

It has been seen in Chapter VIII above that some statutes, for example the Mineral Workings (Offshore Installations) Act 1971, apply expressly or by necessary construction to the marginal solum outside inland waters. What of statutes in general? The basic rule of statutory construction in this regard is set out in *Maxwell on the Interpretation of Statutes* and approved by Cozens-Hardy M.R. in *Tomalin* v. *S. Pearson & Son Ltd.*—'In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subjects beyond the territorial limits of the United Kingdom.'[32]

If statutes are in general construed to apply to the territorial sea, it will indicate that the courts consider this area lies within the limits of the United Kingdom. Unfortunately, there is little practice on the matter other than the *Estuary Radio* case. In *Yorke* v. *British & Continental Steamship Co. Ltd.* in 1945, which concerned the application of Regulations made under the Factory and Workshop Act 1901 to a ship in Gibraltar, Scott L.J. stated:

It is quite clear that the principle of law is that our territorial legislation

[30] Edeson, (1973) 89 *LQR* 364, 379. In *Nissan* v. *Attorney-General* [1970] A.C. 179, Lord Reid (208) and Lord Pearce (225) assumed that the territorial waters or 'three-mile belt' was within the 'realm' for the purposes of the doctrine of Act of State.

[31] It is not clear whether the 'territorial sovereignty' of the Home Office certificate was intended to be co-extensive with the limits of the United Kingdom.

[32] [1909] 2 K.B. 61, 64. See *Maxwell on the Interpretation of Statutes*, 12th ed., 171.

does not extend out of the Realm, or at any rate outside territorial waters, unless Parliament has expressly said so.[33]

In *Fox* v. *Lawson*, a prosecution under the Transport Act 1968 for driving excessive hours, Lord Diplock, in giving the leading speech in the House of Lords, stated that it was conceded that nothing the driver did 'in France or on the ferry outside British territorial waters' was unlawful under the Act.[34] This remark has little persuasive value.

On the other hand, the legislature itself has on many occasions, described in Chapter VIII above, indicated that the territorial sea and its solum may not be within the United Kingdom. Thus the Sea Fisheries (Clam and Bait Beds) Act 1881, s. 2, the National Coal Board (Additional Powers) Act 1966, s. 1(1) (a), the Sea Fisheries (Shellfish) Act 1967, s. 12(2) (a), the Mineral Workings (Offshore Installations) Act 1971, s. 2(a), the Petroleum and Submarine Pipelines Act 1975, s. 20(2), the Petroleum (Production) Regulations 1976, reg. 3(1) (b), and the Ancient Monuments and Archaeological Areas Act 1979, s. 53(7), all envisage that the territorial sea is 'adjacent to' rather than 'in' the United Kingdom or Great Britain.[35]

Other authority is singularly lacking. *Craies on Statute Law* takes the view that the territorial sea is now within the 'realm', but on the contentious argument that the Territorial Waters Jurisdiction Act 1878 has 'reversed' *Keyn* on this point.[36] The Law Commission, on the other hand, has recently stated that 'at common law, the territory included the shore down to low water mark and internal, as distinct from territorial, waters'.[37] It seems that by 'internal waters' the Law Commission means what is

[33] (1945) 78 Lloyd's L.Rep. 181, 182.

[34] [1974] A.C. 803, 808.

[35] Even 'national waters' as well as the territorial sea have been regarded as being outside England and Scotland. S. 1 of the Sea Fisheries Regulation Act 1966 empowers the Minister to create sea fisheries districts comprising 'any part of the sea within the national or territorial waters of the United Kingdom adjacent to England or Wales'. A number of such districts were created by orders effective on 1 July 1980. Of these, the Cumbria Sea Fisheries District (Variation) Order 1980 defines the district so created as comprising 'so much of the sea within the national waters of the United Kingdom adjacent to England as is not included within the national waters of the United Kingdom adjacent to Scotland, and so much of the sea within three nautical miles from the baselines from which the breadth of the territorial sea of the United Kingdom adjacent to England is measured as is not included within three nautical miles from the baselines from which the breadth of the territorial sea of the United Kingdom adjacent to Scotland is measured . . .'. The author is indebted to Mr. Colin Warbrick for bringing these orders to his attention.

[36] *Craies on Statute Law*, 7th ed., 460. See also Wilkinson, (1950) 18 *Modern Law Review* 40.

[37] Law Commission Paper No. 91 (1978), 7.

called in this work 'inland waters' and it is not clear whether the Commission would include waters, other than inland waters, lying on the shoreward side of the baseline in the Territorial Waters Orders in Council. If the Commission does include these waters, and there is evidence in paragraph 17 of the Report that it does, then it is submitted respectfully that their inclusion is fraught with the difficulties pointed out in the previous section.

Finally, on 19 December 1963, the Minister of State for the Home Office, Lord Derwent, remarked in the course of a debate in the House of Lords that 'the Mines and Quarries Act will apply to a mine even if it extends from the land to a point beyond the territorial waters'.[38]

D. Conclusion

The status of the marginal solum in public law remains uncertain. Even the assumption that it is Crown land does not necessarily import the corpus of United Kingdom statute law in the absence of authority that it is within the United Kingdom. Furthermore, it is still doubtful whether the common law, either of England or Scotland, applies to it *proprio vigore*. If the area is, in Salmond's phrase, maritime territory in gross,[39] then doubtless the Crown has power to legislate for it by prerogative decree,[40] but the Crown has not yet done so. Like Mr. Bates on the Sealand Tower six miles from the Essex coast,[41] a person on or in the solum might be outside the ambit of United Kingdom law and the competence of its courts, provided that he does not operate from a British ship or seek to explore or exploit the natural resources of the continental shelf outside the United Kingdom territorial sea.

[38] Mines and Quarries Act 1954. The Act does not contain any express provision or indication that it applies to submarine workings. 254 *HL Debs.*, col. 394.

[39] Salmond, (1918) 35 *LQR* 235, 240.

[40] Roberts-Wray, 164.

[41] *R.* v. *Bates*, Essex Assizes, 1968; see Law Commission Paper No. 91, 17–18, and *The Times*, 22 October 1968.

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ANNEX 3

Halsbury's Laws of England – Paragraph 235 on Meanings of 'High Seas' and 'Territorial Waters'

235. Meanings of 'high seas' and 'territorial waters'.

Halsbury's Laws of England > Water and Waterways (Volume 100 (2024), paras 201–533; Volume 101 (2024), paras 534–1117) > 2. The Sea and Seashore > (1) The High Seas and Territorial Waters

At common law, 'high seas' includes the whole of the sea below low-water mark where great ships can go, except for such parts of the sea as are within the body of a county, for the realm of England only extends to the low-water mark, and all beyond is the high seas. In international law 'high seas' means all parts of the sea not included in the territorial sea and internal waters of any state.

The territorial sea for the United Kingdom now extends 12 nautical miles measured from baselines established by Order in Council, unless otherwise provided. Its legal status is a belt of waters adjacent to the coast within which the coastal state enjoys sovereignty. The sovereignty must be exercised in a manner which respects certain rights for the benefit of other states, notably the right of innocent passage for vessels.

In the absence of any treaty between states or of actual possession by any state, the soil under any part of the high seas which is more than 12 miles from the coast is the property of no person.

ANNEX 4

Extract of Article 56 (1) – United Nations Convention on the Law of the Sea, 1982

Article 56
Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;

      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment;
   (c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

ANNEX 5

Compilation of Extracts from Other Statutes referred to in Part One

- **Section 84, Energy Act, 2004**
- **Section 1, Continental Shelf Act, 1964**
- **Section 1, Crown Estate Act 1961**
- **Section 5, Crown Estate Act 2025**
- **Section 41, Marine and Coastal Access Act, 2009 (MACAA)**
- **Section 42, Marine and Coastal Access Act, 2009 (MACAA)**
- **2013 EEZ Order in Council**

Energy Act 2004

2004 CHAPTER 20

PART 2

SUSTAINABILITY AND RENEWABLE ENERGY SOURCES

CHAPTER 2

OFFSHORE PRODUCTION OF ENERGY

Renewable Energy Zones

84 Exploitation of areas outside the territorial sea for energy production

(1) The rights to which this section applies shall have effect as rights belonging to Her Majesty by virtue of this section.

(2) This section applies to the rights under Part V of the Convention that are exercisable by the United Kingdom in areas outside the territorial sea—

(a) with respect to the exploitation of those areas for the production of energy from water or winds;

(b) with respect to the exploration of such areas in that connection; or

(c) for other purposes connected with such exploitation.

(3) The other purposes so connected include, in particular, the transmission, distribution and supply of electricity generated in the course of such exploitation.

[F1(4) The area within which the rights to which this section applies are exercisable (the "Renewable Energy Zone")—

(a) is any area for the time being designated under section 41(3) of the Marine and Coastal Access Act 2009 (exclusive economic zone), but

(b) if Her Majesty by Order in Council declares that the Renewable Energy Zone extends to such other area as may be specified in the Order, is the area resulting from the Order.**]**

(5) The Secretary of State may by order designate the whole or a part of a Renewable Energy Zone as an area in relation to which the Scottish Ministers are to have functions.

(6) Orders in Council under this section, and orders under subsection (5), are subject to the negative resolution procedure.

(7) In this section—

"the Convention" means the United Nations Convention on the Law of the Sea 1982 (Cmnd 8941) and any modifications of that Convention agreed after the passing of this Act that have entered into force in relation to the United Kingdom;

"exploration" includes the doing of anything (whether by way of investigations, trials or feasibility studies or otherwise) with a view to ascertaining whether the exploitation of an area is, in a particular case, practicable or commercially viable, or both.

Textual Amendments

F1 S. 84(4) substituted (31.3.2014) by Marine and Coastal Access Act 2009 (c. 23), s. 324(3), **Sch. 4 para. 4(2)**; S.I. 2013/3055, art. 2

Commencement Information

I1 S. 84 in force at 5.10.2004 by S.I. 2004/2575, art. 2(1), **Sch. 1**

Changes to legislation:
Energy Act 2004, Section 84 is up to date with all changes known to be in force on or before 02 December 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

– s. 137(3)(c)-(e) inserted by 2011 c. 16 s. 117(b)

1 Exploration and exploitation of continental shelf

(1) Any rights exercisable by the United Kingdom outside territorial waters with respect to the sea bed and subsoil and their natural resources, except so far as they are exercisable in relation to coal, are hereby vested in Her Majesty.

Crown Estate Act 1961

1961 CHAPTER 55 9 and 10 Eliz 2

1 Continuance of Crown Estate Commissioners, and general provisions as to their constitution and functions.

(1) The Crown Estate Commissioners (in this Act referred to as "the Commissioners") shall continue to be a body corporate for all purposes, charged on behalf of the Crown with the function of managing and turning to account land and other property, rights and interests, and of holding such of the property, rights and interests under their management as for any reason cannot be vested in the Crown or can more conveniently be vested in the Commissioners; and the property, rights and interests under the management of the Commissioners shall continue to be known as the Crown Estate.

(2) Subject to the provisions of this Act, the Crown Lands Acts 1829 to 1936 shall cease to have effect, and the Commissioners shall, for the purpose of managing and improving the Crown Estate or any part of it, have authority to do on behalf of the Crown over or in relation to land or other property, rights or interests forming part of the Crown Estate, and in relation to all matters arising in the management of the Crown Estate, all such acts as belong to the Crown's rights of ownership, free from any restraint on alienation imposed on the Crown by section five of the [M1]Crown Lands Act 1702 or by any other enactment (whether general or particular), and to execute and do in the name of Her Majesty all instruments and things proper for the effective exercise of their powers.

(3) It shall be the general duty of the Commissioners, while maintaining the Crown Estate as an estate in land (with such proportion of cash or investments as seems to them to be required for the discharge of their functions), to maintain and enhance its value and the return obtained from it, but with due regard to the requirements of good management.

(4) The Commissioners shall comply with such directions as to the discharge of their functions under this Act as may be given to them in writing by the Chancellor of the Exchequer or the Secretary of State, but the Chancellor of the Exchequer or Secretary of State in giving directions to the Commissioners under this subsection shall have regard to subsection (3) above, and before giving any such direction shall consult the Commissioners.

The Chancellor of the Exchequer and the Secretary of State shall act jointly in giving directions under this subsection, except that in matters not relating to Scotland the Chancellor of the Exchequer may act without the Secretary of State and in matters relating exclusively to Scotland the Secretary of State may act without the Chancellor of the Exchequer.

(5) The validity of transactions entered into by the Commissioners shall not be called in question on any suggestion of their not having acted in accordance with the provisions of this Act regulating the exercise of their powers, or of their having otherwise acted in excess of their authority, nor shall any person dealing with the Commissioners be concerned to inquire as to the extent of their authority or the observance of any restrictions on the exercise of their powers.

(6) Any transaction entered into by the Commissioners in the exercise of their powers (including an acquisition for the Crown Estate) may be carried out by the same means and with the same formalities, and any deed or other instrument entered into by them shall be construed in the same manner, and shall be registrable, as if they were acting on behalf of a subject of Her Majesty:
Provided that an advowson shall not be taken to be comprised in any general words in a grant or agreement for a grant of land.

(7) The provisions of the First Schedule to this Act shall have effect with respect to the constitution and proceedings of the Commissioners and other matters relating to the Commissioners.

Marginal Citations
M1 1702 c. 1.

Changes to legislation:
Crown Estate Act 1961, Section 1 is up to date with all changes known to be in force on or before 15 April 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

- s. 1(3A) inserted by 2025 c. 7 s. 3
- s. 1(4A) inserted by 2025 c. 7 s. 1(2)
- s. 2(1A) inserted by 2025 c. 7 s. 4
- s. 3A inserted by 2025 c. 7 s. 1(4)
- s. 3B inserted by 2025 c. 7 s. 5
- Sch. 1 para. 1(3B)-(3D) inserted by 2025 c. 7 s. 6(2)
- Sch. 1 para. 1(4B) inserted by 2025 c. 7 s. 6(3)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 1(3A) inserted by 2025 c. 7 s. 3
- s. 1(4A) inserted by 2025 c. 7 s. 1(2)
- s. 2(1A) inserted by 2025 c. 7 s. 4
- s. 3A inserted by 2025 c. 7 s. 1(4)
- s. 3B inserted by 2025 c. 7 s. 5
- Sch. 1 para. 1(3B)-(3D) inserted by 2025 c. 7 s. 6(2)
- Sch. 1 para. 1(4B) inserted by 2025 c. 7 s. 6(3)

Crown Estate Act 2025

2025 CHAPTER 7

PROSPECTIVE

5 Territorial seabed

After section 3A of the Crown Estate Act 1961 (inserted by section 1 of this Act) insert—

"**3B Restriction on permanently disposing of interest in seabed etc**

(1) The Commissioners may not without the consent of the Treasury permanently dispose of—

(a) any part of the territorial seabed, or

(b) any interest, right or privilege over or in relation to the territorial seabed,

which forms part of the Crown Estate.

(2) Accordingly, without that consent, any purported disposal of a kind mentioned in subsection (1) is void.

(3) In subsection (1), "territorial seabed" means the seabed and subsoil within the seaward limits of the United Kingdom territorial waters."

Commencement Information

I1 S. 5 in force at 11.5.2025, see **s. 7(2)**

Status:
This version of this provision is prospective.

Changes to legislation:
Crown Estate Act 2025, Section 5 is up to date with all changes known to be in force on or before 08 April 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

– s. 5 coming into force by 2025 c. 7 s. 7(2)

Marine and Coastal Access Act 2009

2009 CHAPTER 23

PART 2

EXCLUSIVE ECONOMIC ZONE, UK MARINE AREA AND WELSH ZONE

41 Exclusive economic zone

(1) The rights to which this section applies have effect as rights belonging to Her Majesty by virtue of this section.

(2) This section applies to all rights under Part V of the Convention that are exercisable by the United Kingdom in areas outside the territorial sea.

(3) Her Majesty may by Order in Council designate an area as an area within which the rights to which this section applies are exercisable (an "exclusive economic zone").

(4) The Secretary of State may by order designate the whole or any part of the exclusive economic zone as an area in relation to which the Scottish Ministers, the Welsh Ministers or any Northern Ireland department are to have functions.

(5) In any enactment or instrument passed or made after the coming into force of an Order in Council made under this section, any reference to the United Kingdom's exclusive economic zone is to be read as a reference to any area designated in the Order in Council.

(6) An Order in Council under this section may include incidental, consequential, supplementary or transitional provision or savings.

(7) In this section "the Convention" means the United Nations Convention on the Law of the Sea (Cmnd 8941) and any modifications of that Convention agreed after the passing of this Act that have entered into force in relation to the United Kingdom.

(8) Part 1 of Schedule 4 (which contains amendments consequential on this section) has effect.

Commencement Information

I1 S. 41 partly in force; s. 41 in force for specified purposes at Royal Assent see s. 324(1)(c)

I2 S. 41 in force at 31.3.2014 in so far as not already in force by S.I. 2013/3055, **art. 2**

Changes to legislation:
Marine and Coastal Access Act 2009, Section 41 is up to date with all changes known to be in force on or before 09 April 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

- s. 58(5A) inserted by 2024 asc 3 Sch. 3 para. 10(2)
- s. 72A(2A) inserted by 2023 c. 55 s. 232(2)(d)
- s. 72A(6)(a) words in s. 72A(6) renumbered as s. 72A(6)(a) by 2023 c. 55 s. 232(2)(f)(i)
- s. 72A(6)(a) words inserted by 2023 c. 55 s. 232(2)(f)(ii)
- s. 72A(6)(b) and word inserted by 2023 c. 55 s. 232(2)(f)(iii)
- s. 243A inserted by 2024 asc 3 s. 110
- Sch. 6 para. 1(2)(da) inserted by 2023 c. 55 Sch. 8 para. 31(2)(a)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 58(5A) inserted by 2024 asc 3 Sch. 3 para. 10(2)
- s. 72A(2A) inserted by 2023 c. 55 s. 232(2)(d)
- s. 72A(6)(a) words in s. 72A(6) renumbered as s. 72A(6)(a) by 2023 c. 55 s. 232(2)(f)(i)
- s. 72A(6)(a) words inserted by 2023 c. 55 s. 232(2)(f)(ii)
- s. 72A(6)(b) and word inserted by 2023 c. 55 s. 232(2)(f)(iii)
- s. 243A inserted by 2024 asc 3 s. 110
- Sch. 6 para. 1(2)(da) inserted by 2023 c. 55 Sch. 8 para. 31(2)(a)

Marine and Coastal Access Act 2009

2009 CHAPTER 23

PART 2

EXCLUSIVE ECONOMIC ZONE, UK MARINE AREA AND WELSH ZONE

42 UK marine area

(1) For the purposes of this Act, the "UK marine area" consists of the following—

(a) the area of sea within the seaward limits of the territorial sea adjacent to the United Kingdom,

(b) any area of sea within the limits of the exclusive economic zone,

(c) the area of sea within the limits of the UK sector of the continental shelf (so far as not falling within the area mentioned in paragraph (b), and see also subsection (2)),

and includes the bed and subsoil of the sea within those areas.

(2) The area of sea mentioned in subsection (1)(c) is to be treated as part of the UK marine area for any purpose only to the extent that such treatment for that purpose does not contravene any international obligation binding on the United Kingdom or Her Majesty's government.

(3) In this section "sea" includes—

(a) any area submerged at mean high water spring tide, and

(b) the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide.

(4) The area of sea referred to in subsection (3)(a) includes waters in any area—

(a) which is closed, whether permanently or intermittently, by a lock or other artificial means against the regular action of the tide, but

(b) into which seawater is caused or permitted to flow, whether continuously or from time to time, and

(c) from which seawater is caused or permitted to flow, whether continuously or from time to time.

(5) Until the coming into force of the first Order in Council made under section 41 (the exclusive economic zone), the reference in subsection (1)(b) to the exclusive economic zone is to be read as a reference to a renewable energy zone.

Commencement Information

I1 S. 42 in force at 12.1.2010 by S.I. 2009/3345, art. 2, **Sch. para. 6**

Changes to legislation:
Marine and Coastal Access Act 2009, Section 42 is up to date with all changes known to be in force on or before 09 April 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

- s. 58(5A) inserted by 2024 asc 3 Sch. 3 para. 10(2)
- s. 72A(2A) inserted by 2023 c. 55 s. 232(2)(d)
- s. 72A(6)(a) words in s. 72A(6) renumbered as s. 72A(6)(a) by 2023 c. 55 s. 232(2)(f)(i)
- s. 72A(6)(a) words inserted by 2023 c. 55 s. 232(2)(f)(ii)
- s. 72A(6)(b) and word inserted by 2023 c. 55 s. 232(2)(f)(iii)
- s. 243A inserted by 2024 asc 3 s. 110
- Sch. 6 para. 1(2)(da) inserted by 2023 c. 55 Sch. 8 para. 31(2)(a)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 58(5A) inserted by 2024 asc 3 Sch. 3 para. 10(2)
- s. 72A(2A) inserted by 2023 c. 55 s. 232(2)(d)
- s. 72A(6)(a) words in s. 72A(6) renumbered as s. 72A(6)(a) by 2023 c. 55 s. 232(2)(f)(i)
- s. 72A(6)(a) words inserted by 2023 c. 55 s. 232(2)(f)(ii)
- s. 72A(6)(b) and word inserted by 2023 c. 55 s. 232(2)(f)(iii)
- s. 243A inserted by 2024 asc 3 s. 110
- Sch. 6 para. 1(2)(da) inserted by 2023 c. 55 Sch. 8 para. 31(2)(a)

STATUTORY INSTRUMENTS

2013 No. 3161

MARINE MANAGEMENT

The Exclusive Economic Zone Order 2013

Made - - - -	*11th December 2013*
Laid before Parliament	*18th December 2013*
Coming into force - -	*31st March 2014*

At the Court at Buckingham Palace, the 11th day of December 2013

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, in exercise of the powers conferred on Her by section 41(3) of the Marine and Coastal Access Act 2009(**1**), section 84(4)(b) of the Energy Act 2004(**2**), and section 1(5)(b) of the Energy Act 2008(**3**), is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:—

1.—(1) This Order may be cited as the Exclusive Economic Zone Order 2013, and comes into force on 31st March 2014.

(2) The Gas Importation and Storage Zone (Designation of Area) Order 2009(**4**) and the Renewable Energy Zone (Designation of Area) Order 2004(**5**) are revoked.

(3) The coordinates in the Schedules hereto are defined on the World Geodetic System 1984 Datum (WGS84).

2. The areas defined in Schedule A are designated as the area within which the rights under Part V of the Convention are excisable by the United Kingdom.

3. However, between points 177 and 184 inclusive, the Renewable Energy Zone and the Gas Importation and Storage Zone extend only to the lines described in column 2 of Schedule B joining in the order given the co-ordinates specified in column 1 of Schedule B.

(**1**) 2009 c.23.
(**2**) 2004 c.20; section 84(4) was amended by paragraph 4(2) of Schedule 4 to the Marine and Coastal Access Act 2009.
(**3**) 2008 c.32; section 1(5) was amended by paragraph 5(2) of Schedule 4 to the Marine and Coastal Access Act 2009.
(**4**) S.I. 2009/223.
(**5**) S.I. 2004/2668.

[redacted]
Clerk of the Privy Council

SCHEDULE A Article 2

Point No.	*Latitude*	*Longitude*	*Line Type to following point*
FIRST AREA			
1	53° 52’.22106N	005° 49’.53816W	Straight line
2	53° 46’.00N	005° 22’.00W	Meridian of longitude
3	53° 45’.80N	005° 22’.00W	Parallel of latitude
4	53° 45’.80N	005° 19’.33W	Meridian of longitude
5	53° 44’.40N	005° 19’.33W	Parallel of latitude
6	53° 44’.40N	005° 17’.85W	Meridian of longitude
7	53° 42’.14N	005° 17’.85W	Parallel of latitude
8	53° 42’.14N	005° 16’.34W	Meridian of longitude
9	53° 39’.00N	005° 16’.34W	Parallel of latitude
10	53° 39’.00N	005° 17’.00W	Meridian of longitude
11	53° 32’.00N	005° 17’.00W	Parallel of latitude
12	53° 32’.00N	005° 19’.00W	Meridian of longitude
13	53° 26’.00N	005° 19’.00W	Parallel of latitude
14	53° 26’.00N	005° 20’.00W	Meridian of longitude
15	53° 09’.00N	005° 20’.00W	Parallel of latitude
16	53° 09’.00N	005° 19’.00W	Meridian of longitude
17	52° 59’.00N	005° 19’.00W	Parallel of latitude
18	52° 59’.00N	005° 22’.50W	Meridian of longitude
19	52° 52’.00N	005° 22’.50W	Parallel of latitude
20	52° 52’.00N	005° 24’.50W	Meridian of longitude
21	52° 44’.00N	005° 24’.50W	Parallel of latitude
22	52° 44’.00N	005° 28’.00W	Meridian of longitude
23	52° 32’.00N	005° 28’.00W	Parallel of latitude
24	52° 32’.00N	005° 22’.80W	Meridian of longitude
25	52° 24’.00N	005° 22’.80W	Parallel of latitude
26	52° 24’.00N	005° 35’.00W	Meridian of longitude
27	52° 16’.00N	005° 35’.00W	Parallel of latitude
28	52° 16’.00N	005° 39’.00W	Meridian of longitude
29	52° 12’.00N	005° 39’.00W	Parallel of latitude
30	52° 12’.00N	005° 42’.00W	Meridian of longitude
31	52° 08’.00N	005° 42’.00W	Parallel of latitude

Point No.	*Latitude*	*Longitude*	*Line Type to following point*
32	52° 08’.00N	005° 46’.00W	Meridian of longitude
33	52° 04’.00N	005° 46’.00W	Parallel of latitude
34	52° 04’.00N	005° 50’.00W	Meridian of longitude
35	52° 00’.00N	005° 50’.00W	Parallel of latitude
36	52° 00’.00N	005° 54’.00W	Meridian of longitude
37	51° 58’.00N	005° 54’.00W	Parallel of latitude
38	51° 58’.00N	005° 57’.00W	Meridian of longitude
39	51° 54’.00N	005° 57’.00W	Parallel of latitude
40	51° 54’.00N	006° 00’.00W	Meridian of longitude
41	51° 50’.00N	006° 00’.00W	Parallel of latitude
42	51° 50’.00N	006° 06’.00W	Meridian of longitude
43	51° 40’.00N	006° 06’.00W	Parallel of latitude
44	51° 40’.00N	006° 18’.00W	Meridian of longitude
45	51° 30’.00N	006° 18’.00W	Parallel of latitude
46	51° 30’.00N	006° 33’.00W	Meridian of longitude
47	51° 20’.00N	006° 33’.00W	Parallel of latitude
48	51° 20’.00N	006° 42’.00W	Meridian of longitude
49	51° 10’.00N	006° 42’.00W	Parallel of latitude
50	51° 10’.00N	006° 48’.00W	Meridian of longitude
51	51° 00’.00N	006° 48’.00W	Parallel of latitude
52	51° 00’.00N	007° 03’.00W	Meridian of longitude
53	50° 50’.00N	007° 03’.00W	Parallel of latitude
54	50° 50’.00N	007° 12’.00W	Meridian of longitude
55	50° 40’.00N	007° 12’.00W	Parallel of latitude
56	50° 40’.00N	007° 36’.00W	Meridian of longitude
57	50° 30’.00N	007° 36’.00W	Parallel of latitude
58	50° 30’.00N	008° 00’.00W	Meridian of longitude
59	50° 20’.00N	008° 00’.00W	Parallel of latitude
60	50° 20’.00N	008° 12’.00W	Meridian of longitude
61	50° 10’.00N	008° 12’.00W	Parallel of latitude
62	50° 10’.00N	008° 24’.00W	Meridian of longitude
63	50° 00’.00N	008° 24’.00W	Parallel of latitude
64	50° 00’.00000N	008° 32’.02264W	Meridian of longitude
65	49° 50’.00000N	008° 32’.02264W	Parallel of latitude

Point No.	*Latitude*	*Longitude*	*Line Type to following point*
66	49° 50’.00000N	008° 36’.00000W	Meridian of longitude
67	49° 40’.00000N	008° 36’.00000W	Parallel of latitude
68	49° 40’.00000N	008° 45’.00000W	Meridian of longitude
69	49° 30’.00000N	008° 45’.00000W	Parallel of latitude
70	49° 30’.00000N	009° 03’.00000W	Meridian of longitude
71	49° 20’.00000N	009° 03’.00000W	Parallel of latitude
72	49° 20’.00000N	009° 12’.00000W	Meridian of longitude
73	49° 10’.00000N	009° 12’.00000W	Parallel of latitude
74	49° 10’.00000N	009° 17’.00000W	Meridian of longitude
75	49° 00’.00000N	009° 17’.00000W	Parallel of latitude
76	49° 00’.00000N	009° 24’.00000W	Meridian of longitude
77	48° 50’.00000N	009° 24’.00000W	Parallel of latitude
78	48° 50’.00000N	009° 24’.53688W	Meridian of longitude
79	48° 30’.00000N	009° 24’.53688W	Parallel of latitude
80	48° 30’.00000N	009° 48’.00000W	Meridian of longitude
81	48° 20’.00000N	009° 48’.00000W	Parallel of latitude
82	48° 20’.00000N	009° 55’.00241W	Meridian of longitude
83	48° 10’.81127N	009° 55’.00241W	Parallel of latitude
84	48° 10’.81127N	010° 48’.56229W	84 to 85 are joined by a line every point of which is 200 nautical miles from the nearest point on the baselines from which the breadth of the territorial sea of Great Britain and Northern Ireland is measured.
85	47° 26’ 124N	009° 52’ 637W	Geodesic
86	48° 05’.935N	009° 36’.588W	Loxodrome
87	49° 11’.940N	005° 41’.587W	Loxodrome
88	49° 12’.107N	005° 40’.587W	Loxodrome
89	49° 12’.940N	005° 20’.753W	Loxodrome
90	49° 13’.307N	005° 18’.087W	Loxodrome
91	49° 14’.407N	005° 11’.087W	Loxodrome
92	49° 23’.175N	004° 32’.735W	Loxodrome
93	49° 27’.325N	004° 21’.852W	Loxodrome

Point No.	*Latitude*	*Longitude*	*Line Type to following point*
94	49° 27’.608N	004° 17’.985W	Loxodrome
95	49° 32’.075N	003° 55’.868W	Loxodrome
96	49° 32’.642N	003° 42’.818W	Loxodrome
97	49° 33’.142N	003° 34’.918W	Loxodrome
98	49° 38’.443N	003° 21’.085W	Loxodrome
99	49° 46’.443N	002° 56’.585W	Loxodrome
100	49° 57’.777N	002° 48’.485W	Loxodrome
101	50° 09’.178N	002° 03’.517W	Loxodrome
102	50° 09’.195N	001° 30’.083W	Loxodrome
103	50° 08’.395N	001° 00’.083W	Loxodrome
104	50° 07’.428N	000° 30’.082W	Loxodrome
105	50° 13’.163N	000° 15’.582W	Loxodrome
106	50° 14’.147N	000° 02’.152E	Loxodrome
107	50° 19’.630N	000° 36’.118E	Loxodrome
108	50° 23’.313N	000° 46’.570E	Loxodrome
109	50° 38’.582N	001° 07’.353E	Loxodrome
110	50° 47’.782N	001° 15’.385E	Loxodrome
111	50° 49’.463N	001° 15’.810E	Loxodrome
SECOND AREA			
112	51° 11’.962N	001° 53’.253E	Loxodrome
113	51° 14’.398N	001° 57’.218E	Loxodrome
114	51° 20’.133N	002° 02’.218E	Loxodrome
115	51° 30’.183N	002° 07’.218E	Loxodrome
116	51° 33’.417N	002° 14’.218E	Geodesic
117	51° 36’.733N	002° 15’.120E	Geodesic
118	51° 48’.250N	002° 28’.820E	Geodesic
119	51° 52’.517N	002° 32’.280E	Geodesic
120	51° 58’.950N	002° 37’.517E	Geodesic
121	52° 00’.950N	002° 39’.417E	Geodesic
122	52° 05’.250N	002° 42’.117E	Geodesic
123	52° 05’.950N	002° 42’.817E	Geodesic
124	52° 12’.350N	002° 50’.317E	Geodesic

Point No.	*Latitude*	*Longitude*	*Line Type to following point*
125	52° 17’.350N	002° 55’.917E	Geodesic
126	52° 24’.950N	003° 03’.417E	Geodesic
127	52° 37’.250N	003° 10’.917E	Geodesic
128	52° 46’.950N	003° 12’.217E	Geodesic
129	52° 52’.950N	003° 10’.417E	Geodesic
130	53° 18’.050N	003° 03’.317E	Geodesic
131	53° 28’.150N	003° 00’.917E	Geodesic
132	53° 35’.050N	002° 59’.217E	Geodesic
133	53° 40’.050N	002° 57’.317E	Geodesic
134	53° 57’.750N	002° 51’.917E	Geodesic
135	54° 22’.750N	002° 45’.717E	Geodesic
136	54° 37’.250N	002° 53’.817E	Geodesic
137	55° 45’.858N	003° 22’.130E	Geodesic
138	55° 50’.059N	003° 23’.913E	Geodesic
139	55° 55’.116N	003° 20’.915E	Geodesic
140	56° 05’.159N	003° 14’.914E	Geodesic
141	56° 35’.660N	002° 36’.712E	Geodesic
142	57° 54’.262N	001° 57’.807E	Geodesic
143	58° 25’.763N	001° 28’.905E	Geodesic
144	59° 17’.365N	001° 42’.602E	Geodesic
145	59° 53’.766N	002° 04’.501E	Geodesic
146	61° 21’.370N	001° 47’.295E	Geodesic
147	61° 44’.171N	001° 33’.493E	Geodesic
148	61° 44’.171N	001° 33’.117E	Geodesic
149	62° 16’.705N	001° 10’.571E	Geodesic
150	62° 19’.652N	001° 08’.409E	Geodesic
151	62° 22’.323N	001° 06’.363E	Geodesic
152	62° 24’.918N	001° 04’.323E	Geodesic
153	62° 27’.520N	001° 02’.187E	Geodesic
154	62° 30’.137N	000° 59’.991E	Geodesic
155	62° 32’.762N	000° 57’.697E	Geodesic
156	62° 36’.319N	000° 54’.638E	Geodesic
157	62° 39’.940N	000° 51’.383E	Geodesic
158	62° 44’.246N	000° 47’.352E	Geodesic

Point No.	*Latitude*	*Longitude*	*Line Type to following point*
159	62° 53’.466N	000° 38’.355E	Geodesic
160	62° 58’.325N	000° 33’.406E	Geodesic
161	63° 03’.320N	000° 28’.098E	Geodesic
162	63° 38’.153N	000° 11’.103W	Geodesic
163	63° 44’.189N	000° 18’.254W	Geodesic
164	63° 50’.424N	000° 25’.904W	Geodesic
165	63° 53’.224N	000° 29’.444W	Geodesic
166	63° 40’.649N	000° 47’.736W	Geodesic
167	61° 59’.233N	003° 03’.325W	Geodesic
168	61° 52’.114N	003° 11’.729W	Geodesic
169	61° 21’.611N	003° 47’.898W	Geodesic
170	61° 07’.651N	003° 59’.619W	Geodesic
171	61° 04’.449N	004° 02’.425W	Geodesic
172	61° 02’.757N	004° 03’.859W	Geodesic
173	60° 54’.979N	004° 10’.497W	Geodesic
174	60° 51’.809N	004° 14’.008W	Geodesic
175	60° 47’.717N	004° 18’.541W	Geodesic
176	60° 24’.077N	004° 44’.272W	Geodesic
177	60° 21’.101N	004° 56’.672W	Geodesic
178	60° 18’.754N	005° 24’.195W	Geodesic
179	60° 13’.128N	006° 25’.047W	Geodesic
180	59° 59’.536N	009° 43’.613W	Geodesic
181	60° 02’.419N	010° 33’.611W	Geodesic
182	60° 03’.090N	010° 52’.953W	Geodesic
183	60° 02’.833N	011° 16’.458W	Geodesic
184	60° 07’.306N	012° 17’.622W	Geodesic
185	60° 09’.031N	013° 16’.199W	185 to 186 are joined by a line every point of which is 200 nautical miles from the nearest point on the baselines from which the breadth of the territorial sea of Great Britain and Northern Ireland is measured.
186	56° 34’.63126N	014° 19’.86168W	Parallel of latitude

Point No.	*Latitude*	*Longitude*	*Line Type to following point*
187	56° 34’.63126N	014° 10’.00000W	Meridian of longitude
188	56° 40’.00000N	014° 10’.00000W	Parallel of latitude
189	56° 40’.00000N	014° 00’.00000W	Meridian of longitude
190	56° 42’.00N	014° 00’.00W	Parallel of latitude
191	56° 42’.00N	012° 12’.00W	Meridian of longitude
192	56° 32’.50N	012° 12’.00W	Parallel of latitude
193	56° 32’.50N	010° 30’.00W	Meridian of longitude
194	56° 21’.50N	010° 30’.00W	Parallel of latitude
195	56° 21’.50N	009° 07’.00W	Meridian of longitude
196	56° 10’.00N	009° 07’.00W	Parallel of latitude
197	56° 10’.00N	008° 39’.50W	Meridian of longitude
198	56° 05’.00N	008° 39’.50W	Parallel of latitude
199	56° 05’.00N	008° 13’.00W	Meridian of longitude
200	56° 00’.00N	008° 13’.00W	Parallel of latitude
201	56° 00’.00N	007° 23’.00W	Meridian of longitude
202	55° 55’.00N	007° 23’.00W	Parallel of latitude
203	55° 55’.00N	007° 15’.00W	Meridian of longitude
204	55° 50’.00N	007° 15’.00W	Parallel of latitude
205	55° 50’.00N	007° 08’.00W	Meridian of longitude
206	55° 45’.00N	007° 08’.00W	Parallel of latitude
207	55° 45’.00N	007° 02’.00W	Meridian of longitude
208	55° 40’.00N	007° 02’.00W	Parallel of latitude
209	55° 40’.00N	006° 57’.00W	Meridian of longitude
210	55° 35’.00N	006° 57’.00W	Parallel of latitude
211	55° 35’.00N	006° 51’.00W	Meridian of longitude
212	55° 30’.00N	006° 51’.00W	Parallel of latitude
213	55° 30’.00N	006° 48’.00W	Meridian of longitude
214	55° 28’.00N	006° 48’.00W	Parallel of latitude
215	55° 28’.00N	006° 45’.00W	Straight line
216	55° 24’.89173N	006° 44’.64809W	

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Point No.	*Latitude*	*Longitude*	*Line Type to following point*
176	60° 24’.077N	004° 44’.272W	Geodesic
217	60°.21’.886N	004° 46’.621W	Geodesic
218	60° 09’.891N	005° 13’.717W	Geodesic
219	60° 01’.549N	005° 32’.169W	Geodesic
220	59° 56’.494N	006° 04’.907W	Geodesic
221	59° 49’.792N	008° 38’.602W	Geodesic
222	59° 50’.490N	009° 34’.037W	Geodesic
223	59° 57’.425N	010° 29’.895W	Geodesic
183	60° 02’.833N	011° 16’.458W	Geodesic

EXPLANATORY NOTE

(This note is not part of the Order)

Under Section 41 of the Marine and Coastal Access Act 2009 provision is made for the declaration around the United Kingdom of an exclusive economic zone, that is to say a zone in which the United Kingdom may exercise the rights under Part V of the United Nations Convention on the Law of the Sea; these rights relate principally to the water column and may extend to 200 nautical miles from baselines.

Article 2 of this Order declares the area of the United Kingdom’s exclusive economic zone. It reflects the treaties which have been concluded with the Belgium, Denmark, France, Ireland, the Netherlands and Norway, and the understanding with Germany. Article 3 is required because under the treaties with Denmark relating to the Faroe Islands the area to the north of the line specified can only be utilised for the purposes of renewable energy and gas storage with the prior consent of Denmark. The Orders referred to in Article 1(2) are revoked because they are superseded by the declaration of the Exclusive Economic Zone.

The treaties in question are:

Belgium: Exchange of Letters of 25 June and 12 August 2013(Cm 8723);

Denmark: Exchange of Notes of 22 October 2009 (relating to the North Sea) (Cm 7893);

Agreement of 18 May 1999 (relating to the Faroe Islands) (Cm 4514);

Protocol of 25 April 2012 (relating to the Faroe Islands) (Cm8570);

France: Exchange of Letters of 20 April 2011 (Cm 8146);

Ireland: Agreement of 28 March 2013 (Cm 8666);

Netherlands: Exchange of Notes of 19 April and 3 July 2013 (Cm 8724);

Norway: Exchange of Notes of 30 April 2009 (Cm 7731).