6.Respondent cannot rely on the essential security defense (Art. 9 of the BIT) as the allegation of leak of information was not substantiated to any extent

In our case, Respondent invoked Essential security clause (Article. 9 of the BIT) after a rumour has been spread that Claimant leaked certain classified information regarding the Sat-Connect joint venture to government of Opulentia. The rumour was based on article published by Beristan-based newspaper.[1]

Essential security clause, as a subgroup of general exemptions serves as a way for a state to protect its own essential security issues. In this case, Claimant holds belief that the act of invoking was unjustified, chiefly because the leak of information was not substantiated to any extent. Involvement of the army engineering corps[2] rather then police force in the process of the expropriation and the clearing of the premises of the Sat-Connect joint venture, raises suspicion as it was based on dubious executive order which indicates strong political motivation to get hold onto the assets and know-how of Claimant. Also taking into account ties of Beritech's owner structure to high-ranking officials of Beristan and 75% share held by Beristani government, actions of the government of Beristan resemble more to conspiracy then to due process of law. Sources of the information on alleged information leak were also top Beristani officials. Furthermore, Beristan acted as guarantor on behalf of Beritech and co-signed the contract, in which way the Respondent was involved in the joint-venture and therefore was motivated to act fraudulently to obtain Claimants know-how and assets.

Without respecting the judiciary power to interpret the joint-venture contract, without even slightest mark of investigation into matters concerning alleged information leak, without hearing the other side of this conflict, Respondent despotically choose to expropriate the Claimant via invoking the Article. 9 of the BIT. Both assets and reputation of Claimant were damaged in the process of invoking the Article 9.

Article 9 of Beristan Opulentia bilateral investment treaty uses the same language and exactly same formulation as a 2005 USA Paraguay BIT, which in Article 18 states that:

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[1] On August 12, 2009, The Beristan Times published an article in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project. The official indicated it was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia.

[2] on September 11, 2009, staff from the Civil Works Force (“CWF”), the civil engineering section of the Beristian army, secured all sites and facilities of the Sat-Connect project.

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

From a formulation of this article, we can establish that essential security-clause is self-judging one (compare to article XXI of GATT, specifically article XXIb[3])

In this type of essential security exemptions which use GATT-like self-judging, the state is the sole arbiter to determine the measures to be taken to combat or alleviate the conditions endangering its own essential security. This of course provided by the fact, that the condition is present, and in our case it wasn't. Respondent didn't prove the leak of information beyond reasonable doubts. Moreover, respondent didn't even tried to lead an investigation into this very serious matter, but acted solely on the rumour published in local newspaper. Acting on false pretences, Respondent intentionally used this article to its own advantage by invoking the article 9 of BIT and by issuing the executive order to clear out the pretences of Sat-Connect. Claimant does not impeach the right of Respondent to act accordingly to the Art. 9 of BIT to protect its own security by taking adequate security measures. As aforementioned, the language of the treaty is self-judging and therefore each of the party is empowered to act on its own free will, but the impulse or condition which threatens the security must be present.

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[3] which provides that :

1. Nothing in this Agreement shall be construed:

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Invoking Security clause without just reason puts whole purpose of contract into jeopardy by constituting a sort of escape tunnel from any contractual obligation, which is in conflict with the essential and basic principle in international law and that is Pacta sunt servanda. This principle is also stated by Vienna Convention on the Law of Treaties as: "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Wide and extended interpretation of self-judging clause will have detrimental effects on motivation of state to fulfil its duties under any BIT. Exceptions to IIA obligations should be interpreted narrowly and that is consistent with the investment promotion and protection purpose of IIAs. For example, the tribunal in Canfor Corporation v. United States and Terminal Forest Products Ltd.. v United States, referring to the GATT jurisprudence, stated that exceptions in international instruments are to be interpreted narrowly.[4] Another example is the award in Enron Corporation and Ponderosa Assets, L.P. v. Argentina in which the tribunal , when discussing the essential security interests clause in Article XI, Argentina-US(1991), provided that :

“...the tribunal must first note that the object and purpose of the Treaty is, as a general proposition, to apply in situation of economic difficulty and hardship that guarantee the protection of the international guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.”[5]

Opulentia-Beristan BIT does contain a self-judging language, but it does not contain an additional formulation use for example in India-Singapore CECA (2005) which provides that any such security measure taken on the discretion on Party is non-justiciable.[6]
Therefore even if this provision of treaty is self-judging, the Party invoking the article 9 must still act in good faith.

[4] Canfor Corporation v. Uniteted States and Terminal Forest Products Ltd. v. United States(decision on Preliminary Question, 6 Jun. 2006) at para. 187.
[5] Enron Corporation and Ponderosa Assets , L.p. Argentina (Award, 22 May 2007) (Enron) at para. 331
[6] CECA directly states that: Any decision of the disputing party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and /or compensation, or an adjudication of any other issues referred to the tribunal.

In this case , we can hardly consider a newspaper article to be a fully-potent stimuli capable of being treated as a thread to national security. Taking short excursion in the question what can be considered a thread to national security a furthermore if the conditions present in this case are constituting such thread we can use example of Enron award.

In Enron, the tribunal was more explicit in holding that since "essential security interests" is not defined, the term takes its meaning by reference to the doctrine of necessity in customary international law. According to the tribunal "The treaty thus becomes inseparable from the customary international standard insofar as the conditions for the operation of state of necessity are concerned. Thus, it found that Article XI does not set out conditions different from customary law.