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

I.

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

II.

Essential security exception, as a subgroup of general exceptions is used increasingly among treaties and serves as a way for a state to protect its own essential security issues.[2] From the formulation of Article 9, we can establish that this is a self-judging type of security exception. Wording of Article 9 uses the same language and exactly same formulation as a 2005 USA Uruguay BIT[3] which stipulates that:

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.

[1] *The Beristan Times*, August 12 2009 issue
[2] Newcombe, Andrew Paul and Paradell, Lluis, Law and Practice of Investment Treaties: Standards of Treatment Chapter 10, Exceptions and Defenses, p. KLUWER LAW INTERNATIONAL, 2009
[3] Article 18, *TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE ORIENTAL REPUBLIC OF URUGUAY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT*, signed on November 2005.

In type of language used, it also resembles to an article XXI of GATT, specifically article XXIb which states:

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.

III.

Main identification sign of self-judging clause is a use of wording "it considers"[4] or "it determines" or "the ... State considers"[5] relating to the phrase "necessary for the protection of its essential security interests".

The question and discourse whether the self-judging clause is a valid legal instrument can be traced back to 1959 to *Certain Norwegian Loans Case* in which Judge Hertsch Lauterpacht considered that a self-judging exception to a declaration under Article 36(2) ICJ Statute (the so-called Optional Declaration) was in his words:

"invalid as lacking in an essential condition of validity of a legal instrument. This is so for the reason that it leaves to the party making the Declaration the right to determine the extent and the very existence of its obligation. The effect of the French reservation relating to domestic jurisdiction is that the French Government has, in this respect, undertaken an obligation to the extent to which it, and it alone, considers that it has done so. This means that it has

[4] Compare to *Canada Model BIT (2004)* Article 10 – General Exceptions and *US Model BIT Treaty (2004)* Article 18: Essential Security
[5] compare to Article 2(c) of the 1986 *Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic* (Mutual Assistance Convention)

undertaken no obligation. An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose."[6]

But since the consent is the fundamental basis for the binding nature of international law, we can hardly view self-judging clauses as invalid, and this BIT, both parties displayed consent with the wording of treaty.

IV.

It could be argued that an interpretation of Article 9 having regard only to the ordinary meaning of the phrase "it considers" would seem to reserve to the State invoking the exception the whole discretion to decide whether the criteria of Article 9 of Opulentia-Beristan BIT are met and therefore there cannot be a breach of State´s obligation under the BIT. However, when taking into account the aforementioned object and purpose of the BIT agreements it is obvious that any interpretation of this exception must also take into account the effect that the invocation of an exception such as Article 9 has on investor and his rights guaranteed by the BIT treaty, namely to :

a) *ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party.*[7]

b) *ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, an well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.*[8]

Also Article 31(1) of the Vienna Convention on the Law of Treaties, stipulates that all treaties are to be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. VCLT also stipulates that : "every treaty in force is binding upon the parties to it and must be performed by them in good faith"[9]

Therefore even the self-judging clause is reviewable under the principle of good faith, since to date there is no case that stood before ICSID, regarding the self-judging clauses, the Claimant would like to take short discourse into International Law, mainly WTO,GATT and ICJ to prove that self-judging clause formulated the same way as in the Beristan Opulentia BIT are subject to the standard of review by the principle of good faith.

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[6] Separate Opinion of Judge Sir Hersch Lauterpacht, *Certain Norwegian Loans Case (France v. Norway)*, ICJ Reports 1957, pp. 44, 48.
[7] Article 2, Promotion and Protection of Investments, *Beristan Opulentia BIT*, paragraph 2
[8] Article 2, Promotion and Protection of Investments, *Beristan Opulentia BIT*, paragraph 3
[9] Article 26, VCLT

Twice in history of WTO, a self-judging clause came nearly under the scrutiny of assembled panel of states to review the invocations of self-judging clause, first time in the dispute between USA and European union over Helms-Burtons[10] act which was described as having effect of secondary boycott and second time in dispute between Nicaragua, Honduras and Columbia relating to the tariff imposed by Nicaragua on goods from the two other countries, because of conflict relating to territorial delimitation between mentioned countries[11]. However ultimately both resolved outside the WTO dispute settlement system, one through negotiations[12] and other through agreement to resolve disputes before ICJ. However, solely the fact that such panels were assembled proves that the invocation of self-judging clause can be the object of cognizance of Tribunal or other Dispute-Resolution Body. Therefore, there is a wide consent that the self-judging clause itself is not a bar to a jurisdiction, rather it limits the standard of review.[13]

Among commentators regarding the WTO/GATT type invocation of self-judging clause several types of standard by the principle of good faith prevail.

Hahn considers that the principle of good faith "requires parties who are in a special legal relationship to refrain from dishonesty, unfairness and conduct that takes undue advantage of another".[14]

He considers the principle to be closely related to customary international law principle of *abuse of rights*, which provides that the exercise of a right for the sole purpose of evading an obligation or of causing injury is unlawful. Hahn then argues, that protection of essential security interest is not economic in nature and it rather relates to internal security, protection of peace and ordre public.

Schloemann and Ohlehoff take the view that the definition of essential security interests, "as a function of the state's understanding of its sovereignty and the legal position it entails, are essentially subjective". They agree with Hahn on the issue of essential security interests being non-economic in nature. Schloemann and Ohlehoff provide a basic test of proportionality, however their opinion is that this test is a part of the good faith principle test, and cognizance of such clause cant go beyond that. They state that:

"A requirement of a minimum degree of proportionality between the threatened individual security interest and the impact of the measure taken on the common interest in the functioning of the multilateral system can be deduced from both the term 'essential' and,

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[10] Dispute over *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996* §302(a) between US and EU
[11] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ, Judgment of 13 December 2007, and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean*
[12] Dispute over *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996* §302(a) between US and EU
[13] See MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 584-588 (1991); HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 A.J.I.L. 424, 444-446 (1999); DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365, 399-402 (2003); MARKUS A. REITERER, Article XXI GATT – Does the National Security Exception Permit "Anything Under the Sun", 2 Austr. Rev. Int'l Eur. L. 19, 201-202 (1997).
[14] HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 446 (1999).

more generally, the function of Article XXI in the WTO system as a remedy for serious hardships emanating from outside the WTO's immediate regulatory realm."

Akande and Williams in adopt the standard of review that is much lower then that of Hahn, Schloemann and Ohlehoff.[15] They consider that a proportionality test fails to respect the self-judging aspect of Article XXI and that good faith review is limited to establishing:

- whether a member State genuinely considers that the measure it is taking is related to the protection of its essential security interests; and

- whether it considers the taking of the measure to be proportionate to the protection of those interests in that it considers that there are serious and compelling reasons for taking the measures.

In realm of ICJ, similar test as that of Hahn is being proposed in a separate declaration in *Djibouti vs France*[16] (Conflict over the failure of France to transfer certain judicial files to Djibouti) in which Judge Keith analyzed the standard of review applicable to self-judging clauses. The majority judgment found that the appropriate standard of review to apply to self-judging clauses was that of good faith.[17] In his declaration, Judge Keith found the appropriate standard of review to be based on the related concepts of good faith, abuse of rights and misuse of power.

He considered that the decision not to grant mutual assistance based on self-judging clause should be reviewed against the closely related principles of good faith, *abuse de droit* and misuse of power. He argued that under those principles the responsible state agency was obliged to exercise the power for the purpose for which it was conferred, in a manner that did not frustrate the object and purpose of the treaty, and without regard to improper purposes or irrelevant factors.[18] In a matter of good faith principle and subsequent standard of review under this principle, he cited the Court's statement in *Gabčíkovo-Nagymaros Project*[19] that the good faith obligation in art 26 of the *VCLT* "obliges the parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized."

This concept reflects Judge Keith's experience as member of Public and Administrative Law Reform Committee from 1972–86, and member of Court of Appeals of New Zealand and Supreme Courts of New Zealand. Principles laid down reflects the Administrative Decisions (Judicial Review) Act 1977 (Cth).
Similarly, the US's Statement of Administrative Action in NAFTA Implementation Act of 1993 provides that self-judging exception is to be invoked in good faith:

"Article 2102 governs the extent to which a government may take action that would otherwise be inconsistent with the NAFTA in order to protect its essential security interests. ... The

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[15] DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365, 399-402 (2003)
[16] Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v.France), Declaration of Judge Keith of 4 June 2008
[17] see Djibouti v France (Judgment) [2008] ICJ [205]
[18] Djibouti v France (Judgment) [2008] ICJ [6] (Declaration of Judge Keith).
[19] Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep 79.

national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith."

Article 2102 stipulates that:

"... nothing in this Agreement shall be construed: [...]
(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests: [objective requirements follow]

In CMS v. Argentina, the ICSID Tribunal found that its limits of review are well beyond the good faith test, since the Article XI of the Bilateral Investment Treaty (BIT) between Argentina and the United States provides:

"This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, 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."[20]

The Tribunal put further its limits of review partly because it found that this type of clause is self-judging only to limited extent. The Tribunal found that in this case it is entitled to: "substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness"[21]

Tribunal proceeded in same manner in other ICSID cases relating to the same treaty provision, namely *LG&E v. Argentina*, *Sempra v. Argentina* and *Enron v. Argentina*.

However, in each of the decisions the Tribunal suggested that if the tribunals had been faced with self-judging clauses, they would had the power to review the State's decision based on a good faith analysis.[22]

Claimant believes that the self-judging clause itself is an object of cognizance of Tribunal, and self-judging clause itself does not pose a bar to such cognizance.

V.

Broad interpretation of self-judging clause to that extent that self-judging clause itself is a bar to cognizance and jurisdiction of tribunal would create a legal mechanism of extreme uncertainty between parties and potential investors, therefore defeating the purpose and object of treaty regime. This can be compared to a vehicle which breaks are so big, that they impede

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[20] Art. XI of the Treaty between the United States and the Argentine RepublicConcerning the Reciprocal Encouragement and Protection of Investment, November 11, 1991, 31 I.L.M. 124 (1992).
[21] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, May 12, 2005, para. 374, 44 I.L.M. 1205 (2005)
[22] See LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, para. 214; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award of Sept. 28, 2007, para. 388; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award of May 22, 2007 para. 339.

the movement of such vehicle, or a ship which lifeboats that are so heavy, that they make the ship sink to the ocean floor.

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.[23] Therefore even if this provision of treaty is self-judging, the Party invoking the article 9 must still act in good faith and this good faith is subject to cognizance of tribunal.

In *LG&E*, suggested that good faith review would not differ significantly from the substantive review undertaken by the Tribunal in the context of the non-self judging clause in Article XI of the United States-Argentine BIT.[24]

Self-judging clause is not a sort of escape tunnel, opt-out, exit-valve or break. It exist so that Party to a treaty have and option to not to fulfil duties or perform parts of contract that would (potentially) harm its essential interests, in our case maintenance or restoration of international peace or security, or the protection of its own essential security interests.

It does not make sense to believe that under wide interpretation this clause would not frustrate the object and purpose of the treaty.

The purpose and object of the bilateral investment agreement is to encourage cross-border investments and make sure that potential investors can use they property, undertakings or any other rights peacefully and in tranquillity, therefore to provide such extent of protection to investment the aforementioned state is attained .[25]

"*The Republic of Beristan and the United Federation of Opulentia (hereinafter referred to as the "Contracting Parties") desiring to establish favourable conditions for improved economic co-operation between the two countries, and especially for investment by nationals of one Contracting Party in the territory of the other Contracting Party; and acknowledging that offering encouragement and mutual protection to such investments based on international agreements will contribute towards stimulating business ventures that will foster the prosperity of both Contracting Parties* "[26])

"*1. Both Contracting Parties shall encourage Investors of the other Contracting Party to invest in their territory, and shall authorize these investments in accordance with their legislation.*
2. Both Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party."[27]

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[23] see India-Singapore CECA from 25th June 2005
[24] *LG&E*, para. 214
[25] Newcombe, Andrew Paul and Paradell, Lluis, Law and Practice of Investment Treaties: Standards of Treatment Chapter 1,Historical development of Investment Treaty Law, III International Investment Agreements, p. 41, KLUWER LAW INTERNATIONAL, 2009
[26] preamble of *Beristan Opulentia BIT*
[27] Artitcle 2, *Promotion and Protection of Investments Beristan Opulentia* BIT

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.[28] 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."[29]

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.[30]

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.

VI.

[28] Canfor Corporation v. Uniteted States and Terminal Forest Products Ltd. v. United States(decision on Preliminary Question, 6 Jun. 2006) at para. 187.
[29] Enron Corporation and Ponderosa Assets , L.p. Argentina (Award, 22 May 2007) (Enron) at para. 331
[30] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award of May 22, 2007

Claimant agrees with the ideas laid down by the Tribunal in *LG&E* and separate opinion of Judge Keith in *Djibouti vs France,* that the standard of review is that of good faith, but also to substantive review of necessity, *abuse de droit*, and misuse of power.
Claimant agrees the state has the discretion to determine the measures to be taken to combat or alleviate the conditions endangering its own essential security. However this discretion is subject to some limitations. Firstly and most importantly the State must act in good faith.[31]

In this case, Claimant holds belief that the act of invoking was unjustified and Respondent acted in bad faith chiefly, and commit *abus de droit* and misuse of power chiefly because of these reasons:

- Leak of information was not substantiated to any extent, it was based solely on the newspaper article, and the source for this information was that of Beristani origin. This puts whole authority and verity of such information into question.

- Involvement of the army engineering corps[32] 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 executive order and this executive order itself can't be appealed. It raises suspicion that respondent did so to evade due process of law, which would otherwise accompanied the notice of eviction via court and police, and by doing so by executive order, Respondent abuse the process and therefore fail to pass the test of *abus de droit*, set by Judge Keith in *Djibouti vs France.* Also, there is question whether the sole removal of personal was adequate measure to counter alleged threat to essential security. By further invoking the buy out clause (via controlling share in Beritech) Respondent let his economic motives trump the essential security of Beristan.

- Ties of Beritech's owner structure to high-ranking officials and oligarchs of Beristan and 75% share held by Beristani government, therefore the character of Beritech is that of Government-owned corporation. 75% share is more than enough for crucial control of any company under the Beristani law.

[31] Article 26, VCLT
[32] 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.

- 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 in *malei fidei* to obtain Claimants know-how and assets.

- There is no information, why the essential security clause was invoked just before the completion of project and how long the Beristani government had the information on alleged leak. Also Respondent didn't even try to carry out investigation into matter and abide with and acted on the sole newspaper article.