E. 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

1. 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.[1]

E.1.Although Art. 9 of the BIT is self-judging, it does not exclude any kind of scrutiny

2. From the formulation of Art. 9 of the BIT, we can establish that this is a self-judging type of exception clause. Wording of Art. 9 uses the same language and exactly same formulation as 2005 *USA-Uruguay BIT*[2] 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."

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

„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 [...]"

4. The crucial identification sign of self-judging clause is a use of wording *"it considers*"[3] or *"it determines*" or *"the ... State considers*"[4] relating to the phrase *"necessary for the protection of its essential security interests".*

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[1] Newcombe, Paradell, pp. 488-99
[2] US-Uruguay BIT, Art. 18
[3] Compare to *Canada Model BIT,* Art. 10; *US Model BIT Treaty ,* Art. 18
[4]Compare to Mutual Assistence Convention, Art. 2(c)

5. The discourse whether the self-judging clause is a valid legal instrument can be traced back to 1959 to the *Norwegian Loans Case* in which Judge Hersch Lauterpacht considered that a self-judging exception to a declaration under Art. 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. [...] It is not a legal instrument. It is a declaration of a political principle and purpose."[5]

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.

7. It could be argued that an interpretation of Art. 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 it are met. However, when taking into account the object and purpose of the BIT it is obvious that any interpretation of this exception must also take into account the effect that an exception such as Art. 9 has on investor and his rights guaranteed by the BIT.

E.1.i. Self-judging clauses are reviewable by the principle of good faith

8. Also Art. 31(1) of the VCLT, 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"*[6]

9. Therefore even the self-judging clause is reviewable under the principle of good faith. To date there is no case that stood before ICSID regarding the self-judging clauses. Claimant argues, that *CMS Annulment decision*, nor *Sempra Annulment* cannot be applied here, as they reflect the entirely different essential security clause, which lacks the "*it considers"* language, although the responding State made submissions regarding self-judging nature of the Art. XI of the US-Argentine BIT.[7] At the same time, we can infer from the cases

[5] Lauterpacht in *Norwegian Loans case*, pp. 44, 48.
[6] VCLT, Art. 26
[7] *CMS Annulment*, § 112

concerning Argentine crisis, that self-judging clauses are at least reviewable by the good faith test.[8] There is a wide consent that a self-judging clause itself is not a bar to a jurisdiction, rather it limits the standard of review.[9]

10. Among commentators several types of standard by the principle of good faith exist. 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"*.[10] He considers the principle to be closely related to the 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.

11. Schloemann and Ohlehoff take the view 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, more generally, the function of Art. XXI in the WTO system as a remedy for serious hardships emanating from outside the WTO's immediate regulatory realm."[11]

12. In realm of ICJ, similar test as that of Hahn is being proposed in a separate declaration in *Djibouti vs France*[12] The majority judgment found that the appropriate standard of review to apply to self-judging clauses was that of good faith.[13] 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. Claimant also points out that in *Gabčíkovo-Nagymaros Project* was opined 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*."[14]

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[8] *CMS Annulment*, §§ 122-3, *Sempra Annulment*, § 168-70. *LG&E*, § 214; *Enron*, § 339

[9] See Hahn: GATT´s Security Exception; Schloemann, Ohlhoff: Constitutionalization and WTO; Akande, Williams: International Adjudication on National Security, pp. 399-402; Reiterer: National Security Exception, pp. 201-202; *WTO Cuban Liberty Act case*; *Territorial and Maritime Dispute*

[10] Hahn: GATT´s Security Exception, p. 558

[11] Schloemann, Ohlhoff: Constitutionalization and WTO, p. 424

[12] Judge Keith in *Djibouti v. France*

[13] See *Djibouti v. France*, § 205

[14] *Gabčíkovo-Nagymaros Project*, § 142

E.1.ii. The interpretation arguing for impossibility of review is against the object and purpose of the BIT

13. Claimant believes that the self-judging clause itself is an object of cognizance of Tribunal. The interpretation of self-judging clause that it cannot be reviewed 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 the movement of such vehicle, or a ship which lifeboats that are so heavy, that they make the ship sink to the ocean floor.

14. Opulentia-Beristan BIT does contain a self-judging language, but it does not contain an additional formulation use for example in *India-Singapore CECA* which provides that any such security measure taken on the discretion on Party is non-justiciable.[15] Therefore even if this provision of treaty is self-judging, the Party invoking the Art. 9 must still act in good faith and this good faith is subject to cognizance of tribunal.

15. 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 Art. XI of the United States-Argentine BIT.[16]

16. Self-judging clause is not a sort of escape tunnel, opt-out, exit-valve or break. It exist so that a Party to a treaty have an option to not to fulfil its obligations that would (potentially) harm its essential interests, in our case the protection of its own essential security interests.

17. It does not make sense to believe that under wide interpretation this clause would not frustrate the object and purpose of investment treaty, which is 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.*[17]

18. 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 investment treaty

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[15] see India-Singapore CECA, Annex 5
[16] *LG&E*, § 214
[17] The BIT, Preamble

obligations shall be interpreted narrowly and this is consistent with their object and purpose. This opinion was upheld by tribunals in *Canfor Corporation et al. case*, referring to the GATT,[18] and especially in *Enron case,* where was taught, that "*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."*[19]

E.1.iii. The actual facts cannot justify an actual existence of a threat to essential security

19. In our case, we can hardly consider a newspaper interview with Beristian governmental official to be a fully-potent stimuli capable of launching invocation of essential security treaty exception.

20. 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.[20]

21. In this case, Claimant holds belief that the act of invoking Art. 9 of the BIT was unjustified and Respondent acted in bad faith and commit abuse of rights chiefly because of these reasons:

- Leak of information was not substantiated to any extent, no ther evidence beside the newspaper article, and moreover the source for this information was that of Beristian origin. This puts the whole authority and verity of such information into question.
- Involvement of the CWF[21] rather than police forces in the process of the expropriation and the clearing of the premises of the Sat-Connect project which was based on executive order which cannot be appealed, raises suspicion that Respondent did so to evade a due process of law. Also, there is question whether the sole removal of personal was adequate measure to counter alleged threat to essential security. By compelling the buy-out (via controlling share in Beritech) Respondent seems to let its economic motives trump the essential security of Beristan.

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[18] *Canfor Corporation et al. case*, § 187.
[19] *Enron Award*, § 331
[20] VCLT, Art. 26
[21] Annex 2, Uncontested facts, § 11

- Last but not least, suitability of the system for the military purposes is still doubtful.[22] The system shall be used mainly for civilian purposes[23] and no particular portion is designed to be used exclusively for army.[24] Therefore it is difficult to reasonably infer any threat to national security, even if the alleged leak had taken place. Notwithstanding the existnce of the confidentiality clause in the JV Agreement. This clause has an economic rationale, common to regular commercial contracts, it has not a national security purpose. not Also Respondent didn't even try to carry out investigation into matter and abide with and acted on the sole newspaper Art..

[22]Responses to Requests for Clarifications, 1st, Resp. No. 178
[23]Ibid.
[24]Responses to Requests for Clarifications, 1st, Resp. No. 121