The Dichotomy between the Duty to Provide Information and the Security Concerns of a State

*Ksenia Shestakova**

Abstract

The Outer Space Treaty establishes the principles of use of outer space for peaceful purposes, cooperation and mutual assistance. The principle of cooperation is further developed in Article XI of the Outer Space Treaty. Under the Article States Parties agreed to inform the Secretary General of the United Nations, public and scientific community 'to the greatest extent feasible and practicable', of the nature, conduct, locations and results of activities in outer space. A breach of Article XI of the Outer Space Treaty, consisting in particular in the non-disclosure of information, can serve as a ground for international responsibility of a state.

However, national security concerns can preclude States from dissemination of certain information. Under international law states can justify non-performance of their obligations by invoking treaty clauses that include reference to national security reasons. The wording of Article XI of the Outer Space Treaty 'to the greatest extent feasible and practicable' might be interpreted as permitting states not to disclose information due to security reasons. National security clause is in its nature a self-judging one. Examples of such self-judging clauses can be found in a number of international treaties. Recently, international courts and arbitral tribunals were examining grounds for invocation of national security clauses by states and seem to establish a common approach to them. At the first glance, there is no conflict between the duty to provide information and the security concerns of a state in the space law, since the wording 'to the greatest extent feasible and practicable', provides for a leeway not to reveal information. However, in a situation when the non-dissemination of information threatens the space security a question arises: can a state freely decide on non-disclosure of certain data, based on "national security concerns"?

The present article will answer this question, in too steps by, first, establishing the scope of the rules, governing the exchange of information in the space law

* Teaching Fellow, PhD, Saint Petersburg State University, Russia, email: Shestakova.K@jurfak.spb.ru.

taking and, second, interpreting existing rules in accordance with recent international jurisprudence on "national security concerns" clauses.

I Principle of Cooperation and Duty to Disclose Information about National Space Activities Enshrined in the Outer Space Treaty

1.1 Enhanced Principle of Cooperation in the Outer Space Treaty[1]

When it was adopted, the Outer Space Treaty established a foundation of a new legal order "based on the community status of the common space, which is reflected in the adaptation of all space activities according to the mankind clause of the common heritage of mankind principle for the common benefit and in the obligation of all states to work together in accordance with the enhanced cooperation principle".[2]

The enhanced principle of cooperation includes the duty to take into due consideration the corresponding interests of other states and the necessity to build a transparent environment by an exchange of information about locations, results and nature of national space activities as well as the information relating to a launch and the space object itself: the place and time of the launch, the technical parameters of the launch, the function of the space object, its designation or registration number. Those ideas are embodied in Articles IX (first sentence) and XI of OST, REG[3] (namely, Article IV) and certain ITU Radio Regulations (that deal specifically with the of frequency assignments and associated orbital characteristics).

Thus, under the first sentence of Article IX of OST, in the exploration and use of outer space, including the Moon and other celestial bodies, states shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space with due regard to the corresponding interests of other states. Cooperation and mutual assistance are further addressed in the Article XI of OST that, together with the provisions of REG, sets up a legal framework for an exchange of information for the actors concerned: to inform the Secretary-General of the United Nations as well as the general public and the international scientific community.

1.2 Legal Mechanism on Disclosure of Information

The extent of legal mechanism of data disclosure stipulated by Article XI of OST, Art. IV of REG, certain ITU Regulations is not sufficient. The key

1 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 19 December 1966, 610 UNTS 205 (hereinafter – "OST").

2 D. Wolter, *Common Security in Outer Space and International Law* (Geneva: United Nations Publications UNIDIR, 2006) at 111.

3 Convention on Registration of Objects Launched into Outer Space, 12 November 1974, 1023 UNTS 15, (hereinafter – REG).

importance of a legal instrument, that would regulate the procedure of disseminating of information between different actors, conducting activities in the outer space (both public and private), led to the situation where a number of more detailed legal mechanisms is currently being discussed within different international fora.
Non-governmental entities, international organizations and single states are currently involved in initiatives aimed towards improving the current regulation of outer space activities by way of adoption of a new space treaty or other instruments of non-binding nature. All those initiatives include provisions on dissemination of the information mechanism:
1) Draft Treaty on the "Prevention of Placement of Weapons in Outer Space" (PPWT);
2) Canada Working Paper on "Merits of Certain Draft Transparency and Confidence-Building Measures and Treaty Proposals for Space Security";
3) Improved Space Situational Awareness (SSA);
4) EU Code of Conduct for Outer Space Activities (currently in the process of being modified into Draft International Code of Conduct for Outer Space Activities[4]);
5) Space Debris Mitigation Guidelines;
6) Space Traffic Management Initiative and others.[5]

So far, little consensus had been reached in the field (although the EU Code seems to be supported by the Council of the European Union and the UN Debris Mitigation Guidelines were adopted by the UN General Assembly without vote) due to the following reasons.
First, private and public entities deal simultaneously with same issues and though both of them are able to perform, for instance, Space Situational Awareness (SSA) in one way or another, they are not eager freely to distribute the available information due to different reasons (and not least of all because of the cost of conducting SSA). At the same time these are the states that bear international responsibility for national activities conducted in outer space, including those, performed by its nationals. Moreover, they are to authorize and continuously supervise national private entities, involved in such activity (Article VI of the OST).
Second, a significant number of satellites are of a dual-use nature (and some of them are or may be privately owned), but civil and military issues are historically being dealt within different forums, which nevertheless have in common the five Outer Space Treaties.

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4 Revised Draft International Code of Conduct for Outer Space Activities (Oct. 01, 2012), http://www.consilium.europa.eu/media/1696642/120605cocspaceeureviseddraftworkingdocument.pdf.

5 J. Robinson, *ESPI Report 28 "The Role of Transparency and Confidence-Building Measures in Advancing Space Security"*. (Oct. 01, 2012), <www.espi.or.at/images/stories/dokumente/studies/ESPI_Report_28_online.pdf>.

Therefore, Article XI is still the only binding rule within the framework of the *corpus juris spatialis* that deal directly with the dissemination of information in general.

1.3 The Scope of Article XI of OST

Article XI of OST stipulates that in order to promote international cooperation in the peaceful exploration and use of outer space, the states conducting activities in outer space agree to inform *to the greatest extent feasible and practicable*, of the nature, conduct, locations and results of such activities. The study of wording leads to the conclusion, that Article XI of OST stipulates a wide margin of discretion for the states as to what kind information to disclose if to disclose at all.[6]

Can Art. XI of OST still define the general mechanism of information sharing? This question shall be answered in the affirmative, since as it was stated by the International Court of Justice stated, "an international instrument must be interpreted and applied within the entire legal system prevailing at the time of the interpretation".[7]

II Article XI of the Outer Space Treaty within the Framework of Recent Developments of Public International Law: Transformation of International, Space and National Security Concepts

2.1 Recognition of *Erga Omnes* (Partes) Obligations

Since a very recent decision of the International Court of Justice in Questions relating to the Obligation to Prosecute or Extradite case of 20 July 2012[8] *erga omnes* (*partes*) obligations were deemed to be a well-developed but still theoretical concept, used by the ICJ only as *obiter dictum*.[9] International Law Commission supported the existence of the *erga omnes (partes)* obligation when drafting the Articles on State Responsibility of States for Internationally Wrongful Acts[10] and later in the Report on Fragmentation of International

6 J.-F. Mayence, T. Reuterm, *Article XI of the Outer Space Treaty* in S.Hobe, B. Schmidt-Tedd, K.-U. Schrogl, eda. *Cologne Commentary on Space Law,* Vol. 1 (Bücher Carl Heymanns Verlag, 2010) at 199; B. Cheng, *Studies in International Space Law* (Oxford: Clarendon Press, 1997) at 253.

7 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory opinion of 21 June 1971, ICJ Rep. 1971, p. 31.

8 Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ, Judgment of 20 July 2012.

9 Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 33.

10 Articles on the responsibility of States for internationally wrongful acts, with commentaries. Available at: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/962001.pdf>.

Law: Difficulties arising from the Diversification and Expansion of International Law. The latter directly named obligations deriving from the global commons regimes and, in particular, Article I of the OST to be among obligations *erga omnes*.[11]

In Questions relating to the Obligation to Prosecute or Extradite case the ICJ first granted standing based on violation of *erga omnes partes* obligations. Though the decision deals with the breach of *jus cogens* norms (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[12]) and not those which would derive out of the global commons regime, it is nevertheless of great importance for the latter. This means recognition that the international community (and therefore any of its members) having interest in certain "important obligations" (leaving out the way the ICJ defined them in the present case) can legally invoke responsibility of the wrongdoer in accordance with the rules of international law (though there is a separate opinion of Russian Judge Leonid Skotnikov on the standing).[13]

Thus, this is a new step towards recognizing of a growing role of international community as a separate actor in international relations. In this context, the needs to disclose information and to be actively engaged in cooperation and mutual assistance in space law gain additional importance.

2.2 Reconceptualization of International (Global) Security

The growing role of the international community as a whole in the field of international relations, the end of the Cold War and the appearance of new challenges have widened the understanding of international or global security. Global security nowadays is not limited to collective military security – it has other political, economic, social, environmental or human dimensions.[14] Moreover, national security is nowadays deemed to depend on international security and *vice versa*.

Different fora are currently dealing with the need to ensure global economic stability: OECD, UNCTAD and others. In particular, they are aiming to ensure the transparency and predictability of the related fields, for instance with respect to vague national security concepts relating to investment policies.[15]

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11 Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 18 July 2006, UN Doc. A/CN.4/L.702 p. 23, footnote 34.

12 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85.

13 Separate opinion of Judge Skotnikov in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ, Judgment of 20 July 2012.

14 International Security. Volume III: Widening Security, ed. Burry Buzan and Lene Hansen, Sage Publication. 2007. Globalization, security, and the nation-state: paradigms in transition/edited by Ersel Aydinli & James N. Rosenau, 2005.

15 OECD Guidelines for Recipient-country Investment Policies relating to National Security, (Oct. 1, 2012), <www.oecd.org>; The protection of national security in IIAs. UNCTAD Series on International Investment Policies for Development United Nations, New York and Geneva, 2009. (Oct. 1, 2012), <www.unctad.org>.

It is logical that the "national security" concept is also evolving. As applied by international tribunals, it nowadays tends to include not only the issues related to defense and military, but also economic and other disturbances.
The human rights dimension of the national and international security has the longest history. A certain standard of balancing individual rights and needs to ensure national security of a state has already been developed in this field. Moreover, in their recent decisions, the conventional human rights bodies, namely, the European Court of Human Rights also faced the problem of weighing the international security dimension against the observance by a state of the fundamental rights of an individual.[16]

2.3 The Notion of Space Security

Since outer space has an ever-increasing role in the everyday life of persons, communities, states and the international community as a whole, the understanding of space security also has recently evolved.
The essence of space security is currently being defined as the secure and sustainable access to, and use of, space and freedom from space-based threats.[17]
This broad definition encompasses the security of the unique space environment, which includes the physical and operational integrity of manmade assets in space and their ground stations, as well as security on Earth from threats originating in space-based assets. As stated in the recent Space Security 2011 report[18], one of the contemporary trends (number 3.4 Report) is that the national policies on space continue to focus on the security uses of outer space, with increased attention being paid to developing space industries.
Fueled by a technological revolution, the military doctrines of a growing number of states emphasize the use of space systems in order to support national security. This tendency can be seen, for example, in the increasing development of multiuse space systems, which has led some states to view space assets as part of critical national security infrastructure. While states continue to focus on space as a source of national security, they are also increasingly interested in developing a healthy commercial and industrial sector based on space. According to Space Security 2011 report, "it is inevitable that major spacefaring states will continue to use space for national security. But, given the inherent vulnerabilities of operating in this domain, an overreliance on space for security may lead to a climate of mutual suspicion and mistrust that will ultimately be detrimental to space security".[19]
Thus, as in other domains, the necessity of protecting space security (in its broad interpretation) is likely one day to be in conflict with national security

16 *Nada v. Switzerland* [GC], no 10593/08, ECHR, 2012.
17 R. Lawson, *The Space Security Index*. Astropolitics. (2004) 2(2) Int J Space Polit Policy 177, 1557–2943; A. Ruwantissa, *Space Security Law* (Berlin-Heidelberg: Springer-Verlag, 2011) at 15-29.
18 *Space Security* 2011 (Oct. 01, 2012), <www.spacesecurity.org/executive.summary.2011.PDF>.
19 Ibid.

issues, as generally space activities are closely connected with national security issues understood in both narrow and broad sense.
And it is rather undisputable, that when determining the "feasibility" of disclosure of certain information under Article XI of the OST or providing assistance under Article IX of the OST, broad national security reasons already are playing and can further play a significant role.

2.4 "Self-Judging" Clauses in International law

This widening of the global security concept resulted in a willingness of states to ensure their sovereign right to define and resort to national security reasons as an exemption to fulfillment of their obligations arising from the treaties.[20]
In international law, such treaty clauses are opposed to circumstances precluding wrongfulness under customary international law as enshrined in the Articles on Responsibility of States for Internationally Wrongful Acts.[21] While the letter can be only invoked in the case when a wrongful act is at hand, the former justify non-performance form the very beginning. Moreover, the test that the state shall establish in order invoke any of such circumstances is rather sever and international courts and tribunals so far has never granted, for instance the state of necessity.
The space industry is of no exception: the national security clause for non-disclosure can be found explicitly in a number of national laws and policies governing national outer space activities[22] and certain international treaties, in particular the Convention for the Establishment of a European Space Agency.[23]
Undoubtedly, it is the sovereign right of a state to regulate national space, investment and other type of activities on its territory and, in particular, to impose certain restrictions that can result in certain measures including refusal to disclose information based on national security reasons. It is also up to the individual country to decide how it defines "national security", and under what circumstances it considers this interest to be at risk. This gives a state huge discretion in deciding whether or not certain actions or disclosure of certain information threatens national security, and whether to disclose it or what other steps to take.
On the other hand, in the area of space law, an effective realization of the principle of common heritage of mankind as set forth in Article I of OST can only

20 National security clauses or similar broad exceptions, such as "public order", "international peace and security", are contained in a vast number of international investments agreements, free trade agreements, GATT, GATS, the Rome Statute of International Criminal Court, treaties on international assistance in criminal and other matters.

21 Art. 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries as adopted in 53rd Session, 23 April to 01 June; 02 July to 18 August 2001, A/56/10.

22 E.g., National Space Policy of the United States of America as of 28 June 2010, (Oct. 1, 2012) http://www.whitehouse.gov/sites/default/files/nationalspacepolicy6-28-10.pdf.

23 Convention for the Establishment of a European Space Agency, Paris, 1975, (Oct. 1, 2012) http://esamultimedia.esa.int/docs/SP1271Enfinal.pdf(l).

be done through adherence to the principle of cooperation and mutual assistance in conducting space activities, that can be guaranteed first of all through ensuring their transparency.[24]
Therefore, a vague national security concept may have a negative impact on outer space security, irrespective of whether it would actually apply in an individual case.

2.5 Article XI of OST as Self-Judging Clause

In this sense Art. XI of OST is such a self-judging clause. On the one hand, arising out of the duty to cooperate and provide mutual assistance, it may be interpreted as stipulating an obligation to disclose information outside the scope of Art. IV of REG and needed for ensuring global space security. On the other hand, it contains the wording "to the extent feasible and practicable". Thus the question arises: how wide can a state's discretion be under this article when "national security concerns" come into play?

2.6 "National Security Concerns" as Applied by International Courts and Tribunals

Indeed national security is a very sensitive matter and it is being argued that noone, save for the state itself, including an international judicial body, can substitute that state's assertion on whether a matter confronts its security reasons. However, there is international jurisprudence that has already evaluated on certain national security clauses worded in the different way (or similar concepts that are formulated in a broader or narrower sense such as "essential security interests", "international peace and security", "public order", "extreme emergency" etc.)
Although the body of international case law is relatively small and based on different treaty clauses and facts, a general approach to the conditions of invocation of nationals security concept can ne derived from it.

2.6.1 International Centre for Settlement of Investment Disputes (ISCID)

Recently, the International Centre for Settlement of investment Disputes (ISCID) resolved a number of cases, invoking the broad "national security clause" contained in the bilateral investment treaty (BIT) between Argentina and the United States of America[25]: the *SMC* case[26], the *LG&E* case[27], the *Continental*

24 M. Manor, K. Neuman, *Space Assurance* in Scott Jasper ed. *Securing Freedom in the Global Commons* (Stanford University Press, 2010) at 99-115.

25 Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment, signed 14 November 1991, entered into force 20 October 1994, (Oct. 1, 2012), <www.unctadxi.org/templates/DocSearch779.aspx>.

26 CMS Gas Transmission Company v The Argentine Republic, ICSID case no. ARB/01/08, 12 May 2005.

27 LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v The Argentine Republic, ICSID case No. ARB/02/1, 3 October 2006.

Causality case[28], the *Enron* case[29], the *Sempra* case[30]. This broadly formulated clause provided a state with a wide margin of discretion as to how to act when its national security interests are concerned within the framework of the said BIT. Article XI of the Argentine-US BIT reads as follows: "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".

Tribunals in all of the above cases not only used different reasoning when interpreting Article XI of the Argentine-US BIT, but also came to different conclusions on whether the measures applied were justified by Argentina's defense.

In all those cases tribunals were to decide whether emergency measures, taken by Argentina at a time of economic crisis would fall under the national security clause, contained in the Argentine-US BIT or could they be justified under customary rules of the state of necessity.

Only in two of the above cases the measures adopted by Argentina were justified under the Argentine-US BIT clause only during a certain period of time; in all other cases Argentina was held responsible for damages suffered by the claimant.

In the *Enron*, *Sempra* and *SMC* cases the tribunals didn't make a clear distinction between the treaty clause on national security and customary rule of state of necessity. For instance, the tribunal in the *Sempra* case stated that: "Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined. Similarly, the Treaty does not contain a definition concerning either the maintenance of international peace and security, or the conditions for its operation".[31]

However, the annulment committee in the *SMC* case pointed out that the necessity plea should be understood as a subsidiary claim to the exemption contained in the Article XI of BIT and has different conditions for application.[32]

The tribunals in the *LG&E* and *Continental Causality* cases took a similar approach, distinguishing the national security clause as contained in Article XI of BIT and the more severe standard of state of necessity as per the customary international law.

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28 Continental Casualty Company v The Argentine Republic, ICSID case No. ARB/03/9A, 5 September 2008.

29 Enron Corporation Ponderosa Assets L.P. v The Argentine Republic, ICSID case No. ARB/01/03, 22 May 2007.

30 Sempra Energy International v The Argentine Republic, ICSID case No. ARB/02/16, 28 September 2007.

31 Sempra case, para. 376. See note 28 supra.

32 CMS Gas Transmission Company v The Argentine Republic, ICSID case no. ARB/01/08, 12) (annulment proceeding). Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 128–131.

In most recent of Argentinian cases – the *Impregilo* case[33] – the tribunal also took this approach. It first examined Article 4 of the Argentine-Italy BIT: "investors of one [state] whose investments suffer losses in the territory of the other [state] owing to war or other armed conflict, a state of national emergency, or other similar political economic events shall be accorded, by such other [state] in whose territory the investment was made, treatment no less favorable than that accorded to its own nationals or legal entities or to investors of any third country as regards damages".[34] Concluding that the measures adopted by Argentina go beyond the meaning of Article 4, the tribunal addressed and consequently rejected Argentina's state of necessity claim.

At the same time the tribunals in all cited cases considered that an economic crisis could justify invocation of the national security clause. They disagreed on the degree of economic crisis severity that would justify such invocation.[35] Though in the *Impregilo* case, the tribunal concluded that there was a grave and imminent peril to the "essential interest" of Argentina's economic and social stability within the necessity test under customary international law (Article 25 (1)(a) of the ARSIWA), in the other case the tribunal stated that it was not severe enough to threaten essential security interests of Argentina.

When deciding on whether Article XI of the Argentine-US BIT can be subject to their judicial review, all tribunals agreed that states under it do not have unlimited discretion to decide on whether an economic crisis falls within the scope of the said article, and whether the measures adopted by such a state would be "necessary" for the protection of its security interests. As the tribunal concluded in the *CMS* case: "when States intend to create for themselves a right to unilaterally determine the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they did so expressly".[36]

At the same time, all the tribunals evaluated by the way of *obiter dictum* the possibility for Article XI of the US-Argentina BIT to be non-self-judging. They concluded that in such case a lower judicial review standard should be applied: the assessment of whether such clause was applied by a state in good faith. When dealing with the latter principle, they observed that this low standard would not have differed much form the one applied in the cases in hand.

2.6.2 World Trade Organization Dispute Settlement Body (WTO DSB)

The WTO instruments, on the contrary, contain the words "[state] considers necessary" and even more – a list of situations that will be described as falling within the protection of national security clause. Article XXI "Security Exceptions" of the General Agreement on Tariffs and Trade ("GATT") stipulated for states a possibility to take independent security and defense policy measures

33 Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, 21 June, 2011.

34 Agreement between Italy and the Argentine Republic for the Promotion and Protection of Investments, signed 22 May 1990, entered into force 14 October 1993.

35 Impergilo case, para. 350, see note 35 supra.

36 CMS case, para. 370. See note 34 supra.

that would be exempted from the general legal obligations contained in the GATT. The same provisions are contained in Article XIV*bis* of the General Agreement on Trade in Services (GATS) and Article 73 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).
So far, WTO Dispute settlement body (DSB) had never considered any cases involving these exemptions. However, there is a list of cases dealing with Article XXI of the GATT 1947 containing the same security interests exception. Although this jurisprudence is not uniform, the Decision concerning Article XXI of the General Agreement of November 30, 1982 seems to leave room for a judicial review of this article at least with respect to its application in good faith.[37]
At the same time, the WTO DSB has currently reviewed other similar concepts. For instance, in United States – the Measures Affecting the Cross-Border Supply of Gambling and Betting Services[38] it was determining whether the ban on cross-border delivery of gambling services would fall within the 'public moral' and 'public order' exceptions contained in the General Exception provision of Article XIV(a) of the GATS. The WTO DSB firstly recognized the sensitivities associated with the interpretation of these terms and noted that the content of these concepts for different states can vary in time and space depending upon a range of factors, including prevailing social, cultural, ethical and religious values. However, taking into consideration note 5 to this Article: "the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society", it came to the conclusion that "public morals" and "public order' are different but overlapping concepts. However, measures taken to protect either of them must be aimed at protecting the interests of the people within a community or a nation as a whole. It defined that the "public morals" to set up the standards of right and wrong conduct were maintained by or on behalf of a community or nation. In turn, "public order" was considered to set up the standards for preservation of the fundamental interests of a society, relating, inter alia, to the standards of law, security and morality. Furthermore, the DSB concluded that the measures, directed against money laundering, organized crime, pathological gambling and fraud were justifiable under the examined general exception clause.
Moreover, since Article 3.2 of the WTO Dispute Settlement Understanding contains a reference to the customary rules of interpretation, that is the good faith principle enshrined in Article 26 of the Vienna Convection on the Law of Treaties 1969 is applicable to the WTO Treaties and being, inter alia, a possible standard for review for security exceptions contained therein: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered

37 S. Schill, R. Briese. *"If a state considers": Self-Judging Clauses in international dispute settlement* in 13 Max Planck Yearbook of United Nations Law, Vol. 13 (2009) at 98-103.

38 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services. Report of the Panel, WT/DS285/R (10 November 2004), para. 6.461.

agreements, and *to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*"[39] (emphasis added), in particularly principle of good faith, enshrined in Article 26 of the 1969 Vienna Convention on the Law of Treaties.[40]

2.6.3 International Court of Justice (ICJ)

Only one ICJ decision is directly dealing with the national security clause contained in the treaty, Certain Questions of Mutual Assistance in Criminal Matters case.[41] Though on several occasions the ICJ has examined the standards, dealing with peril to essential national interests – that is an element of test for invoking the state of necessity or self-defense plea under customary international law.

In the Nicaragua[42] and in the Oil Platforms[43] cases, the ICJ had reached the conclusion that the essential security exceptions contained in the treaties between the United States and Nicaragua, and Iran, respectively, were not self-judging but subject to judicial review. It based its interpretation on the wording of the provisions, which did not contain for the words "which it considers". Moreover, in the Gabcikovo-Nagymaros case[44], the ICJ ruled with respect to the state of necessity standard under customary international law, "the State concerned is not the sole judge of whether those conditions [in particular existence of a great and eminent peril for its essential interests] have been met".

In the recent Certain Questions of Mutual Assistance in Criminal Matters case, France based its defense for non-fulfillment of Article 2(c) of the Convention on mutual assistance in criminal matters of 1986, providing that "the requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, … security, … ordre public or other … essential interests [of a state]". The French judge refused to fulfill the Djibouti international letter of rogatory, reasoning such refusal with the fact that the record of national proceedings, the transmission of which were requested by Djibouti, contain declassified information and "handing over record would entail indirectly delivering French intelligence service documents to a foreign political authority. Without contributing in any way to the discovery

39 Annex 2 Understanding on rules and procedures governing the settlement of disputes to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

40 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 187.

41 Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), I.C.J. Reports 2008.

42 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 116, para. 222.

43 Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 183, para. 43.

44 Gabčíkovo-Nagymaros Project, Judgment, I.C.J. Reports 1997, p. 79, para. 142.

of the truth, such transmission would seriously compromise the fundamental interests of the country and the security of its agents."[45]
Apart from contesting the power of the French judge alone to make an assessment of whether the fundamental interests of a state could be damaged by the execution of an international letter rogatory, Djibouti claimed that the independence of the judicial system must not lead a state to ignore entirely the rules of co-operation in good faith and equality between States which that State must observe under general international law.[46]
In its reasoning, the ICJ has examined Article 2 of the 1986 Convention by observing that, while it is correct that the terms of Article 2 provide the State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith as codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties. This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2.[47] To support this position ICJ recalled Gabčíkovo-Nagymaros Project in which it stated that the good faith obligation in Article 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".[48]
Furthermore, examining whether the decision of a competent authority was made in good faith and fell within the scope of Article 2 of the 1986 Convention, the Court recalled the French Judge soit-transmis that named the grounds for her decision to refuse the request for mutual assistance, explaining why the transmission of the file was considered to be "contrary to the essential interests of France", in that the file contained declassified "defence secret" documents, together with information and witness statements in respect of another case in progress. The reasoning was expressed in part as follows: "On several occasions in the course of investigation, we have requested the Ministry of the Interior and the Ministry of Defence to communicate documents classified under 'defence secrecy'. The Commission consultative du secret de la défense nationale delivered a favourable opinion on the declassification of certain documents. … To accede to the Djiboutian judge's request would amount to an abuse of French law by permitting the handing over of documents that are accessible only to the French judge. Handing over our record would entail indirectly delivering French intelligence service documents to a foreign political authority. Without contributing in any way to the discovery of the truth, such transmission would seriously compromise the fundamental interests of the country and the security of its agents."[49]
The court decided that it was not relevant to go into details and establish the objective criterion how the disclosure of such information will prejudice the

45 Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), I.C.J. Reports 2008, para. 28.
46 Ibid, para. 131.
47 Ibid, para. 145.
48 Gabčíkovo-Nagymaros Project, Judgment, I.C.J. Reports 1997, p. 79, para. 142.
49 Ibid, para. 147.

national security of France. It confirmed that presence of declassified information is enough to justify France refuse to transmit the file. However, it found France responsible for breach of obligation set up in Article 7 of the said convention and reflecting good faith standard – within reasonable time to disclose reasons for such refusal.
In his declaration Judge Keith while asserting a wide discretion of state not to hand out declassified information, noted, that in accordance with the facts of the case, declassified information contained only in 25 documents out of 350. He argued, that the Court should have went further by examining of an alternative claim of Djibouti – could partial transmission of the requested filed with the declassified information deleted or blackened be justified.[50]
The conclusion that can be drawn from the percent case is as follows: since the presents of defense or military secrecy will with high probability justify measures taken under the security or essential interests treaty exception, invocation of such clause is still subject to good faith standard that provides for at least stating reasons for refusal to comply with certain international obligations.

2.6.4 European Court of Human Rights (ECtHR)

Though the standards for reviewing limitations of certain fundamental rights are stipulated in the European Convention on Human Rights (ECHR) itself, European Court of Human Rights has the longest history of determine whether these limitations are justified by the state of public emergency (article 15 of ECHR) or protection of national security reasons (Article 8 of the ECHR).
Recognizing a special character of the human rights treaties,[51] we will further demonstrate the standard of judicial review for exceptional clauses adopted by the European Court of Human Rights (ECtHR).
Under article 15 of the ECHR "in time of war or other public emergency threatening the life of the nation [a state] may take measures derogating from its obligations under Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

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50 Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), I.C.J. Reports 2008, Declaration of Judge Keith.

51 In the *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, I.C.J. Reports 1996*, p. 240, para. 25, the Court described the special character of the human right law in its relationship with the laws of armed conflict in the following way: "… the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant … The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".

In its early cases such as Lawless v. UK[52] followed by Ireland v. UK[53] court has described the standard of review under article "the limits on the Court's powers of review are particularly apparent where Article 15 (art. 15) is concerned. It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, *the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it*. In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, … is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision".

In other words, under this article the ECtHR is not to question or substitute a state's assessment of the existence of a public emergency, however concentrating on the proportionality of such measures. Lawless decision was not yet overruled and the recent A. and others v. United Kingdom judgment with the reference to prior jurisprudence almost literally cites it: "it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it".[54]

Having determined that terrorism in principle can be a public emergency matter, the Court further concentrates on the proportionality of measures adopted by the United Kingdom. This approach deriving out of the existence of an emergency situation in principle, as opposed to an emergency situation in a concrete case, is currently being widely criticized.[55]

So far, only in the case of *Greece v. the UK* the Commission and the Court elaborated on specific criteria needed to justify the threat of public emergency: this threat must be actual or imminent; its effects must involve the whole nation, the continuance of organized life in the community must be threatened; the crisis or danger must be exceptional, in that the normal measures or restrictions,

52 *Lawless v. UK*, 1 July 1961, §§ 22, 36-38, 57-59, Series A no. 3.

53 *Ireland v. The United Kingdom*, no. 5310/71, §207, ECHR, 1978.

54 *A. and Others v. United Kingdom*, no. 3455/05, §173, ECHR, 2009.

55 For discussion see A. *Greenem Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention On Human Rights*. (2011) German Law Journal. 12 (110). 175-178.

permitted by the Convention for the maintenance of pubic safety, health and order, are plainly inadequate.[56]

However, this approach is not followed by the general practice of the Court in the matter.

Save for the derogation clause, the ECHR contains a number of limitations of certain rights "in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". This is the case, for instance, for the freedom of thought and expression, the freedom of association and some others. In a number of cases of alleged interference with the right to respect for private and family life/personal data protection (Article 8 of the ECHR) the ECHR was assessing requests to gain access to declassified information, that are of particular interest for the present study.

Under Article 8(2) of the ECHR, in order to justify the interference with the right to private life derogation from the obligation: 1) must be in accordance with the law, 2) must pursue one or more legitimate aims as referred to in paragraph 2, and 3) must be necessary in a democratic society in order to achieve the aim or aims.

As a general rule, in cases related to personal data protection the ECtHR performs a very detailed proportionality assessment. [57]

In the field of personal data protection, one of the most sensitive matters for states is releasing information stored in secret security files. Already in one of its early cases – *Leander v. Sweden* – the Court considered the refusal to allow the applicant an opportunity to challenge the raised allegations, which were based on intelligence information, amounted to an interference with Article 8 ECHR. In this case, the ECtHR observed that the right of access to data kept in secret service files, as such, is not enshrined in the ECHR. However, the Court considered that non-disclosure of such data could be a potential element of interference.[58]

Twenty years after in the *Segerstedt-Wilberg and others v. Sweden* case the ECtHR explicitly stated that the refusal to advise the applicants on the full extent to which information about them was being kept on a security police register amounted to an interference with Article 8 ECHR.[59]

It went further in *C.G. and others v. Bulgaria* and established that when a state invokes national security grounds based on intelligence information, the person concerned must at least be able to challenge the assertion that national security is at stake.[60] In such cases an independent authority or court must be able to

56 See Report of the Commission, 5 November 1969, YB XII (1969), p. 45-72 and p. 76, 100.

57 F. Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice: Towards Harmonized Data Protection Principles for Information Exchange at EU-level (*Berlin-Heidelberg: Springer-Verlag, 2012) at 46-47.

58 *Leander v. Sweden*, no. 9248/81, § 48, 59, 67, ECHR, 1987

59 *Segerstedt-Wiberg and others v. Sweden*, no. 62332/00, §99, ECHR, 2006.

60 *C.G. and others v. Bulgaria*, , Application no. 1365/07, §40, ECHR, 2008.

assess whether the invocation of the concept of national security has no reasonable basis in the facts or reveals an interpretation of national security that is unlawful or contrary to common sense and arbitrary.[61]
The Court further emphasized that the threats to national security may vary in character and may be unexpected or difficult to define in advance. However, even under such circumstances, the concepts of lawfulness and the rule of law in a democratic society require that a decision taken to the detriment of an individual and affecting fundamental rights is subject to a form of adversarial proceedings before an independent authority or court to effectively examine and analyze the reasons and the relevant evidence on which the decision is based. If needed, appropriate procedural restrictions on the use of classified information could be taken. However, the individual must be able in any case to challenge the assertion that national security is at risk.[62]
Thus giving a wide margin of appreciation to the state parties with respect to determining whether a war or public emergency exist and concentrating primarily on proportionality of measures taken, the Court nevertheless established a different test for personal data protection under Article 8 of the ECHR that includes the existence of an independent authority that is able to assert the reasonableness of invocation of national security or reveal the interpretation of the national security.

III Conclusion: How Wide Can a State's Discretion Be under Article XI of the Outer Space Treaty?

Changes that the concept of international security underwent in the recent past give rise to the need to ensure a possible retreat behind the screen on national security interests (that currently represent a rather vague concept, including save for military threats also economic crises and other possible threats to the well-being of a nation). Such exceptions are being inserted in a wide number of international treaties that are concluded in different fields.
When contained in the treaties, such clauses – depending on their wording – are subject to slightly different standards of judicial review by a competent court or tribunal. They are supposed to be a lawful basis for the exemption from legal obligations – as opposed to the state of necessity, that preclude wrongfulness of otherwise wrongful act. When such clauses contain the word '[state] considers' the courts usually apply the good faith standard as contained in the Vienna Convention on the Law of Treaties. When such wording is missing the standard of judicial review is little bit higher higher and the courts feel able to assess the factual background for invoking of the national security clause.
The general meaning of good faith is that 'any reasonable man in the position of a state would assess the situation as having an impact on the national security' in other words when invoking such a clause as grounds for non-compliance

61 Ibid.
62 *C.G. and others v. Bulgaria*, , Application no. 1365/07, §40, ECHR, 2008.

with its obligations. Acting in good faith means here to at least give reasons for non-fulfillment of a certain obligation. At the same time, military threats still more likely than any other will justify invocation of national security clauses. 'Practicable and feasible' test of Art. XI of OST in line with application of national security clauses developed in general international law can be interpreted as imposing a floor for general mechanism of disclosure of information:
when invoking national security concerns for non-sharing of information needed for ensuring space security a state shall
1. *do it in good faith and*
2. *provide sound reasons for such non-disclosure.*[63]

63 It shall be noted that both the European Code of Conduct for Outer Space Activities and the Draft International Code of Conduct for Outer Space Activities based on the former, in the sections dealing with the disclosure of technical data of importance for space security in broad, contemporary sense, use the same formula "to the extent possible and practicable".