

An applied approach to national security: Controlling foreign direct investment on “national security” or related grounds.

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1. National security: Different notions to cover similar or related threats.

“National security” is a very flexible notion that is devoid of a clear definition and that, also, is not easily definable in categorical terms¹ in so far as it may not remain constant over time. This absence of definition is not only due to the objective difficulty to define it but also to the fact that states want to have a rather broad and flexible notion that will finally allow them to reach their specific goals when referring to it in the specific area targeted. The existence of this nebulous situation as regards this notion provides a high level of flexibility to the state but also generates a great deal of uncertainty in so far as it may finally permit everyone to label almost whatever policy and measure he favours under the heading of “national security”.²

Additionally, the notion has now expanded both as regards the amount of threats covered and the areas where reference to it is made. Indeed, Foreign Direct Investment (FDI) is becoming one of those fields in which the issue of national security is gaining relevance. Although most countries are open to FDI, renewed concerns by states as regards the ability to fulfil certain government goals and policies or to the preservation of some natural resources, industries or interests has led many of them to adopt a more reserved stance in some areas of the economy, especially in cases of sovereign FDI.³ On the one hand, the use of certain general exceptions in International

¹ WJ MOON, ‘Essential Security Interests in International Investment Agreements’ (2012) 15:2 *Journal of International Economic Law* 481, 500.

² A WOLFERS, “National Security” as an Ambiguous Symbol’ (1952) 67:4 *Political Science Quarterly* 481, 481.

³ Within growing fears about the existence of a real technically based espionage threat in many developed countries by companies now belonging to foreign investors, many of them Multinational Enterprises –MNEs- (AE SAFARIAN, ‘The Canadian Policy Response to Sovereign Direct Investment’ in KP SAUVANT, LE SACHS and WPF SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, OUP, Oxford 2012, p 443). The acquisition of Lenovo by a Chinese computer manufacturer has given rise to suspicion within the US, in so far as many of these computers are used by the US administration. At the same time, even wholly owned national companies have branches in foreign countries where components are produced and the risk of infiltration also exists in these cases. See

Investment Agreements (IIAs) has grown steadily. Also mechanisms of screening FDI projects by governments on “national security” grounds, mainly those focussed on Mergers and Acquisitions (M&As), have been designed in certain developed and emerging economies and some market access rules have been implemented too.

In addition to the idea of national security, other different notions aimed to apparently cover a similar reality –the protection of the host state against some kinds of threats caused by certain FDI- are also used when facing non-welcomed FDI: national “essential security interests” or “public policy” are two of them. All these terms constitute elastic and highly contextual concepts that can be understood in different ways depending on diverse factors: the perception of the threat, the set of values to be protected or the means through which these values can be protected are some of them.⁴ This is also referable to the notion of national security, a term to which many of the other notions mentioned by national legislations and IIAs are finally linked.⁵

Usually, all these terms cover a similar reality or, at least, somehow similar reality: the goal is the protection of the essential interests of the host state against some kinds of threats. But this is done through the use of notions which are different in their wording and origin and without clearly describing in any case what particular interests are to be defended under every heading and from what kind of threats the host state should be protected. “National security”, national “essential security interests”, “public policy” and related terms can mean different things to different people in different moments. And because of this intrinsic relativity they can also serve a range of different purposes. Moreover, they may be open to somehow different understandings in domestic and international cases.⁶

“National security”, national “essential security interests” and related terms broadly refer to ideas about the integrity and power of the state itself as an institutional apparatus.⁷ Their traditional understanding, especially that of national security, has been linked to the safety and protection of the people and institutions of a country from military threats, terrorism or espionage. But all of them constitute evolving notions that develop at the same time that society does and that, consequently, now also relate to cyber espionage, and risks linked to the political, financial or economic system of a country, to its socio-cultural basis, to its essential infrastructures or to its environment, among other potential areas of impact.⁸ National security and the essential national security interests of the state may also be threatened when certain basic strategic infrastructures or areas of the economy come under the control of foreign investors.⁹

RG BRACKNELL, ‘Trust Not Their Presents, Nor Admit the Horse: Countering the Technically-Based Espionage Threat’ (2006-7) 12 *Roger Williams University Law Review* 832, 837-839.

⁴ H NASU, ‘The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System’ (2011) 3:3 *Amsterdam Law Forum* 15, 15.

⁵ P LINDSAY, ‘The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?’ (2002-3) 52 *Duke Law Journal* 1277, 1297.

⁶ W BURKE-WHITE and A VON STADEN, ‘Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’ (2008) 48:2 *Virginia Journal of International Law* 307, 360-361.

⁷ J WALDRON, ‘Safety and Security’ in E REED and M DUMPER (eds), *Civil Liberties, National Security and Prospects for Consensus Legal, Philosophical and Religious Perspectives*, CUP, Cambridge, 2012, p 14.

⁸ UNCTAD, *The Protection of National Security in IIAs*, UNCTAD Series on International Investment Policies for Development, UNCTAD/DIAE/IA/2008/5, UNCTAD, New York/Geneva 2009, p 7.

⁹ M BARBIERI, ‘Sovereign Wealth Funds as Protected Investors under BITs and the Safeguard of the National Security of Host States’ in G SACERDOTI with P ACCONCI, M VALENTI and A DE LUCA (eds), *General Interests of Host States in International Investment Law*, CUP, Cambridge 2014, p 132.

2. Exploring the meaning of national security in the field of foreign direct investment.

Traditionally, when assessing the notion of “national security” or of national “essential security interests” and similar terms in the field of FDI, defence industries have been considered very relevant and consequently foreign investment has habitually been limited in that sector. Military intelligence and espionage have also been key elements in the construction of the understanding of these terms as regards FDI. However, these notions have now expanded to include other different ideas and threats. In the case of FDI and because of the increase of flows coming from emerging countries in developed economies and the consequent threat that they may apparently create to them and to their economies, these terms become very broadly understood, encompassing ideas and situations that although may have aspects linked to “national security” or national “essential security interests” have not been traditionally included in these notions.

The particular sector where the FDI project is to be implemented as well as the potential harm that it can cause are two of the many elements that permit both the construction of these notions and the determination of when, and why, a certain FDI project runs against them in a specific host state. In the area of FDI these notions now encompass references to economic well-being, to energy independence, to control of certain key strategic sectors of the economy or to the necessary preservation of certain critical infrastructures, among others, linked to the origin of the investment, the nature of the investor and the area targeted by the investment.

In line with this idea, national security related clauses embodied in IIAs are broadly understood to go beyond the traditional military threats.¹⁰ Their usual wide wording also point in this direction. Support for this position has been explicitly given by some states. For instance, the US has provided some guidance in this line during the negotiation of some of its Bilateral Investment Treaties (BITs). Thus, the Message from the President of the United States Transmitting the Treaty between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment, of 1994, considers that reference to “essential security interests” embodied in Article X(1) “*would include security-related actions taken in time of war or national emergency; actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interest of the Party involved.*”¹¹ This notion has also been interpreted in the domestic practice of other countries with a tradition of negotiating BITs. In India, for instance, the concept of “essential security” is approached as equivalent to “security of the State”.¹²

“National security”, national “essential security interests” “public policy” and other related terms used in practice are all notions that coincide nowadays in evoking general considerations of protecting the security of a state, the safety of its citizens and key aspects of its way of life.¹³ However they are not exactly similar, and some different understandings can be afforded to each of them, although their exact content is dependent on different factors and may vary in accordance to the specific area or in relation to the particular host country in which it is assessed. In any case, IIAs and national legislations tend to include no explicit definition of any of these terms, thus creating uncertainty and leaving a broad power of interpretation to the parties of the treaty or national administrations.

¹⁰ Note, W BURKE-WHITE and A VON STADEN, above n 6, 351-352.

¹¹ Art. X. In similar terms, Message from the President of the United States Transmitting the Treaty between the United States of America and Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, Art. XIV.

¹² Note, judgments of the Supreme Court of India in the cases *Dr. Ram Manohar Lohia vs State of Bihar and Others, and Union of India v. Tulsiram Patel* of 07.09.1965, [1966] AIR 740, [1966] SCR (1) 709. See W BURKE-WHITE and A VON STADEN, above n 6, 353-354.

¹³ OECD, *Security-Related Terms in International Investment Law and in National Security Strategies*, May 2009, Paris, OECD 2009, p 3.

2.1. The elusive and variable notion of national security.

The understanding of the notion of national security varies depending on the country and the moment in which it is approached. In the specific field of investment, national security concerns as regards FDI in the US may be primarily related to foreign control over critical infrastructures, mostly when the headquarters of the potential acquirer are located in certain countries, either competitors or considered unfriendly countries. In the EU, it may be related to the fear of domination by investors from certain countries or to the control of certain national champions or high level technological industries by foreigners, mainly when they belong to some countries of the world. In Russia, fears are directly related to the foreign control over the exploitation of national resources or investment in firms controlling certain military know-how.¹⁴ On the contrary, in the PRC these concerns as regards FDI are linked to the idea of development and, therefore, to the control of particular sectors of the economy or strategic industries considered essential for the economic development of the country.¹⁵

In addition to that, in those countries which have been affected by terrorism or have a permanent terrorist threat, the relationship between national security and FDI has a deep military and strategic dimension: the US is a good example. Whereas for other countries like the EU, Japan and many developing countries, notions of national security are mostly related to its economic dimension and blend with considerations of strategic industries and national champions.¹⁶ The French Government, for instance, speaks of “economic patriotism”.¹⁷

During the last few decades a change in the perception of security threats has arisen affecting both the specific content of the notion of security and its objectives, as well as the ways to address these potential threats. The rising awareness about the increasing environmental problems, the limited existence of natural resources, the need to ensure the normal functioning of some essential critical infrastructures including water and energy supply as the basis for the normal development of modern societies or the importance of cyberspace as a basic element of the society and a primary arena for conflict play, among others, a relevant role in a securitized society in which the understanding of security and national security broadens and affects fields so far not central to the notion.¹⁸

All these changes have additionally taken place in a post 9/11 globalized world which is increasingly characterized by ideas of threat and fear and by the quest for security, in many cases within a securitization framework.¹⁹ The final result is that all these concerns extend now to areas in which the security dimension has not so far been present or only to a very low or marginal degree. Such areas and sectors that are now understood as relevant for the preservation of the national security of a country and are reinterpreted in accordance to this goal. FDI seems to be one of those sectors that gain a new approach and understanding in this environment and that,

¹⁴ JR HEATH, ‘Strategic Protectionism? National Security and Foreign Investment in the Russian Federation’ (2009) 41 *The George Washington International Law Review* 101, 117-122.

¹⁵ KP SAUVANT, ‘The regulatory framework for investment: where are we headed?’ in R RAMAMURTI and N HASHAI (eds), *The Future of Foreign Direct Investment and the Multinational Enterprise*, Research in Global Strategic Management, Volume 15, Emerald Books, Bingley 2011, p 417; M BARBIERI, above n 9, pp 132-133.

¹⁶ KP SAUVANT, ‘Driving and Countervailing Forces: A Rebalancing of National FDI Policies’ (2008-9) *Yearbook on International Investment Law & Policy* 215, 242.

¹⁷ *De Villepin stands by calls for ‘economic patriotism’*, *Financial Times* of 22.09.2005.

¹⁸ See JT MATTHEWS, ‘Redefining Security’ (1998-1990) 68 *Foreign Affairs* 162, 163-171.

¹⁹ As regards the understanding of this concept, note M McDONALD, ‘Securitization and the Construction of Security’ (2008) 14:4 *European Journal of International Relations* 563, 565-567. And in certain cases of macro-securitization, note to this respect, B BUZAN and O WÆVER, ‘Macrosecuritisation and security constellations: reconsidering scale in securitisation theory’ (2009) 35 *Review of International Studies* 253, 257-259 & 273.

consequently, is affected by this new security discourse and is now given a role to play in national security and critical infrastructures and protection strategies of the state.²⁰

This national security dimension of FDI varies from country to country although it seems to be increasingly assessed everywhere. For instance, the *UK National Security Strategy and Strategic Defence and Security Review 2015. A Secure and Prosperous United Kingdom* makes an explicit reference to the national security dimension of FDI when speaking of the investment by China into the new Hinkley Point C nuclear power station. It specifically refers to the requirement to combine the necessity to attract inwards investors to modernize the UK energy infrastructure thus “supporting our longer term energy security” with the necessary assessment “of any national security risks, and mitigation.”²¹ FDI projects -and also FDI law- are now reinterpreted on national security grounds. Not only the potential positive impact on the national economy is assessed but also a national security analysis is undertaken. What this national security discourse means and how it is actually envisaged and implemented in practice is a very relevant issue that is already open and subject to different interpretations worldwide.

At the same time, the growing specialization and the existence of contradictory forces and interests in the broad number of sectors affected by the ideas of “security” and of “national security” have fostered the need to rethink the definition of national security and to consider whether one or different definitions of the term exist depending on the specific area to which its meaning is to be addressed: critical infrastructures, energy security, food security, water security or so on.²²

In an objective sense security has been defined as a “low probability of damage to acquired values”.²³ In a subjective sense, very important in the current society of fear and securitization, security means “the absence of fear that such values will be attacked.”²⁴ And this directly entails that the same threat may be understood differently in different moments and places.²⁵

However, despite all these differences and the absence of a clear definition, the term “national security” is considered to have a coherent and internationally understood meaning with some commonly accepted principles, and it is generally referred to as the “protection of the nation and its citizens against a broad set of threats”.²⁶ Nevertheless it remains a very wide term that permits very different outcomes when it is approached on a case by case basis, and which may generate problems of understanding when it is used in the area of FDI.

The determination of the threat from which we need to be protected constitutes a central element in the construction of any idea of security and of national security. In the case of FDI the lack of a clear definition of the notion of “national security” or any similar term referred to, and the vague concepts employed in the several existing national and IIAs security provisions provide states with a broad margin of appreciation and allow them to deal with unanticipated national security threats.²⁷ But this vagueness may also foster a shift from the idea of protection of the state and of

²⁰ OECD, *Building Trust and Confidence in International Investment. Report by countries participating in the “Freedom of Investment” Process March 2009*, OECD, Paris 2009, p 10.

²¹ HM GOVERNMENT, *National Security Strategy and Strategic Defence and Security Review 2015. A Secure and Prosperous United Kingdom*, HSO, London 2015, para 4.141 at p 44.

²² See H NASU, ‘State Secrets Law and National Security’ (2015) 64 *International and Comparative Law Quarterly* 365, 372.

²³ DA BALDWIN, ‘The Concept of Security’ (1997) 23 *Review of International Studies* 5, 13, standing on the definition provided by WOLFERS, “the absence of threats to acquired values” (A WOLFERS, above n 2, 485).

²⁴ A WOLFERS, above n 2, 485.

²⁵ Vid. H NASU, above n 22, 373.

²⁶ OECD, *Interim report approved by the OECD Investment Committee at the fourth OECD Roundtable on Freedom of Investment, National Security and “Strategic” Industries on 30 March 2007* (reproduced in OECD, *International Investment Perspectives: Freedom of Investment in a Changing World*, OECD, Paris 2007, p 56.

²⁷ WJ MOON, above n 1, 500.

its essential security interests against some vaguely defined threats, to the goal of preservation by the state of certain national sectors of the economy and national champions from foreign competition or control and, consequently, to the implementation by the state of certain policies on hidden restriction of FDI. The UNCTAD Core Principles for Policy Making recognize that states have their legitimate reasons to limit foreign investment for national security reasons or “in the context of their national development strategies”, which constitutes a much more vague and encompassing term.²⁸

The concept of “national security” and of all those terms related to it is no longer static and in the area of FDI pertains to the potential effects arising out of the transition of ownership from national to foreign actors, some of them state driven, of critical infrastructures, major energy assets, critical technologies and long-term projections of needs for critical resources and material.²⁹ But the analysis of all these situations on national security grounds is not only done on purely traditional security grounds –for instance, on the basis of the foreign acquirer’s record regarding non-proliferation and control regimes or national counter-terrorism activities- but from a more complex security approach in which traditional ideas of security are combined with economic, political or social related security approaches. The consequence is that in some cases it is far from easy to actually differentiate between true security concerns and other economic, political or geostrategic fears that may be relevant to the FDI host state but are the direct consequence of the free market competition in the framework of liberalized international trade.

To prevent this situation, the World Bank Guidelines on the Treatment of Foreign Direct Investment, without prejudice to the general approach of recommended free admission, accepts that the host state may –not can-, “as an exception”, refuse admission to a proposed investment “which is, in the considered opinion of the state, inconsistent with clearly defined requirements of national security”.³⁰ Curiously, this requirement of having clearly security related requirements is combined with the acceptance of the possibility for the host state to reject FDI in sectors “reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest.”³¹

2.2. Towards a common shared meaning of national security.

The multidimensionality of security, its multifaceted and complex condition is currently well established.³² “Security” and “national security” have traditionally been linked to their military dimension and have historically been interpreted as referring to the protection of the legal interests of the state against the use of force by other states.³³ These notions then have been focussed on military national security. Central to these concepts –“security” and “national security”- has been the protection of the territory of one nation from external military threats and attacks.³⁴ However, the notion has evolved and it has today become much more complex and comprehensive affecting

²⁸ UNCTAD, *Investment Policy Framework for Sustainable Development*, Doc. UNCTAD/DIAE/PCB/2015/5, UNCTAD, Geneva 2015, p 34.

²⁹ AE SAFARIAN, above n 3, p 442.

³⁰ WORLD BANK, *World Bank Guidelines on the Treatment of Foreign Direct Investment* <<http://www.italaw.com/documents/WorldBank.pdf>> accessed 01.11.2017, No II(4)(i).

³¹ *Ibid*, No II(4)(ii).

³² H NASU, above n 4, 15; M STONE, *Security According to Buzan: A Comprehensive Security Analysis*, Groupe d’Etudes et d’Expertise “Sécurité et Technologies” GEEST-2009, Security Discussion Papers Series 1, Paris, Spring’09, p 2.

³³ H KELSEN, ‘Collective Security and Collective Self-Defense Under the Charter of the United Nations’ (1948) 42:4 *The American Journal of International Law* 783, 783; H KELSEN, *Collective Security under International Law*, Naval War College New Port Rhode Island, International Law Studies, United States Government Printing Office, Washington DC 1957, p 1.

³⁴ As expressed in Art. 2(4) of the UN Charter.

also many civilian areas of the society, and refers to critical infrastructures, that in many cases are owned or controlled by private individuals, or international trade.³⁵

A broad understanding of national security as a concept not limited to military or security threats is now shared in most countries of the world and has been accepted by some arbitration panels which stressed this fact and accepted that in addition to military and armed attacks, including terrorism, also severe economic crises which reach a certain level of gravity so as to endanger the existence and integrity of the country affected may be covered by this or similar notions.³⁶ In this respect, the award granted in the case *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* of 2006 explicitly manifested that,

*“To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State’s economic foundation is under siege, the severity of the problem can equal that of any military invasion”.*³⁷

Also the award in the case *Continental Casualty Company v. The Argentine Republic* of 2008 stressed that,

*“... international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order. It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population.”*³⁸

Thus, “security” is no longer solely linked to the preservation of the integrity of the territory of individual states and of their nationals from foreign military attacks.³⁹ Among some other facts, and in addition to the traditional focalization of the notion of “security” in relation to one specific state and its territory, the ideas of international security or of human security as distinct objects of security not referred to a single state have now arisen.⁴⁰ Moreover, the technological revolution has led to the overcoming of the understanding of borders as purely geographical realities, and to the correlative appearance of new threats that are characterized both by the fact that not only the territory of the state is the target of the threat but also because states are not the only addressees of the threat. The case of cybersecurity and cyber threats would be paradigmatic to this respect.⁴¹

Consequently, the notions of “security” and “national security” have expanded in a necessary attempt to accommodate new threats and challenges. The absence of military actions and war

³⁵ Like self-defense as regards terrorist threats. Note N LUBELL, *Extraterritorial Use of Force against Non-State Actors*, OUP, Oxford 2010, p 29ff; H KELSEN, above 33, 791-792.

³⁶ M BARBIERI, above n 9, p 131; D COLLINS, *The BRIC States and Outward Foreign Direct Investment*, OUP, Oxford 2013, pp 176-177.

³⁷ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of 03.10.2006 (Decision on Liability) <www.italaw.com/sites/default/files/case-documents/ita0460.pdf> accessed 29.10.2017, para 238, at p 70.

³⁸ *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 05.09.2008 <www.italaw.com/sites/default/files/case-documents/ita0228.pdf> accessed 22.10.2017, para 175, at p 76. Significantly both cases related to the severe financial crisis that Argentina underwent in the last decade of the 20th Century and they gave importance to different outcomes as to the assessment of the relevance of that crisis for the national interest of the state (See UNCTAD, above 8, pp 9-10; JE VIÑUALES, 'Sovereignty in Foreign Investment Law' in Z DOUGLAS, J PAUWELYN and JE VIÑUALES JE (eds), *The Foundations of International Investment Law Bringing Theory into Practice*, OUP, Oxford, 2014, p 347).

³⁹ A WOLFERS, above n 2, 484.

⁴⁰ Note H NASU, above n 4, 16-17 & 22-24.

⁴¹ H NASU, above n 4, 18; S SAHA, 'CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization' (2012) 33:1 *Northwestern Journal of International Law & Business* 199, 206-208.

among nations does not ensure on its own security and peace for the state or for the international community. New sources of instability in the economic, social, humanitarian or ecological fields have now become threats to peace and security.⁴² Non-traditional threats arise and they now cover issues like economic security, energy and resource security, environmental security, food security, bio-security or health security, among other areas.⁴³

The presence of the notion of national economic security –like in the PRC- or the debate that has arisen in some countries of the world as regards it –in the US or the EU- shows the relevance and breadth of the notion of security nowadays, as well as the potential risks that the reference to broad notions such as the one of economic security may have in areas like FDI. It may pose protectionist threats in so far as it can be used by states to prevent the acquisition of certain sectors of the economy by foreigners instead of blocking FDI proposals that may potentially or effectively harm the national security of the host country.⁴⁴

National security strategies acknowledge this change of approach and the dynamic nature of “security” and “national security” and go beyond the military threat by focusing also on individual citizens and their way of life. The analysis of the national security strategies or national defence strategies of some major countries of the world corroborate the use of the term national security as the central idea on which they stand⁴⁵ as well as the evolving condition of the concept that is not limited to military threats any longer.⁴⁶ In the UK, for example, the *National Security Strategy and Strategic Defence and Security Review 2015. A Secure and Prosperous United Kingdom* explicitly states that “*National Security Objective 1 is to protect our people – at home, in our Overseas Territories and abroad, and to protect our territory, economic security, infrastructure and way of life*”.⁴⁷ This idea of protecting nations and citizens is included on a regular basis in many national security and defence strategies of states around the world.⁴⁸

Additionally, almost all of them show the usual absence of a clear definition of the concept of national security; in some cases, no definition is provided at all. In Germany, for instance, the Germany Defence Policies of 2011⁴⁹ refers to national security on many occasions but instead of enshrining a definition of what it actually means makes a broad call to Germany’s security objectives –“the security and protection of German citizens; - the territorial integrity and sovereignty of Germany and its allies; - the fulfilment of international responsibilities”- and to German security interests.⁵⁰ Also the afore-mentioned *UK National Security Strategy and Strategic Defence and Security Review 2015. A Secure and Prosperous United Kingdom* lacks any definition of national security. It merely focuses on the values to be preserved without

⁴² UNITED NATIONS, SECURITY COUNCIL, *Verbatim Record of the Three Thousand and Forty-Sixth Meeting*, UN Doc. S/PV.3046 (Provisional), of 31.01.1992 <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/RO%20SPV%203046.pdf>> accessed 04.11.2017, p 143.

⁴³ H NASU, above n 4, 18-19.

⁴⁴ Vid. PT MUCHLINSKI, ‘Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate: The Issue of National Security’ (2008-9) 1 *Yearbook on International Investment Law and Policy* (2008–2009) 37, 55.

⁴⁵ OECD, above n 13, p 11.

⁴⁶ Note to this respect, OECD, above n 13, Annex 3, p 42

⁴⁷ HM GOVERNMENT, above n 21, para 1.10 at p 11.

⁴⁸ OECD, above n 13, p 11 and Table 1 at p 13.

⁴⁹ FEDERAL MINISTRY OF DEFENCE, *Germany: Defence Policy Guidelines 2011. Safeguarding National Interests – Assuming International Responsibility – Shaping Security Together*, Berlin, 28.05.2011 <http://www.nato.diplo.de/contentblob/3150944/Daten/1318881/VM_deMaiziere_180511_eng_DLD.pdf> accessed 22.10.2017.

⁵⁰ “German security interests include: - preventing, mitigating and managing crises and conflicts that endanger the security of Germany and its allies; - advocating and implementing positions on foreign and security policy in an assertive and credible way; - strengthening transatlantic and European security and partnership; - advocating the universality of human rights and principles of democracy, promoting global respect for international law and reducing the gap between the rich and the poor regions of the world; - facilitating free and unrestricted world trade as well as free access to the high seas and to natural resources” (FEDERAL MINISTRY OF DEFENCE, above n 49, p 4).

providing any notion or definition of the term: “Our security, prosperity and freedom are interconnected and mutually supportive. They constitute our national interest”.⁵¹

This same absence of definition of the concept of national security is encountered in the US *National Security Strategy February 2015*. In this case, the national security of the US would involve “primarily (but not only) military security, namely the protection of the defense industrial base and critical technologies that provide a military advantage, as well as more broadly the protection of assets that constitute critical infrastructure”.⁵²

Some isolated examples of a definition of what national security is and means are also encountered worldwide. For instance, the *Spanish National Security Strategy. Sharing a Common Project* defines national security as “the State action aimed at protecting the freedom and well-being of its citizens, guaranteeing the defence of Spain and its constitutional principles and values, and contributing together with our partners and allies to international security in compliance with the commitments undertaken.”⁵³ A much broader definition is embodied in the Russia’s National Security Strategy to 2020 where national security is, for instance, defined as “the protection of the individual, society and the State from domestic and foreign threats, which in turn ensures constitutional rights and freedoms, an appropriate quality of life for citizens, sovereignty, territorial integrity and stable development of the Russian Federation, the defence and security of the State.”⁵⁴ Consequently, a threat to the national security would be understood as “the direct or indirect possibility of damage to constitutional rights and freedoms, quality of life, sovereignty/territorial integrity, stable development of the Russian Federation, defence and security of the State.”⁵⁵

3. The multidimensional scope of national security: A single notion or some autonomous but related sectoral notions? The case of energy security and critical infrastructures protection.

As stated, the concept of national security becomes increasingly complex and coexists now with sectoral notions referring to particular individual national security areas and aspects. The global ideas of “security” or of “national security” become related in certain cases to some autonomous notions of “security” specifically referring to some areas of society and of the economy of a particular country.

National security is an ill-defined term whose content may vary depending on the country and the moment when it is ascertained and the specific sector, even the specific firm or infrastructure referred to. Whether a single notion of “national security” or some of them exist with different contours, underlying principles and goals depending on the specific field referred to, is something to be determined on a case by case basis. Moreover, national security gets its own meaning from a social, economic or environmental standpoint and may potentially vary in reference to foreign

⁵¹ HM GOVERNMENT, above n 21, para 2.12 at p 22.

⁵² KP SAUVANT, *FDI Protectionism Is on the Rise, Policy Research Working Paper 5052, The World Bank Poverty Reduction and Economic Management Network*, International Trade Department, World Bank Washington, September 2009, p 8.

⁵³ PRESIDENCIA DEL GOBIERNO, *The National Security Strategy. Sharing a Common Project*, Madrid, 2013, p 6.

⁵⁴ PRESIDENCE OF THE RUSSIAN FEDERATION, *Russia’s National Security Strategy to 2020*, Approved by Decree of the President of the Russian Federation of 12.05.2009 No. 537, No 6 (Unofficial Russian version <<http://rustrans.wikidot.com/russia-s-national-security-strategy-to-2020>> accessed 28.10.2017).

⁵⁵ Above n 54, No 6. The Peoples’ Republic of China Military Strategy speaks of China’s national strategic goal being “to complete the building of a moderately prosperous society in all respects by 2021 when the CPC celebrates its centenary; and the building of a modern socialist country that is prosperous, strong, democratic, culturally advanced and harmonious by 2049 when the People’s Republic of China (PRC) marks its centenary.” (STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, *China’s Military Strategy*, Beijing, 05.2015, p 5).

investment. This elusive and multidimensional understanding has a direct effect on the control of FDI on national security grounds.

New sectoral notions of “security” arise which respond to the singularities and policies of some particular sectors of the economy and which are autonomous from the global idea of “security” and of “national security” of a certain state. Notions like “national energy security”, “national economic security” – a concept that exists in countries like the PRC,⁵⁶ and that receives also some support to be adopted in the US or in the EU-⁵⁷ or of “national food security”,⁵⁸ among some others, are now referred to. All of them are linked to the basic idea of the preservation of the national security of the host country in particular fields of different size, nature and relevance, in which some specific policies and necessities of protection exist. All of them require the global concept of national security to be adapted to a particular area and situation of the host state. As well as making necessary the determination of the intrinsic relationship of any of these autonomous sectoral concepts of security with the global concept of national security.

The absence of a clear definition of the notion and the difficulties to actually reach one multiply when referring to the other security related notions in use. For instance, the determination of the meaning of “national economic security” or of “economic threats” is objectively difficult because risk, aggressive competition and uncertainty are what actually characterize the normal condition of actors in a market economy.⁵⁹ This makes it very difficult to differentiate what can be understood as a threat to the economic security of a country and what is only the consequence of the normal functioning of the economy and which must therefore be accepted (although to what extent?). In fact, the current economic crisis has confronted states with the difficult task of determining which areas of their economies should be preserved from FDI and which others should not.

FDI is subject to a growing scrutiny by national authorities with some areas of the economy being especially relevant nowadays as regards the control of foreign investment on national security grounds: telecommunications and technology, energy or critical infrastructures are some of them. The lack of a clear understanding of what “national economic security” means and the pressure from public opinion and the media may in certain cases also invite politicians of certain states to control some inwards FDI fearing that it will lead to losses of jobs or to a lowering of social rights in the host country. The issue is to determine whether this control is exercised on grounds of protection of the “national economic security” or it is just reflection of an economic protectionist attitude.

Each one of these sectoral categories of “security” defines a focal point within the security issue as well as a way of ordering priorities. The content of these new threats is to be constructed autonomously although they are not independent and a strong network of linkages exists among

⁵⁶ V BATH, ‘Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China’ (2012) 34:5 *Sydney Law Review* 5, 5.

⁵⁷ Where it is already used in the definition of “critical infrastructure” provided by the Patriot Act 2001. Note G LAN, ‘Foreign Direct Investment in the United States and Canada: Fractured Neoliberalism and the Regulatory Imperative’ (2014) 47 *Vanderbilt Journal of Transnational Law* 1261, 1264; KB GOLDSTEIN, ‘Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities’ (2011) 3 *Tsinghua China Law Review* 215, 226.

⁵⁸ Note, JA VANDUZER, P SIMONS and F MAYEDA, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries (prepared for the Commonwealth Secretariat by the authors)*, London 2012, p 70. Reference to the construction of a food security strategy and to its meaning may be also found at UNCTAD, *Investment Policy Framework for Sustainable Development*, Doc. UNCTAD/DIAE/PCB/2015/5, UNCTAD, Geneva 2015, pp 6, 11, 13 or 123, among others or D HALLAM, *Foreign Investment in Developing Country Agriculture – Issues, Policy Implications and International Response*, OECD Global Forum on International Investment, OECD Publishing, Paris 2009, p 2ff.

⁵⁹ B BUZAN, *People, States & Fear. An Agenda for International Security Studies in the Post-Cold War Era*, 2nd ed, ECPR, Colchester, 2008, pp 192-196.

them. The relationship existing between energy, climate and security are a good example of that.⁶⁰ Also the dependence of military security on economic security in so far it is finally dependent on budget constraints is significant.⁶¹ In many cases, their combination provides a new approach to security deeply linked to the idea of resilience. “Security” as a part of “national security” is a major element in modern societies which becomes increasingly linked to, and supplemented by, the notion of resilience, “the capacity to withstand and rebound from disruptive challenges or adverse effects”.⁶² Its translation into the area of FDI implies the need to control foreign investment in certain critical infrastructures, industries and sectors of the economy to allow the implementation of regulatory powers and to fulfil basic goals towards citizens.

Among the potential collection of national security dimensions and, maybe, of national security concepts, energy constitutes a perfect test bench for many issues related to the control of foreign investment by host states in some particular areas of their economy. It is an independent notion that is very much linked to other sectors like that of the protection of national critical infrastructures.

Despite the relevance of many areas of the economy not all of them have given importance to the existence of an individualized area for security as energy or critical infrastructure do. This is, for instance, ascertainable in the US where the notion of critical infrastructure has a direct effect on foreign investment in the energy sector. Among the factors to be considered by the Committee on Foreign Investment in the United States (CIFUS) when assessing the national security dimension of a FDI proposal reference is made to “(6) *the potential national security-related effects on United States critical infrastructure, including major energy assets*”.⁶³ It is the only sector mentioned within this broad notion of critical infrastructure.

Energy security and the protection of national critical infrastructures are two different but interrelated dimensions of “security” and “national security”. The determination of their exact meaning and scope and of their dynamic relationship are prime examples of the difficulty in assessing a single and comprehensive notion of “national security”. And of the evaluation of their potential impact in the area of FDI.

3.1. National energy security.

National security has traditionally been equated with the ability of countries to thwart armed aggression. However, as stated, the notion has changed over time and has also being enlarged. Currently, national security also embraces, among other concepts, a threat to national energy security.⁶⁴ Many states are now well aware of this fact, to the extent that during the last few years investment in this sector –especially oil and gas- has been exposed to “national security” or national “essential security interests” concerns. Different restrictions have been introduced in some countries for foreign investment in this area and many FDI projects have been subject to prior scrutiny on “national security” grounds.⁶⁵

⁶⁰ Note UNITED NATIONS, Security Council, *Sixty-second year 5663rd meeting Tuesday, 17.04.2007, 10 a.m.*, UN Doc S/PV.5663 (Provisional), New York, p 2. Consider B BUZAN, ‘New Patterns of Global Security in the Twenty-First Century’ (1991) 67:3 *International Affairs* 431, 433.

⁶¹ M STONE, above n 32, p 5.

⁶² J COAFFEE, ‘Rescaling and Responsibilising the Politics of Urban Resilience: From National Security to Local Place-Making’ (2013) 33:4 *Politics* 240, 240.

⁶³ 50 USC §2170(f)(6).

⁶⁴ L GURUSWAMY, ‘Energy and the Environment: Confronting Common Threats to Security’ (1991) 16 *North Carolina Journal of International Law and Commercial Regulation* 255, 255.

⁶⁵ UNCTAD, above n 8, pp 12-13.

Energy is the world's most capital intensive industry.⁶⁶ Energy security constitutes a core element of energy policy that has gained increased attention in the last few years.⁶⁷ Its understanding is based on the concept of security "in general", however, the term lacks a common and clear understanding and is absent of guiding principles.⁶⁸ Many different definitions of what it means are provided.⁶⁹ Additionally, its meaning has evolved over time. It is defined both as "slippery", because of the difficulties to universally define or conceptualize it, and "multi-dimensional",⁷⁰ in so far as the traditional political economic approach to oil supply for western industrialized countries has now given way to a much broader and complex reality addressing a plurality of sectors and challenges.⁷¹

3.1.1. Energy security: a notion linked to energy supply and energy availability.

Leaving aside its connection with the physical –natural, in many cases linked to climate changes, or technical aspects- "risks" that the supply of energy may encounter,⁷² energy security has traditionally been linked to the idea of supply of energy, stressing the dimension of its economic risk. The International Energy Agency has focussed on this idea of market supply and energy availability at market price and it understands "energy security" as "the uninterrupted availability of energy sources at an affordable price".⁷³ Resting on this approach the notion would then be of special relevance to energy consuming or net importer countries.⁷⁴

However, the notion of energy security is constantly reshaped in accordance to the moment in which it is evaluated and the country or region to which reference is made. Further, the notion of energy security has been modified in recent times to include new and additional dimensions not covered so far. Under the traditional market-centric definition of energy security the idea of assurance of adequate and reliable supplies of energy at reasonable prices and in a way that does not jeopardize major national values and goals⁷⁵ would be stressed. But the notion has evolved as energy necessities of states develop too.

Nowadays it is both much broader, in so far as additional dimensions of energy security are taken into account when approaching it, and it is also the subject of a continuous and intense re-

⁶⁶ A BRESSAND, 'The Role of Markets in Investment in Global Energy' in A GOLDTHAN (ed), *The Handbook of Global Energy Policy*, Wiley-Blackwell, Malden/Chichester, 2013, p 15.

⁶⁷ B KRUYT, DP VAN VUUREN, HJM DE VRIES *et al*, 'Indicators for Energy Security' (2009) 37 *Energy Policy* 2166, 2166.

⁶⁸ S BELOW, 'Obstacles in Energy Security: An Analysis of Congressional and Presidential Framing in the United States' (2013) 62 *Energy Policy* 860, 861; D VON HIPPEL, T SUZUKI, JH WILLIAMS *et al*, 'Energy Security and Sustainability in Northeast Asia' (2011) 39 *Energy Policy* 6719, 6719.

⁶⁹ Note Ch WINZER, 'Conceptualizing Energy Security' (2012) 46 *Energy Policy* 36, 42-43, Table A1.

⁷⁰ L CHESTER, 'Does the Polysemic Nature of Energy Security Make It a "Wicked" Problem?' in ARDIL C (ed), *International Conference in Energy, Environment, Sustainable Development*, June 24 2009, World Academy of Science, Engineering and Technology WASET, Paris 2009 p 163, the author defines the term as "wicked" (*Ibid*, 163-164); A CHERP and J JEWELL, 'The Concept of Energy Security. Beyond the Four As' (2014) 75 *Energy Policy* 415, 417.

⁷¹ A CHERP and J JEWELL, above n 70, 420. Energy security is not a policy per se and some specific policy must be implemented by the state to achieve the objective of "energy security", L CHESTER, above n 70, p 162. As regards the energy security policy of the OECD members, see OECD / DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS. COMPETITION COMMITTEE, *Energy Security and Competition Policy* JT03238675, OECD Paris, 14.01.2008, pp 95-246.

⁷² Ch WINZER, above n 69, 37; L CHESTER, 'Conceptualising Energy Security and Making Explicit its Polysemic Nature' (2010) 39 *Energy Policy* 887, 890-891. Consider that in 2005, the Hurricanes Katrina and Rita shut down 27% of US oil production and 21% of US refining capacity, note F UMBACH, 'Global Energy Security and the Implications for the EU' (2010) 38 *Energy Policy* 1229, 1234.

⁷³ INTERNATIONAL ENERGY AGENCY, What is Energy Security?

<<https://www.iea.org/topics/energysecurity/subtopics/whatisenergysecurity/>>, accessed 25.10.2017. In the same sense, the World Assessment Energy of the UNDP, defines energy security as "the continuous availability of energy in varied forms, in sufficient quantities, and at reasonable prices" (UNITED NATIONS DEVELOPMENT PROGRAMME, *World Energy Assessment*, UNDP, New York 2000, p 112). Other authors consider energy security as "...a condition in which a nation and all, or most, of its citizens and businesses have access to sufficient energy resources at reasonable prices for the foreseeable future free from serious risk of major disruption of service." (B BARTON, C REDGWELL, A RØNNE *et al*, 'Introduction' in B BARTON, C REDGWELL, A RØNNE *et al* (eds), *Energy Security Managing Risk in a Dynamic Legal and Regulatory Environment*, OUP, Oxford 2004, p 5). Regarding the notion of "affordability" note A CHERP and J JEWELL, above n 70, 419.

⁷⁴ ML O'SULLIVAN, 'The Entanglement of Energy, Grand Strategy, and International Security' in GOLDTHAN A (ed), *The Handbook of Global Energy Policy*, Wiley-Blackwell, Malden/Chichester 2013, p 31.

⁷⁵ D YERGIN, 'Energy Security in the 1990s' (1998) 67:1 *Foreign Affairs* 110, 111.

examination.⁷⁶ The notion becomes increasingly comprehensive as it attempts to tackle the several challenges that exist for energy security.⁷⁷ Thus, it certainly refers to the availability, accessibility, affordability and acceptability of energy, the well-known “four As” of energy security,⁷⁸ and not only in relation to oil but also to other sorts of energies. But it also points to the diversification of energy suppliers or the geostrategic threats and vulnerabilities that this may generate.⁷⁹

In accordance with this position, energy security would then be directly linked to the concept of “security of energy supply”⁸⁰. It would be equated to self-sufficiency or “energy independence” of the state⁸¹ and, more recently, to the need to reduce dependence on fossil fuel consumption.⁸² Consequently the notion of security would be connected to the short-term disruption of supply – “shocks”- and long-term problems – “stresses”- for this supply.⁸³

This description of energy security has been broadly accepted,⁸⁴ although it has also changed over time because of the new challenges national and international energy policies are facing.⁸⁵ It is still directly linked to the reliability and affordability of energy supply in general,⁸⁶ but it has evolved from the classical former idea of stable supply of cheap oil⁸⁷ to that of “energy supply continuity”.⁸⁸ This change implies an additional degree of difficulty and complexity in so far as many and important differences exist between the oil, gas, nuclear or electricity energy markets⁸⁹

⁷⁶ A CHERP and J JEWELL, above n 70, 415; L CHESTER, above n 70, p 159.

⁷⁷ D VON HIPPEL, T SUZUKI, JH WILLIAMS *et al.*, above n 68, 6722.

⁷⁸ Note ASIA PACIFIC ENERGY RESEARCH CENTRE, *A Quest for Energy Security in the 21st Century Resources and Constraints*, APERC, Tokyo 2007, pp 7-42; L CHESTER, above n 70, p 164; A CHERP and J JEWELL, above n 70, 415-418 with a critical analysis in depth of these four principles. Also, S BELOW, above n 68, 861 who speaks of the existence of some commonly accepted “dimensions” to depict what energy security means: affordability, availability, efficiency, technological development, sustainability and regulation.

⁷⁹ In this line, and within the EU, Rec 3 of Directive 2004/8/EC of the European Parliament and of the Council of 11.02.2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 94/42/EEC [2004] OJ L52/50, following the Green Paper - *Towards a European strategy for the security of energy supply* (COMMISSION OF THE EUROPEAN COMMUNITIES, *Green Paper - Towards a European strategy for the security of energy supply*, COM/2000/0769 final) recognizes that “security of supply should not be conceived as merely a question of reducing import dependency and boosting domestic production. Security of supply calls for a wide range of policy initiatives aimed at, *inter alia*, diversification of sources and technologies and improved international relations.” Also consider Rec 22 of Directive 2009/73/EC of the European Parliament and of the Council of 13.07.2009, concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94, which as regards gas explicitly states that, the “security of supply of energy to the Community requires, in particular, an assessment of the independence of network operation, the level of the Community’s and individual Member States’ dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country.”

⁸⁰ Ch WINZER, above n 69, 36. A secure energy supply would imply “the continuous uninterrupted availability of energy at the consumer’s site” (M SCHEEPERS, A SEEBREGTS, I DE JONG *et al.*, *EU Standards for Energy Security of Supply. Updates on the Crisis Capability Index and the Supply/Demand Index Quantification for EU-27*, ECN Energy Research Centre of The Netherlands, Clingendael international energy programme, The Hague April 2007, p 19).

⁸¹ G COHEN, F JOUTZ and P LOUNGANI, ‘Measuring Energy Security: Trends in the Diversification of Oil and Natural Gas Supplies’ (2011) 39 *Energy Policy* 4860, 4860.

⁸² L CHESTER, above n 70, pp 159-160.

⁸³ Ch WINZER, above n 69, 38; M SCHEEPERS, A SEEBREGTS, I DE JONG *et al.*, above n 80, p 19; A CORRELJÉ and C VAN DER LINDE, ‘Energy Supply Security and Geopolitics: A European Perspective’, (2006) 34 *Energy Policy* 532, 538-539, distinguishing among “sudden disruptions”, “slow emerging supply gaps” and as result of ideological choices by states. Energy insecurity would then be related to the loss of economic welfare that may derive of change in the price or availability of energy (L CHESTER, above n 72, 889).

⁸⁴ As regards this notion and its subsequent evolution, consider L CHESTER, above n 70, pp 159-160; A CHERP, A ADENIKINJU, A OLDTHAU *et al.*, ‘Energy and Security’ in GEA WRITING TEAM, *Global Energy Assessment Toward a Sustainable Future*, CUP, Cambridge 2012, p 330; D VON HIPPEL, T SUZUKI, JH WILLIAMS *et al.*, above n 68, 6723-6725.

⁸⁵ D VON HIPPEL, T SUZUKI, JH WILLIAMS *et al.*, above n 68, 6720.

⁸⁶ Consider L CHESTER, above n 72, 889. This equation is made, for instance, by the White Paper on Energy Security and Global Warming of the World Economic Forum (WORLD ECONOMIC FORUM, *Global Agenda Council on Energy Security. White Paper on Energy Security and Global Warming*, 10.2012, p 4 <http://www3.weforum.org/docs/WEF_GAC_WhitePaperEnergySecurityGlobalWarming_2012.pdf> accessed 26.10.2017). In the same sense, note APEC Energy Security Initiative (APEC, *Tenth Report on Implementation of the Energy Security Initiative (ESI)*, 2008/EWG36, Manila 3-4.12.2008, <http://www.ewg.apec.org/documents/EWG36_ESIImplementationPlan10th20081218.pdf> accessed 20.10.2017).

⁸⁷ A CHERP and J JEWELL, above n 70, 418.

⁸⁸ Ch WINZER, above n 69, 36.

⁸⁹ L CHESTER, above n 70, p 162.

which are explicitly accepted in some national energy strategies.⁹⁰ And it also requires an effective quantitative measurement of energy security.⁹¹

3.1.2. The changing understanding of energy security.

However, even resting on this main idea of supply, the concept of energy security enjoys a high degree of relativity and changeability. How it is finally conceptualized is relative, context-dependent and a matter of perception by the actor approaching it.⁹² Energy security may finally mean different things in different places – a country, a continent, a region,⁹³ energy markets⁹⁴ or to different people in some parts of the world. And within them, for producers, large and small consumers, developing and developed countries, energy importing or energy exporting countries, companies operating in a network, policy makers or other energy stakeholders.⁹⁵ They may all consider different aspects of energy security and provide diverse definitions and approaches to the notion.⁹⁶

Also the temporal element is to be taken into account in so far as risks and responses may vary in the short, medium and long term.⁹⁷ For example, PRC oil's dependence ranged at around 51.3% of its demand in 2010 and is expected to rise up to 85,6% by 2035.⁹⁸ On the contrary, in 2015 only around 24% of the petroleum consumed by the United States was imported from foreign countries, the lowest level since 1970.⁹⁹ From the traditional definition approach of energy security the US would be a more energy secure country whereas China would have a more insecure position.¹⁰⁰

Energy security has also gained an additional geostrategic dimension that although has always been present in this area is now even more relevant and noticeable, and consequently enhances its “security” dimension.¹⁰¹ It may be the time to speak of “geopolitics of energy” instead of “energy security” is coming.¹⁰² The notion is then linked to new aspects of the energy supply like security of demand or security of transit and transport¹⁰³ and also to other fully new dimensions of energy security that have gained relevance over time like the environmental impact of energy sources and choices, climate change, innovation of energy research and development or energy

⁹⁰ As regards the UK, note DEPARTMENT OF ENERGY AND CLIMATE CHANGE, *Energy Security Strategy, Presented to Parliament by the Secretary of State for Energy and Climate Change by Command of Her Majesty*, November 2012, Cm 8466, HMSO, London 2012, p 31ff. In relation to the EU, note COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Second Strategic Energy Review An EU Energy Security and Solidarity Action Plan COM(2008) 781 final*, Brussels, 13.11.2008, p 4ff.

⁹¹ Which should be multifaceted to be fully effective, note G COHEN, F JOUTZ and P LOUNGANI, above n 81, 4860-4861.

⁹² S BELOW, above n 68, 861.

⁹³ A CHERP and J JEWELL, above n 70, 416; A CHERP, A ADENIKINJU, A OLDTHAU A *et al*, above n 84, pp 356-364; D VON HIPPEL, T SUZUKI, JH WILLIAMS *et al*, above n 68, 6721-6722, approaching several factors that generate differences in energy security policies.

⁹⁴ L CHESTER, above n 70, p 164.

⁹⁵ L CHESTER, above n 72, 891; S BELOW, above n 68, 861.

⁹⁶ M SANDER, ‘Conceptual Proposals for Measuring the Impact of International Regimes on Energy Security’ (2013) 63 *Energy Policy* 449, 449.

⁹⁷ L CHESTER, above n 72, 893. Note as regards Europe and the market of gas, M BILGIN, ‘Scenarios on European Energy Security: Outcomes of Natural Gas Strategy in 2020’ (2011) 43 *Futures* 1082, 1083 & 1086-1089.

⁹⁸ ZX ZHANG, ‘The Overseas Acquisitions and Equity Oil Shares of Chinese National Oil Companies: A Threat to the West but a Boost to China’s Energy Security?’ (2012) 48 *Energy Policy* 698, 698; J JIANG and J SINTON, *Overseas Investments by Chinese National Oil Companies. Assessing the Drivers and Impacts*, International Energy Agency Information Paper, February 2011, IEA, Paris 2011, pp 10-12.

⁹⁹ US ENERGY INFORMATION ADMINISTRATION, How much oil consumed by the United States comes from foreign countries? <<https://www.eia.gov/tools/faqs/faq.php?id=32&t=6>> accessed 28.10.2017. Note COUNCIL ON FOREIGN RELATIONS, *National Security Consequences of U.S. Oil Dependency*, New York 2006, p 18; ML O’SULLIVAN, above n 74, p 30.

¹⁰⁰ ML O’SULLIVAN, above n 74, p 31.

¹⁰¹ ML O’SULLIVAN, above n 74, pp 37-38. And which increases even further when approaches the risk of terrorist actions or sabotage. Note Ch WINZER, above n 69, 37.

¹⁰² In words of ML O’SULLIVAN, above n 74, p 31.

¹⁰³ ML O’SULLIVAN, above n 74, p 31; J JIANG and J SINTON, above n 98, pp 29-34.

poverty.¹⁰⁴ Reference is not only then made to the nature of the risks¹⁰⁵ but also to their sources and to their origin.¹⁰⁶ All these facts, among others, affect the traditionally vital role played by governments in this area as providers, regulators and owners of networked infrastructures¹⁰⁷ and introduce new elements, actors and geometries into the security scene,¹⁰⁸ which impacts on the understanding of the notion and are increasingly taken into account in different ways by national energy security strategies. For instance, the UK Energy Security Strategy identifies several “cross-cutting risks” in this area: major domestic disruption to energy supply and major international disruptions to energy supply, increased international energy prices and insufficient investment in UK energy infrastructure.¹⁰⁹

Energy security has risen in relevance because of the growing habitual dependence of industrialized and emerging economies on imported energy consumption, the increasing potential for frequent disruption in supply and emerging issues and risks for accessing energy.¹¹⁰ Thus, for instance, the *Green Paper - Towards a European strategy for the security of energy supply*, although it still speaks of energy supply, identifies several different risks for energy security: physical, economic, social and environmental risks.¹¹¹ And the *Communication from the Commission to the European Parliament and the Council on European Energy Security Strategy* stresses the geostrategic dimension of energy security and insists on the idea of coordinating national energy policies and on the necessity for the EU to speak “with one voice in external energy policy”.¹¹² Also, in the PRC, “security energy supply through international co-operation” was considered one of the six major areas of focus at the first meeting of the Chinese State Council-level National energy Commission.¹¹³

3.2. Energy security and its links with the protection of critical infrastructures.

The achievement of energy security, a very relevant piece within the whole concept of national security, has now become, with increasing strength, an integrated part of the foreign and defence policy of many countries,¹¹⁴ a foreign policy instrument that has always existed but that now gains further relevance, and affects the attitude towards, for example, FDI, both inwards and outwards.¹¹⁵ The separation of economics and politics in the area of energy has today come to an

¹⁰⁴ J JEWELL, ‘EU energy security is only as strong as its weakest link: the former Eastern Bloc’ *The Conversation*, 18.04.2014, p 1; A CHERP and J JEWELL, above n 70, 418-419; L CHESTER, above n 70, p 160; KM CAMPBELL, J GULLEDGE, JR McNEILL *et al*, *The Age of Consequences: The Foreign Policy and National Security Implications of Global Climate Change*, Center for Strategic & International Studies/Center for a New American Security, Washington November 2007, pp 7 & 65ff. This multiple dimension is now acknowledged by authors (note BK SOVACOO, “Introduction: Defining, Measuring and Exploring Energy Security” in BK SOVACOO (ed), *The Routledge Handbook of Energy Security*, Routledge, Oxford/New York 2013, p 2ff. Also, as a general reference, BK SOVACOO, *Energy Security*, Sage Publications, London, 6 vols, 2014).

¹⁰⁵ “... the risk of interrupted, unavailable energy supplies; the risk of insufficient capacity to meet demand, the risk of unaffordable energy prices, the risk of reliance on unsustainable sources of energy” (L CHESTER, above n 70, p 161).

¹⁰⁶ A CHERP and J JEWELL, above n 70, 419; D VON HIPPEL, T SUZUKI, JH WILLIAMS *et al*, above n 68, 6722-6723.

¹⁰⁷ S BOUZAROVSKI, M BRADSHAW and A WOCHNIK, ‘Making Territory Through Infrastructure: The Governance of Natural Gas Transit in Europe’ /2015) 64 *Geoforum* 217, 217.

¹⁰⁸ UNITED NATIONS DEVELOPMENT PROGRAMME, above n 73, pp 112-113. Also A BRESSAND, above n 66, p 19 regarding the new “actors of influence” in the energy sector.

¹⁰⁹ DEPARTMENT OF ENERGY AND CLIMATE CHANGE, above n 90, pp 25-30. Note also HOUSES OF PARLIAMENT, *Measuring Energy Security*, Postnote, No. 449, London 01.2012, p 1 <researchbriefings.files.parliament.uk/documents/POST-PN-399/POST-PN-399.pdf> accessed 16.05.2016 where reference is made to the maximization of economic recovery of domestic fuel reserves, reduction of the demand for energy, ensuring a well-designed market framework with a clear allocation of responsibilities or influence other countries “for example by diversifying imports and supporting long term contracts”.

¹¹⁰ V CONSTANTINI, F GRACCEVA, A MARKANDYA *et al*, ‘Security of Energy Supply: Comparing Scenarios from a European Perspective’ (2007) 35 *Energy Policy* 210, 211 & 221-224.

¹¹¹ Part 3(I)(A)(1)(2)(3) & (4). Consider, V CONSTANTINI, F GRACCEVA, A MARKANDYA *et al*, above n 110, 210.

¹¹² EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament and the Council European Energy Security Strategy* COM(2014) 330 final, Brussels 28.5.2014, p 17.

¹¹³ J JIANG and J SINTON, above n 98, p 12.

¹¹⁴ As regards the US, note COUNCIL ON FOREIGN RELATIONS, above n 99, pp 3-4; K CRANE, A GOLDTHAU, M TOMAN *et al*, *Imported Oil and U.S. National Security*, RAND Infrastructure, Safety, and Environment and National Security Research Division, Santa Monica 2009, p 60.

¹¹⁵ K CRANE, A GOLDTHAU, M TOMAN *et al*, above n 114, p 25ff.

end. A struggle for energy exists nowadays and national energy security becomes intrinsically geopolitical;¹¹⁶ strategic and geopolitical interests and approaches are currently playing a key role in this area, and in so far as they interplay and dynamically influence each other they affect the achievement of energy security and also, its understanding.¹¹⁷ For example, and from an EU standpoint, the dependence of the EU on the provision of gas from Russia and the successive Ukrainian-Russian crisis has clearly shown this interdependence that now is explicitly taken into account by the EU¹¹⁸ and other countries like the US in its National Security Strategy 2015¹¹⁹ The risk of the use of energy as a political weapon is clear for Europe.¹²⁰

No static or “one-size-fits-all” solution exists as regards the content and understanding of the notion of energy security.¹²¹ The chief concern for energy security is vulnerability to politically motivated disruption:¹²² However, the final response provided will be dependent on the formulation of three essential questions: Security for whom? Security for which values? And security from what threats?¹²³ Depending on the responses granted to these three questions, security energy could be understood as referring broadly to the low vulnerability of vital energy systems of a nation.¹²⁴

The concept of “vital energy systems” addresses the central question of what to protect and refers to energy resources, technologies or infrastructure uses linked together by energy flows that support critical social functions.¹²⁵ That implies a direct link to the notions of critical infrastructure and resilience. Ensuring energy security of the state would also mean ensuring the control and functioning of some critical infrastructures. And the notion of vulnerability of these vital energy systems combines exposure to risks and resilience capacities.¹²⁶

The concept of critical infrastructure varies from country to country. However, and in accordance with the OECD, a common understanding of critical infrastructure would involve any “physical or intangible assets whose destruction or disruption would seriously undermine public safety, social order and the fulfilment of key government responsibilities. Such damage would generally be catastrophic and far-reaching” and will depend either on natural or man-made risks.¹²⁷

Criticality is usually referred to any infrastructure that provides “an essential support for economic and well-being, for public safety and for the functioning of key government responsibilities”.¹²⁸ This is expressed in different ways in several countries. To this respect, legislation in Germany

¹¹⁶ J NYMAN, “Red Storm Ahead”: Securitization of Energy in US-China Relations’ (2014) 43:1 *Millennium: Journal of International Studies* 43, 46.

¹¹⁷ L CHESTER, above n 72, 891; A CHERP, A ADENIKINJU, A OLDTHAU *A et al*, above n 84, pp 368-370; A CORRELJÉ and C VAN DER LINDE, above n 83, 535ff referring to the Market and Institutions and Regions and Empires approach to the oil and gas industry.

¹¹⁸ Russia holds more than 25% of the world’s natural gas and hard coal reserves as well as around 6% of oil reserves. In addition to that it has acquired important infrastructures in some European countries thus having a leading position within them as regards the supply of energy. Note F UMBACH, above n 528, 1230 & 1234; S BOUZAROVSKI, M BRADSHAW and A WOCHNIK, above n 107, 220-222; M BILGIN, above n 97, 1086-1089 analyzing the different potential scenarios for the EU’s energy-security depending on the position maintained by Russia or A MAÑÉ-ESTRADA, ‘European Energy Security: Towards the Creation of the Geo-Energy Space’ (2006) 34 *Energy Policy* 3773, 3781-3784; A CORRELJÉ and C VAN DER LINDE, above n 83, 535 or P BELKIN and VL MORELLI, *The European Union’s Energy Security Challenges*, CRS Report for Congress, January 26, 2007, Congressional Research Service, RL 33636, Washington 2007, p 9ff stressing the influence that these risks may have in the US (*Ibid*, 28-30).

¹¹⁹ US PRESIDENT, *The National Security Strategy of the United States of America March 2006*, Washington 2006, p 25.

¹²⁰ ML O’SULLIVAN, above n 74, p 39.

¹²¹ L CHESTER, above n 72, 893; S BELOW, above n 68, 861.

¹²² S TREVISANUT, ‘Foreign Investments in the Offshore Energy Industry Investment Protection v. Energy Security v. Protection of the Marine Environment’ in T TREVES, F SEATZU and S TREVISANUT (eds), *Foreign Investment, International Law and Common Concerns*, Routledge, London/New York 2014, p 249.

¹²³ A CHERP and J JEWELL, above n 70, 417-418. Other authors speak of what to protect? What risks to be protected from? and how to protect (or prevent)?, note D VON HIPPEL, T SUZUKI, JH WILLIAMS *et al*, above n 68, 6720-6721.

¹²⁴ A CHERP and J JEWELL, above n 70, 418; S TREVISANUT, above n 122, p 249.

¹²⁵ A CHERP and J JEWELL, above n 70, 418.

¹²⁶ *Ibid*, 419.

¹²⁷ OECD, *Protection of “Critical Infrastructure” and the Role of Investment Policies Relating to National Security*, OECD, Paris 05.2008, p 2.

¹²⁸ *Ibid*, p 3.

speaks when asserting this critical condition of “a relative measure of the importance of a given infrastructure in terms of the impact of its disruption or functional failure on the security of supply, i.e. providing society with important goods and services.”¹²⁹ Canada refers to “processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government”.¹³⁰

This new content of the notion implies a further shift in the approach to it and a growing reference to establish complex policies and measures to strategically manage potential risks that can affect all elements of energy systems.¹³¹ Not only reference to the sovereignty dimension of energy security¹³² or to the risk exposure of the system and its vulnerabilities would be made, but also to the resilience of the whole system in an environment of securitization.¹³³

Many national security strategies refer now to energy within the list of critical infrastructures to be protected. For instance, the EU Directive of 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, to which the Communication from the Commission to the European Parliament and the Council on European Energy Security Strategies explicitly refers,¹³⁴ embodies under the headings of “energy”: electricity (infrastructures and facilities for generation and transmission of electricity in respect of supply electricity), oil (Oil production, refining, treatment, storage and transmission by pipelines) and gas (Gas production, refining, treatment, storage and transmission by pipelines and LNG terminals). And reference to the “resilience of the European gas system” is made by the EU.¹³⁵ Also NATO is willing to “enhance its strategic awareness of energy developments with security implications; (and to) develop its competence in supporting the protection of critical energy infrastructure...”.¹³⁶

The list of critical infrastructures is widening overtime¹³⁷ and becoming broader in its interpretation.¹³⁸ This trend to enlarge its understanding generates additional problems. In addition to the physical protection against potential risks and threats, the protection of critical infrastructures encounters a relevant FDI dimension which is ascertainable in some national FDI screening systems. The process of liberalization undertaken during the last few decades has led many critical infrastructures to be owned by private owners, in some cases foreigners. In almost every country critical infrastructures are in many cases privately owned, and for their proper protection the full cooperation between the public administration and private undertakers is required.¹³⁹ In the US, for instance, 85% of critical infrastructures are said to be privately owned.¹⁴⁰ Property of these critical infrastructures, many of them linked to the energy sector, may be transferred to foreigners through M&As operations. This requires in some cases the

¹²⁹ FEDERAL MINISTRY OF THE INTERIOR, *National Strategy for Critical Infrastructure Protection (CIP Strategy)*, Berlin, 17.06.2009, p 7.

¹³⁰ GOVERNMENT OF CANADA/GOUVERNEMENT DU CANADA, *National Strategy for Critical Infrastructure*, Ottawa 2009, p 2.

¹³¹ A CHERP, A ADENIKINJU, A OLDTHAU *et al*, above n 84, pp 329 & 331.

¹³² As regards this notion, A CHERP, A ADENIKINJU, A OLDTHAU *et al*, above n 84, p 365.

¹³³ Note A CHERP, A ADENIKINJU, A OLDTHAU *et al*, above n 84, pp 331 & 365ff; S BELOW, above n 68, 861-862. Also J NYMAN, above n 116, 53ff, as regards the attempt to buy UNOCAL by China National Offshore Oil Corporation (CNOOC). And her quest for desecuritisation of energy (*Ibid*, 60ff.).

¹³⁴ EUROPEAN COMMISSION, above n 112, p 6.

¹³⁵ Note EUROPEAN COMMISSION, *Commission Staff Working Document Report on the Findings of the South-East-European Focus Group Accompanying the Document Communication from the Commission to the European Parliament and the Council on the Short Term Resilience of the European Gas System Preparedness for a Possible Disruption of Supplies from the East During the Fall and Winter of 2014/2015 SWD(2014) 326 final*, Brussels, 16.10.2014, p 2ff.

¹³⁶ NATO, *NATO's role in energy security* <http://www.nato.int/cps/en/natohq/topics_49208.htm> accessed 20.11.2017.

¹³⁷ PhE AUERSWALD, LM BRANSCOMB, TM LA PORTE *et al*, ‘Where Private Efficiency Meets Public Vulnerability: The Critical Infrastructure Challenge’ in PhE AUERSWALD, LM BRANSCOMB, TM LA PORTE *et al* (eds), *Seeds of Disaster, Roots of Response How Private Action Can Reduce Public Vulnerability*, CUP, Cambridge 2006, p 2.

¹³⁸ OECD, above n 127, p 5.

¹³⁹ OECD, above n 127, p 5. Note in the US, DEPARTMENT OF HOMELAND SECURITY, *National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience*, Washington 2013, p 15 ff.

¹⁴⁰ PhE AUERSWALD, LM BRANSCOMB, TM LA PORTE *et al*, above n 137, p 1.

implementation of a process of evaluation by national authorities of FDI proposals in certain sectors of the economy or specific infrastructures and assets to determine whether their prospective acquisition may threaten, or not, the national security of the host state.

This directly poses the question of the interrelation between energy security and the protection of critical infrastructures as two different realities, and their interplay with and within the global notion of “national security”. An issue that is already present in the US in relation to the evaluation by CFIUS of foreign investment projects on national security grounds. Some of the most relevant security concerns associated with foreign investments refer to the preservation of critical infrastructures, a kind of independent area of concern within the general rubric of “essential security interests” or “national security”.¹⁴¹ But what a critical infrastructure is, constitutes something far from being well-established.

Critical infrastructures and their protection are closely related to other dimensions of national security like, for instance, energy and telecommunications. Especially, energy investment is unique due to the particularly long risk exposure, the very intense capital investment and the acute project risk.¹⁴² To what extent the protection of critical infrastructures in the area of energy is a manifestation of the new and broad notion of energy security or is independent of the previous and constitutes an example of the protection of critical infrastructures? Or which level of interrelation with the global notion of “national security” exists are issues to be determined in every country. The absence in many cases of clear definitions in this respect may potentially generate uncertainty when they are used in the area of FDI.

What constitutes critical infrastructure and its necessary protection, and what constitutes energy security is something to be determined by every nation when evaluating FDI projects. Reality shows that their differentiation is not easy and that their broad interpretation provides the state with a multi-tiered instrument to control FDI. Whether measures finally adopted by the state constitute protective measures on “national security” or national “essential security interests” grounds or hidden protectionist measures adopted in the name of economic patriotism, economic national security or similar terms is difficult to assess, with no guarantee of success, on a case by case basis.

4. The multi-dimensional notion of national security.

The notion of national security is complex and multidimensional. It is also subject to constant evolution. It has now expanded to cover situations not directly linked to its traditional military dimension. Foreign Direct Investment is becoming one of those fields in which the issue of national security is gaining relevance. Non-traditional threats arise and they now cover issues like economic security, energy and resource security, environmental security, food security, bio-security or health security, among other areas. National security lacks a clear understanding and it currently defragmented in different national security notions. This makes necessary the determination of the specific relationship of any of these autonomous sectoral concepts of security with the global concept of national security, as well as the specification of the ways to protect them.

¹⁴¹ JK JACKSON, *Foreign Investment and National Security: Economic Considerations*, Congressional Research Service, 7-5700, www.crs.gov, RL34561, Washington 04.04.2013, p 10.

¹⁴² As regards the characteristics of energy investment, note M ERKAN, *International Energy Investment Law. Stability through Contractual Clauses*, Wolter Kulwers Law and Business, Alphen aan den Rijn, 2011, pp 27-29.