



**SECURITY-RELATED TERMS IN INTERNATIONAL INVESTMENT LAW AND IN  
NATIONAL SECURITY STRATEGIES**

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## EXECUTIVE SUMMARY

Building a workable framework for international investment policy requires developing a mutually-understood vocabulary for key policy terms. This fact-finding study, prepared in support of discussions at a March 2009 “Freedom of Investment” Roundtable hosted at the OECD, explores the meaning of three terms – essential security interests, public order and national security – that are used frequently in international policy dialogue, including on investment.

In late 2008 meetings, “Freedom of Investment” Roundtable participants discussed whether it would be appropriate to apply guidance initially developed for recipient country policies relating to “national security”<sup>1</sup> to investment policies relating to “public order” and “essential security interests”. That is, they asked themselves whether these terms have enough in common (shared meaning, shared use in a policy context) that this guidance could be considered equally relevant to them all. This fact-finding study suggests that the answer to this question is “no”.

Although, all three terms evoke general considerations of protecting the security of a country, the safety of its citizens and key aspects of its way of life, their use in different policy contexts is quite different. It is particularly useful in this regard to examine the policy uses of the term “public order”.

This fact-finding study shows that the history and the use of the term “public order” is highly complex and varied:

- *National legal systems.* It plays diverse roles in national legal systems: it is a term in constitutional law in France, Italy and Switzerland, where it has been subjected to country-specific interpretations through national jurisprudence. In Germany, public order is a fundamental legal concept (separate from, but almost always used in conjunction with “public security”) referring to unwritten rules of individual behaviour in the public sphere that are considered indispensable for an orderly life of the people in a community. In the United States, it is most frequently used in criminal law, for example as a label for a category of offenses linked to disorderly behaviour.
- *International law.* The term “public order” has a long history of use in international law. There has been considerable debate in international law circles about the appropriate English language equivalent of the French *ordre public* – recent practice would translate it as “public policy” (its common law equivalent), but some international law texts in English continue to use “public order” or even the French *ordre public*. In addition, this fact-finding study’s review of the use of the term in multilateral and bilateral international agreements provides no evidence that the treaties are underpinned by shared definitions of this term. Moreover, international private law principles call for treaty interpretations to refer to national conceptions of “public order”, suggesting that the diverse national uses of the term provide the standard for international use in some contexts.

Thus, “public order” is an idiosyncratic term – it takes on meaning through international jurisprudence in various fora and through national legal traditions. These meanings are varied. Roundtable participants agreed that there is a need to explore more thoroughly the meaning of this term, with particular focus on clarifying its meaning in the OECD investment instruments.

In contrast, the term “national security” is shown to have a coherent and internationally-understood meaning. Although the definitions used in various national security plans vary somewhat, the term is generally used to refer to protection of the nation and its citizens against a broad set of threats. The national security plans reviewed here reveal that national security policy practitioners have a shared practice and vocabulary relating to risk management, efficient and effective security-related regulation and use of public resources and enhancing accountability. Two of the ten plans reviewed (those of France and the United States) describe the role of international investment review boards in safeguarding national security.

Thus, the OECD guidance on recipient country investment policies relating to national security would appear to be most in line with the objectives, practices and concerns of national security policy. It is therefore appropriate that the guidance uses only the term “national security”, the preferred term of the national security policy community.

## I. INTRODUCTION

The development of mutually understood policy terms facilitates international dialogue on investment policy. In meetings of the “Freedom of Investment” (FOI) Roundtables hosted at the OECD, participants noted that they might not attach the same meanings to such terms as “essential security interests”, “public order” and “national security”. These terms are used in many international investment instruments, including those of the OECD Codes of Liberalisation and the OECD Declaration on International Investment and Multinational Enterprises (Box 1). The *Guidelines on Recipient Country Investment Policies relating to National Security* produced by the Freedom of Investment Roundtables uses the term “national security”. The terms are frequently used in other settings as well. For example, “public order” is a fundamental concept of law in some continental European countries (e.g. it appears in the French, Italian and Swiss constitutions).

This fact-finding study surveys the use of the terms “essential security interests”, “public order” and “national security” in a variety of settings in order to promote understanding of their meanings. The OECD Secretariat has produced this study in order to support discussions at the FOI Roundtables, without prejudice to future decisions about their interpretation in an OECD setting.<sup>2</sup>

This paper looks at the use of the terms “essential security interests”, “public order” and “national security” in three contexts: 1) international law, including international and bilateral agreements and related jurisprudence; 2) national law; and 3) national and multilateral security planning and coordination processes.<sup>3</sup>

### **Box 1. Use of Security-related terms in OECD instruments and reports**

The OECD Codes of Liberalisation state that their provisions shall not prevent countries “from taking actions considered necessary for the maintenance of *public order* or the protection of public health, morals or safety; the protection of *essential security interests*; or the fulfilment of obligations relating to international peace and security.”<sup>4</sup>

The OECD National Treatment instrument recognizes that countries should accord National Treatment “consistent with their needs to maintain *public order*, to protect their *essential security interests*, and to fulfil commitments relating to international peace and security.” The FOI Roundtable has issued guidance regarding investment policy relating to *national security*.

## II. THE USE OF SECURITY-RELATED TERMS IN INTERNATIONAL LAW

The right of nations to defend themselves is one of the oldest principles in international law.<sup>5</sup> Many international agreements contain explicit exceptions or exclusions for actions taken to protect security-related interests. International bodies (courts and legal commissions) and doctrine have produced jurisprudence and developed principles relating to security considerations in international law. This section reviews the use of the terms – essential security interests, public order and national security – in these settings.

### Use of the terms in OECD agreements

The two main OECD investment instruments (Box 1) contain provisions that limit obligations with a view to measures taken in regard to “essential security” or “public order”. The discussion at the OECD that led to the adoption of the Codes’ Article 3, in 1961, indicates that delegates fully intended the choice of language – including “public order” and “essential security interests” – to be an explicit restatement of generally accepted principles of international law.<sup>6</sup>

An authoritative restatement of principles of international law, issued just prior to the development of the OECD Codes was the 1959 “Law of Treaties” Report of the International Law Commission (ILC). In this report, the Rapporteur Sir Gerald Fitzmaurice “restates” the law as it had been decided in International Court of Justice (ICJ) cases and other sources up until that time. Fitzmaurice explains that non-performance of treaty obligations is justified on particular occasions related to “legitimate military self-defence”, “riots and other civil disturbances, or civil war”, “a major emergency arising from natural causes” and adds:

*Treaties dealing with undertakings relating to topics of private international law are to be read as subject to the implied condition or exception of “ordre public” – i.e., that the parties are not obliged to implement the treaty in any case where to do so would be contrary to judicial conceptions of “ordre public” as applied by their courts.*<sup>8</sup>

### Use of the terms in other multilateral agreements and bilateral investment agreements

“Public order”, “essential security interests” and “national security” are terms commonly found in multilateral and bilateral treaties and in other international law texts. Terms vary from agreement to agreement, and their meanings may overlap. A number of other terms are often found in these contexts (e.g. public morals, public health and public security). The provisions therefore invite careful study. Annex 1 lists provisions from twenty-six multilateral treaties, two bilateral treaties,<sup>9</sup> and three model treaties. Annex 2 presents 38 security-related texts in bilateral investment treaties (BITs), investment chapters of Regional Trade Agreements (RTAs) and model BITs.<sup>10</sup> The texts presented in Annexes 1 and 2, make frequent use of the terms “essential security interests”, “public order”, and, more rarely, “national security”.<sup>11</sup>

*A number of multilateral commercial agreements include security-related provisions.* WTO, EU, NAFTA include such provisions. The earliest provisions found date from the immediate post-World War II period. The WTO includes provisions dating back to the 1947 GATT agreement. European treaties include provisions that date back to its earliest agreements of 1957.

*Variable terminology in English for ‘ordre public’.* Annex 1 shows that many multilateral international treaties use the term “public policy”<sup>12</sup> (not “public order”) where the French language version (equally authentic) says “ordre public”. Indeed, a recognized translation of the legal term “ordre public” is “public policy.”<sup>13</sup> In the European Union, “public policy” is today the preferred term, but the International Court of Justice continues to use *ordre public* without translation.<sup>14</sup>

The Hague Conference on Private International Law is among the institutions that choose to use “public policy” as translation of “*ordre public*”. This practice evolved recently and was only adopted after considerable debate.<sup>15</sup> In contrast, the Explanatory Report to a 1978 Convention explains a similar provision in which “*ordre public*” was used, as follows:

*This provision, which is now traditional in Hague Conventions, allows the court applying the Convention to refuse to apply a particular law... only where its application would be manifestly incompatible with “ordre public”. The concept of “ordre public”, which is known in one form or another in most civil law systems, is a more general one, more frequently used by the court, than is the narrower concept of public policy as it is applied in the common law. The Drafting Committee suggested to the Commission that the concept of “ordre public” would be more accurately rendered in the English text by being translated as “public order or the public interest” but the Commission preferred to adhere to the traditional formulation of the English text, on the grounds, firstly, that it is well-established even though it might have its defects and, secondly, that the proposed change, since it would produce two apparently different texts, would cause translation difficulties for Member States using a third language.*<sup>16</sup>

*Treaties and agreements do not define their terms.* None of the treaties and agreements surveyed contains an explicit definition or an exhaustive list of the elements of any of the terms “essential security interests”, “public order” or “national security”.<sup>17</sup> The exact scope and constituting elements of these terms remain uncertain from the face of the text. An attempt to clarify their meaning for the specific treaty would require a thorough study of the genesis of the individual treaty.

*Context does not provide much clarification, either.* Context often provides indications on the interpretation of legal terms. The texts shown in Annexes 1 and 2 do not provide evidence in support of the view that these treaties attribute a consistent meaning to these terms. For example, public order appears a total of 29 times in the treaty texts of the Annexes 1 and 2. In some cases, it appears alone. In other cases, its context suggests relationships with other terms, but these related terms vary from treaty to treaty. For example, it appears in the same context as such terms: “public health,<sup>18</sup> public morals or morality,<sup>19</sup> or “decency”<sup>20</sup>. One BIT refers to “reasons of public order, national security or sound development of national economy”<sup>21</sup> and another to the “maintenance of defence, national security and public order, protection of the environment, morality and public health.”<sup>22</sup>

### ***The use of the terms in international jurisprudence and other sources***

Security-related terms have been used in a variety of other international law contexts:

*Finding an English language equivalent of “ordre public” is difficult.* Although the French term “*ordre public*” is a fundamental legal concept, finding an equivalent in English has proved challenging. While some courts use the common law equivalent of “public policy”, others use the French-language term *ordre public* even in their English texts, suggesting that direct translation of the term risks altering its sense.<sup>23</sup> Other substitute terms appear in decisions of domestic courts.<sup>24</sup>

*The meaning of “public policy” in EC law is controlled by the European Court of Justice (ECJ).* ECJ jurisprudence in principle gives deference to the country-specific content of “public policy” (that is, its preferred translation of “public order”). Yet, over time, it has shown concern that the provisions not become easy excuses for non-performance of treaty obligations.<sup>25</sup> Also, due to the importance given to secondary EU law, the ECJ has in effect limited the possibility for Member States to invoke the treaties’ provisions on “public policy.”<sup>26</sup> Some directives, by defining their exceptions completely, may even suggest content for “public policy” in their areas.<sup>27</sup>

The ECJ interprets the term “public policy” narrowly, and includes only those interests that are “crucial to the protection of the political, social or economic order.”<sup>28</sup> In “Regina versus Pierre Bouchereau”, the ECJ describes “public policy” using the following language:

*The concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.*

In the area of investment, the ECJ refers to both treaty terms 'public policy' and 'public security' (these terms appear together in the treaties). "Public policy and public security" must be interpreted narrowly, and interpretation is reviewable by European-level institutions. It is settled case-law of the ECJ that economic grounds can never serve as justification for obstacles to the free movement of capital.<sup>29</sup> In “Eglise de Scientologie versus France”, the ECJ explained:

*While Member States are still, in principle, free to determine the requirements of public policy and public security in light of their national needs, those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, to this effect, Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219, paragraphs 26 and 27). Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, to this effect, Rutili, cited above, paragraph 28, and Case C-348/96 Calfa [1999] ECR I-11, paragraph 21). Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends (to this effect, see Rutili, paragraph 30).<sup>30</sup>*

ECJ cases also set limits for what the treaty means by “public policy.” “Public policy” does not include other areas of protection such as consumer protection.<sup>31</sup> A “public policy” provision should be construed narrowly as an exception: it “must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure.”<sup>32</sup>

### **III. NATIONAL LAW AND VARIATIONS IN THE USE OF THE CONCEPT “PUBLIC ORDER”**

A review of the use of the term “public order” in five national legal contexts (France, Germany, Italy, Switzerland and the United States) suggests that the term is well established within national legal settings. However, the meaning of “public order” varies widely among the five countries. In some, it plays a fundamental – even constitutional – role, such as in France, Italy and Switzerland. Others use it to describe a class of offenses (United States) or the sum of behavioural norms that have not been codified (Germany). In the United States, other terms are used to describe a similar legal concept – public policy is the term used in common law countries.

#### ***France***

In France, “*ordre public*” is a fundamental and long-standing legal concept. The term *ordre public* appears in the French Constitution of 1789, in several subsequent constitutions, and in Napoleon’s Civil Code, and it has been the subject of considerable jurisprudence. It “is a notion that everyone understands without having to give it a precise definition”, states a member of the *Conseil Constitutionnel*, the French court responsible for interpreting the Constitution.<sup>33</sup> He notes further that the “heart” of *ordre public* can be found in “the principle of security guaranteed by the Declaration of 1789: no liberty is possible if individuals fear for their personal safety.”

A French legal dictionary describes *ordre public* as “a vast conception of communal life in the political and administrative spheres”.<sup>34</sup> The concept helps to define the set of collective concerns that might justify restrictions on individual liberties, especially “liberty of movement, the inviolability of the home, liberty of thought and of expression”. In relation to civil law, the dictionary defines *ordre public* as “the rules that are imposed for reasons of morality or security and that are needed for the conduct of social relations. Parties may not derogate the rules of ‘*ordre public*’.”

### **Germany**

Public order (“*öffentliche Ordnung*”) occupies an important place in German law, but it is almost always used in conjunction with a related term: public security/safety (“*öffentliche Sicherheit*”). “Public security/safety” is defined as the “inviolability of the rule of law, of subjective rights and legal positions of the individual as well as the existence, the institutions and manifestations of the State or other bearers of sovereign power”;<sup>35</sup> public order in turn constitutes the “entirety of those unwritten rules of the behaviour of the individual in the public sphere the respect of which is considered – in light of the general perception at a given point in time – indispensable for an orderly life of the people in a community”.<sup>36</sup>

Both terms are almost invariably used in conjunction with one another (“*öffentliche Sicherheit und Ordnung*”) and the two together constitute a standing core concept of administrative law. The terms are mutually exclusive, because the basis of “public security” is, by definition, set out in law, while what forms “public order” is, by definition, not written as law. This fact also justifies that they are systematically used in conjunction.

In practice, the scope of what remains as (unwritten) “public order” is declining steadily to the benefit of “public security” because almost all norms that need to be respected to allow a life in society are now regulated by law. Indeed, the breadth and imprecision of the term has led some German *Länder* not to include references to public order in the catalogue of concerns calling for police action.<sup>37</sup> Another driver that continually narrows the scope of “public order” is the fact that all authoritative limitations of civil liberties – and thus almost all administrative acts in relation to a citizen – require authorisation by a general law; by virtue of this fact, such limitations are taken out of the domain of public order and into that of public security.

### **Italy**

In Italy, the concept of “public order” is fundamental to the legal system, although it is not precisely defined – a situation that somewhat resembles the situation in French law. The Italian term is closely related to the French and derived from the Napoleonic Code.<sup>38</sup>

The Constitutional Court of Italy has defined “public order as a value which is protected by the Constitution, for the good of the whole community; the norms, which are legitimate under the constitution are those which in a proportional way are designed to prevent and repress disruptions to public order (which should be understood emergence of an effective and concrete state of threat to the legal order through illegal means apt to undermine it) even through the limitation of other rights which are equally protected by the Constitution.”<sup>39</sup>

### **Switzerland**

Public order is an ubiquitous concept in Swiss law at both Federal and Cantonal levels. The Constitution of the Swiss Confederation contains references to public order, and to external and internal security;<sup>40</sup> the Constitution also recognizes the concepts of “constitutional order” and “public order”.<sup>41</sup> Most often, public order is mentioned in conjunction with public security (“public order and security”) as a

composite legal term. Constitutions of the Cantons also mention “public order and security”,<sup>42</sup> and the term “public order” appears in many instances in federal and cantonal administrative law.<sup>43</sup>

The exact content of the concept of “public order” or “public order and security” does not seem to be defined by law itself. “Public order and security” is the umbrella term for certain legal protections under administrative law.<sup>44</sup> In this twin term, “public order” covers the objective legal order, as well as the entirety of the unwritten conceptions that are generally considered to form essential conditions of life in society. “Public security” includes the inviolability of the positions of the individual (such as life, health, liberty, and property) as well as the institutions of the State. Other legal texts shed a somewhat different light on the concept of public order and security that makes the scope of the concept appear wider.<sup>45</sup>

### *Peru*

In Peru, the term “public order” has its place in constitutional law. It appears once in the Constitution of the Republic of Peru (Article 2 allows that “laws governing public order” may circumscribe the guarantee of rights to individuals for making contracts), and for that purpose is given a broad meaning that includes security, order, tranquility, public health, and the free and peaceful exercise of fundamental individual rights.<sup>46</sup> Elsewhere in the Constitution, public need, morals, health and safety, and the term “national security” are also mentioned.

In laws and regulations relating to international investment, no specific reference is made to “public order”.

### *United States*

The term “public order” is used in a variety of ways in legal settings in the United States. An electronic search for the term “public order”<sup>47</sup> in US jurisprudence and statutes reveals a multitude of meanings, most often in a criminal law context. Public order was found to be used ubiquitously, with a number of different, but related meanings. A typology could be proposed as follows: 1) as a label for a category of criminal offenses (such as trespass, harassment, and disorderly behaviour); 2) the basis for police power and a duty of police forces; 3) a reference to the name of a public authority (including law enforcement authorities). Public order also is the name sometimes given to official court orders; in military orders it may refer to basic security and institutional needs of a population. Finally, the term refers, in US jurisprudence, to the mandatory rules (rules which cannot be derogated) of other countries.<sup>48</sup> Thus, under US law, the term “public order” takes on variety of meanings and its use in the United States does not generally describe the “*ordre public*” (in the French sense of the term; see above) of the United States.

In the common law tradition, the closest equivalent of *ordre public* is the term “public policy”, which is a long-standing common law rule.<sup>49</sup> In US jurisprudence, “public policy” refers to mandatory rules of law which could be relied upon to justify setting aside other binding obligations. It empowers a court to void contracts, and prevent the application of conflicting laws.<sup>50</sup> The doctrine is defined in a well-known legal dictionary<sup>51</sup> as “community common sense and common conscience, extended and applied throughout the state to matters of *public morals, health; safety, welfare and the like*; it is that general and well-settled opinion as to man’s plain, palpable duty to his fellow men, having due regard to all circumstances of each particular relation and situation” (emphasis added).

#### IV. PLANNING AND CO-ORDINATION PROCESSES FOR SAFEGUARDING NATIONAL SECURITY

The previous sections review the uses of the term “public order”, “essential security interests” and “national security” in various national and international legal settings. This section looks at how these terms are used in nine national security strategies and plans – of Australia, Austria, Canada, France, Germany, Italy, Mexico, United Kingdom, and United States – and the European Security Strategy.<sup>52</sup> These plans and strategies define national security, identify sources of threat and vulnerability, and provide blueprints for assignment of roles and cooperation at the international, national and sub-national levels in managing security related risks.

All of the plans reviewed use the term “national security” as the central concept. The term “public order” appears infrequently (it is mentioned in the French plan) and the term “essential security interests” was not found in any of the plans. A number of themes emerge from this examination of texts.

*National security is a dynamic, evolving concept.* Several national security plans note that the concept of national security is dynamic and continually evolving (Annex 3). Recently, the focus has expanded beyond protecting borders from military attack to include protecting the public from large scale threats to its safety and way of life. For example, the UK plan notes that: “in the past, the state was the official focus of foreign, defence and security policies, and national security was understood as dealing with the protection of the state and its vital interests from attacks by other states. Over recent decades, our view of national security has broadened to include threats to individual citizens and to our way of life...”. The European Security Strategy states: “Our traditional concept of self-defence – up to and including the Cold War – was based on threat of invasion. ... “There has also been a gradual blurring of the boundaries between external and internal threats. In the preamble to the French Security White Paper, the French President notes that the “traditional separation between internal security and external security is being steadily erased.” “Constant adaptation to change” is a value promoted in the Mexican National Security Policy.

*Coherent meaning and objectives across national plans – protecting nations and citizens* (Table 1). Although there is some variation across countries, the meaning of term “national security” is quite similar across national plans – it refers to protecting nations and citizens. For example, the United States plan states: “Our first and most solemn obligation is to protect the American people.” The French plan states that its goal is the “protection of the population and the territory of France”. The UK plan commits to “providing security for the nation and its citizens.” The plans also deal with threats with impacts whose scale means that they cannot be managed by individuals, or by single government departments or at the local or regional level. For example, the Canadian plan addresses threats that “require a national response, as they are beyond the capacity of individuals, communities or provinces to address alone.” The French plan refers to improving the nation’s ability to “face large scale crises”.

*The plans adopt a broad, integrated approach to risk management.* Related to the focus on safeguarding the security of people is the tendency for the plans to aspire to a broad and integrated management of risks, often including all threats to public safety that require co-ordinated, nation-wide responses (Table 2). Most plans covered the following threats: terrorism, weapons of mass destruction, attacks by foreign countries, global pandemics, natural disasters and man-made emergencies. Many plans also cover a series of related concerns such as energy security, failed states and organised crime.

*The plans seek to co-ordinate the actions of many actors and to construct an efficient overall policy framework for safeguarding national security.* The plans are, first and foremost co-ordinating devices for integrating the efforts of the various policy communities that participate in the management of large scale security threats (e.g. armed forces, national and international intelligence and sectoral regulators). They identify human and physical assets needed to implement the plans and often discuss the resources needed

to secure these assets. They co-ordinate roles across various parts of government and across various levels of government. They set forth commitments to government transparency and accountability.<sup>53</sup> They define private sector roles, including those of private operators of critical infrastructure.<sup>54</sup> For most countries, the role assigned to investment policy making in these plans is non-existent. Two of the plans – those of France and the United States – mention the role of investment policy reviews in protecting national security. The texts describing these roles occupy only a small part of very large plans. Thus, even in these plans, the role of investment policy making is relatively small, with defence, international intelligence and sectoral regulators assuming more important roles.

In summary, this review of national security strategy suggests that the term “national security”, despite some variations across the ten plans studied, represents a coherent concept that has an internationally-understood meaning. The national security plans cover a reasonably similar set of risks (although they do not all take the same approach to assigning roles to investment policy in managing these risks). They seek to create transparent and accountable policy systems for managing these risks.

**Table 1. Objectives of national security in selected national security plans**

From National Security Strategies	
Canada	<p>National security deals with threats that have the potential to undermine the security of the state or of society. These threats generally require a national response, as they are beyond the capacity of individuals, communities or provinces to address alone. National security is closely linked to both personal and international security. While most criminal offences, for example, may threaten personal security, they do not generally have the same capacity to undermine the security of the state or society as do activities such as terrorism or some forms of organized crime.</p> <p>Given the international nature of many of the threats affecting Canadians, national security also intersects with international security. At the same time, there are a growing number of international security threats that impact directly on Canadian security and are addressed in this strategy.</p>
France	<p>La <i>protection</i> de la population et du territoire français revient au cœur de notre stratégie, en raison de l'apparition des nouvelles vulnérabilités auxquelles ils sont directement exposés. L'objectif est de protéger la nation face à des <i>crises de grande ampleur, tout en augmentant sa capacité de résilience. Celle-ci se définit comme la « capacité des pouvoirs publics et de la société française à répondre à une crise majeure et à rétablir rapidement leur fonctionnement normal ».</i></p>
Germany	<p>Germany has not yet adopted an official national security strategy that provides a comprehensive plan for managing security risks stemming from a broad range of threats. A 2006 White Paper identifies international terrorism, WMD proliferation, and consequences of regional conflicts and failed states as main security risks. Energy security, migration and pandemics are also mentioned. The White Paper notes that globalisation has brought risks rooted in distant regions to Germany; it also has increased the vulnerability of Germany's critical infrastructure, including through attacks in cyberspace.</p>
Mexico	<p>National Security Policies are the ensemble of principles that define the regular State's behavior, in its effort to reach and preserve the security of the Nation as a whole.</p> <p>A policy in this field allows rationalizing, managing and governing the national security state action, setting general criteria to adopt strategies, use resources, impose measures and execute missions. The Mexican National Security Policy is conformed by the following principles:</p> <p><b>Comprehensiveness</b> Assumption of a holistic approach</p> <p><b>Dynamic behavior</b> Constant adaptation to change</p> <p><b>Lawfulness</b> Being in conformity with the Mexican positive law</p> <p><b>State supremacy and legitimacy</b> Fair appraisal of the state as main actor of the promotion of the national interest</p> <p><b>Democratic participation</b> Promotion of the national security based on civil society's participation</p> <p><b>Selectiveness</b> Careful national security issues ranking</p>
United Kingdom	<p>"Providing security for the nation and for its citizens ...."</p>
United States	<p>Our first and most solemn obligation is to protect the American people. The <i>National Strategy for Homeland Security</i> will guide our Nation as we honour this commitment and achieve a more secure Homeland that sustains our way of life as a free, prosperous, and welcoming America (from the 2007 National Strategy)</p>

**Table 2. Issues or Threats Covered in Selected National Security Plans**

Country/ Region	Terrorism	Weapons of Mass Destruction	Attack by foreign country	Pandemic	Natural disaster	Man-made emergency	Other concerns discussed
Australia	x	x		x	x		Technology-enabled crime (e.g. cyber crime), critical infrastructure
Austria	x	x		x	x	x	Regional conflict, failed states, organised crime
Canada	x	x	x	x	x	x	Critical infrastructure, cyber networks, failed states, organised crime, trafficking in drugs or humans, climate change
France	x	x	x	x	x	x	Critical infrastructure, organised crime, trafficking in drugs or humans
Germany	x	x		x	x	x	Critical infrastructure, migration, regional conflict, failed states
Italy (same as EU)	x	x	x	x			Regional conflicts, failed states, organised crime
Mexico	x		x				Regional conflict
United Kingdom	x	x	x	X	x	x	Energy, regional conflict, failed states, climate change
United States	x	x	x	X	x	x	Critical infrastructure, energy, trafficking in drugs or humans
European Union	x	x	x	X			Regional conflicts, failed states, organised crime

## V. CONCLUSIONS

At the FOI Roundtable held in December 2008, Roundtable participants considered whether it would be appropriate to apply guidance initially developed for recipient country policies relating to “national security”<sup>55</sup> to investment policies relating to “public order” and “essential security interests”. That is, they asked themselves whether these terms have enough in common (shared meaning, shared use in a policy context) that the new guidance could be considered equally relevant to them all. This fact-finding study suggests that the answer to this question is “no”.

Although, all three terms evoke general considerations of protecting the security of a country, the safety of its citizens and key aspects of its way of life, their use in different policy contexts is quite different. It is particularly useful in this regard to explore the policy uses of the term “public order”.

This fact-finding study shows that the history and the use of the term “public order” is highly complex and varied:

- *National legal systems.* It plays diverse roles in national legal systems: it is a term in constitutional law in France, Italy and Switzerland, where it has been subjected to country-specific interpretations through national jurisprudence. In Germany, public order is a fundamental legal concept (separate from, but almost always used in conjunction with “public security”) referring to unwritten rules of individual behaviour in the public sphere that are considered indispensable for an orderly life of the people in a community. In the United States, it is most frequently used in criminal law, for example as a label for a category of offenses linked to disorderly behaviour.
- *International law.* The term “public order” has a long history of use in international law. There has been considerable debate in international law circles about the appropriate English language equivalent of the French *ordre public* – recent practice would translate it as “public policy” (its common law equivalent), but some international law texts in English continue to use “public order” or even the French *ordre public*. In addition, this fact-finding study’s review of the use of the term in multilateral and bilateral international agreements provides no evidence that the treaties are underpinned by shared definitions of this term. Moreover, international private law principles encourage interpretations of treaties to refer to national conceptions of “public order” (or *ordre public*), suggesting that the diverse national uses of the term provide the standard for international use in some contexts.

Thus, “public order” is an idiosyncratic term – it takes on meaning through international jurisprudence in various fora and through national legal traditions. These meanings are varied. Roundtable participants agreed that there is a need to explore more thoroughly the meaning of this term, with particular focus on clarifying its meaning in the OECD investment instruments.

In contrast, the term “national security” is shown to have a coherent and internationally-understood meaning. Although the definitions used in various national security plans vary somewhat, the term is generally used to refer to protection of the nation and its citizens against a broad set of threats. The national security plans reviewed here reveal that national security policy practitioners have a shared practice and vocabulary relating to risk management, efficient and effective security-related regulation and use of public resources and enhancing accountability. Two of the ten plans reviewed (those of France and the United States) describe the role of foreign investment review boards in safeguarding national security.

Thus, the OECD guidance on recipient country investment policies – which, from the perspective of the investment policy community, attempts to promote effective safeguards for national security while

leaving international investment markets open – would appear to be most in line with the objectives, practices and concerns of national security policy. It is therefore appropriate that the guidance uses only the term “national security”, the preferred term of the national security policy community.

## ANNEX 1. SECURITY-RELATED PROVISIONS IN INTERNATIONAL AGREEMENTS

Two tables below provide samples of security-related provisions in selected international agreements (Table 1) and international model laws or other sources (Table 2), so as to allow a comparison of the terms “public order” “essential security interests” and “national security” as they are used in drafting these provisions.<sup>56</sup> Other terms found in these provisions are identified.

**Table 1. Security-related provisions in selected international agreements**

		Public order	Essential security interests	National security	Other
<b>OECD</b>					
Convention on the Organization for Economic Co-operation and Development (1960)		no	no	no	
OECD Code of Liberalisation of Capital Movements OECD/C(61)96 <i>and</i> OECD Code of Liberalisation of Current Invisible Operations	<p>Article 3. Public Order and Security</p> <p>The provisions of this Code shall not prevent a Member from taking action which it considers necessary for:</p> <p>i) the maintenance of <b>public order</b> or the protection of public health, morals or safety;</p> <p>ii) the protection of its <b>essential security interests</b>;</p> <p>iii) the fulfilment of its obligations relating to international peace and security.</p>	yes	yes	no	Public health, public morals, public safety, international peace and security

OECD/C(61)95					
OECD Declaration on International Investment and Multinational Enterprises C(76)99	<p>National Treatment</p> <p>II.1. That adhering governments should, consistent with their needs to maintain <b>public order</b>, to protect their <b>essential security</b> interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government (hereinafter referred to as ("Foreign-Controlled Enterprises") treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as "National Treatment");</p>	yes	yes	no	International peace and security
<b>WTO</b>					
Agreement Establishing the World Trade Organization (incorporating GATT 1994, GATT 1947, GATS, and other Multilateral Trade Agreements and Plurilateral Trade Agreements)		yes	yes	yes	See below for each
General Agreement on Trade in Services (1994)	<p>Article XIV</p> <p>General Exceptions</p> <p>Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:</p> <p>(a) necessary to protect public morals or to maintain <b>public order</b>; See footnote 5</p> <p>(b) necessary to protect human, animal or plant life or health;</p> <p>(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</p>	yes	yes	no	Public morals, Protect human animal or plant life or health, secure compliance with laws, taxes, compliance with UN Charter obligations

	<p>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;</p> <p>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;</p> <p>(iii) safety;</p> <p>(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective (See footnote 6) imposition or collection of direct taxes in respect of services or service suppliers of other Members;</p> <p>(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.</p> <p><b>Footnote: 5</b></p> <p><b>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.</b></p>				
	<p>Article XIV bis</p> <p>Security Exceptions</p> <p>1. Nothing in this Agreement shall be construed:</p> <p>(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its <b>essential security interests</b>; or</p> <p>(b) to prevent any Member from taking any action which it considers necessary for the protection of its <b>essential security interests</b>:</p> <p>(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;</p> <p>(ii) relating to fissionable and fusionable materials or the materials from which they are derived;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p> <p>(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</p> <p>2. The Council for Trade in Services shall be informed to the fullest extent possible</p>				

	of measures taken under paragraphs 1(b) and (c) and of their termination.				
GATT 1994	Incorporates GATT 1947 (see next entry)	no	yes	no	(See next entry)
GATT 1947 (now integrated into GATT 1994)	<p>Article XX General Exceptions</p> <p>Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:</p> <p>(a) necessary to protect public morals;</p> <p>(b) necessary to protect human, animal or plant life or health;</p> <p>(c) relating to the importations or exportations of gold or silver;</p> <p>(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;</p> <p>(e) relating to the products of prison labour;</p> <p>(f) imposed for the protection of national treasures of artistic, historic or archaeological value;</p> <p>(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;</p> <p>(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;</p> <p>(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; <i>Provided</i> that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-</p>	no	yes	no	Public morals, human animal or plant life or health, gold/silver import, compliance with laws not inconsistent with this agreement, etc.; compliance with UN Charter obligations

	<p>discrimination;</p> <p>(j) essential to the acquisition or distribution of products in general or local short supply; <i>Provided</i> that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.</p> <p>The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.</p>				
	<p>Article XXI</p> <p>Security Exceptions</p> <p>Nothing in this Agreement shall be construed</p> <p>(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its <b>essential security interests</b>; or</p> <p>(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its <b>essential security interests</b></p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p> <p>(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</p>				
<p>Agreement on Government Procurement (1994)</p>	<p>Article XXIII. Exceptions to the Agreement</p> <p>1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its <b>essential security interests</b> relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for <b>national security</b> or for national defence purposes.</p> <p>2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on</p>	<p>yes</p>	<p>yes</p>	<p>yes</p>	<p>National defence; public morals; public safety; human animal or plant life or health; intellectual property; relating to the products or</p>

	international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect <b>public</b> morals, <b>order</b> or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.				services of handicapped persons, of philanthropic institutions or of prison labour.
Agreement on Trade-Related Aspects of Intellectual Property Rights (integrated into GATT 1994)	<p>Article 73 Security Exceptions</p> <p>Nothing in this Agreement shall be construed:</p> <p>(a) to require a Member to furnish any information the disclosure of which it considers contrary to its <b>essential security interests</b>; or</p> <p>(b) to prevent a Member from taking any action which it considers necessary for the protection of its <b>essential security interests</b>;</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p> <p>(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</p>	no	yes	no	Compliance with UN Charter obligations
Agreement on Technical Barriers to Trade	<p>Technical Regulations and Standards</p> <p>Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies</p> <p>With respect to their central government bodies:</p> <p>2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.</p> <p>2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to</p>	no	no	yes	Prevention deceptive practices, human health or safety, animal or plant life or health, environment

	international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, <i>inter alia</i> : <b>national security requirements</b> ; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, <i>inter alia</i> : available scientific and technical information, related processing technology or intended end-uses of products.				
<b>European Union</b>					
<p>Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union</p> <p>(2008/C 115/01)</p> <p><i>Official Journal C115, 09/05/2008 P. 0001 - 0388</i></p> <p><i>NB: This publication, provisional in nature, contains the consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union, together with the annexes and protocols thereto, as they will result from the amendments introduced by the Treaty of Lisbon, signed on 13</i></p>	<p>Article 4</p> <p>1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.</p> <p>2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding <b>national security</b>. In particular, <b>national security</b> remains the sole responsibility of each Member State. ....</p>	yes – as public policy	no	yes	Public morality; public policy; public security; health and life of humans, animals, and plants; protection national treasures; industrial and commercial property; taxes

<p><i>December 2007 in Lisbon. The Treaty of Lisbon has not yet entered into force and is still in the process of being ratified by the Member States, in accordance with their respective constitutional requirements. As provided for in Article 6 thereof, the Treaty will enter into force, provided that all the instruments of ratification have been deposited, on the first day of the month following the deposit of the last instrument of ratification.</i></p>					
	<p>Article 36 (ex Article 30 TEC)</p> <p>The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, <b>public policy</b> or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.</p>				
	<p>TITLE IV FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL CHAPTER 1 WORKERS</p>				

	<p>Article 45 (ex Article 39 TEC)</p> <p>1. Freedom of movement for workers shall be secured within the Union.</p> <p>2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.</p> <p>3. It shall entail the right, subject to limitations justified on grounds of <b>public policy</b>, public security or public health:</p> <p>(a) to accept offers of employment actually made;</p> <p>(b) to move freely within the territory of Member States for this purpose;</p> <p>(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;</p> <p>(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.</p> <p>4. The provisions of this Article shall not apply to employment in the public service.</p>				
	<p>Article 52 (ex Article 46 TEC)</p> <p>1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of <b>public policy</b>, public security or public health.</p> <p>2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.</p>				
	<p>Article 65 (ex Article 58 TEC)</p> <p>1. The provisions of Article 63 shall be without prejudice to the right of Member States:</p>				

	<p>(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;</p> <p>(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of <b>public policy</b> or public security.</p> <p>2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.</p> <p>3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.</p> <p>4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.</p>				
	<p>Article 202 (ex Article 186 TEC)</p> <p>Subject to the provisions relating to public health, public security or <b>public policy</b>, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203.</p>				
<p>Treaty on European Union (<i>Official Journal C 191, 29 July 1992</i>) (subsumed in above consolidated treaties)</p>	<p>Article 73d</p> <p>1. The provisions of Article 73b shall be without prejudice to the right of Member States:</p> <p>(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or</p>	<p>yes – as public policy</p>	<p>no</p>	<p>no</p>	<p>Public security</p>

	<p>with regard to the place where their capital is invested;</p> <p>(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of <b>public policy</b> or public security.</p> <p>2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.</p> <p>3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b.</p>				
Treaty establishing the EEC 1957	<p>Article 36</p> <p>The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, <b>public order</b>, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.</p>	yes	no	no	Public morality; public safety; protection of human or animal life or health, protection of plant life; national treasures; industrial and commercial property
Treaty establishing the European Atomic Energy Community (Non official consolidated version) (1996)	<p>Article 96</p> <p>The Member States shall abolish all restrictions based on nationality affecting the right of nationals of any Member State to take skilled employment in the field of nuclear energy, subject to the limitations resulting from the basic requirements of <b>public policy</b>, public security or public health.</p> <p>After consulting the European Parliament, the Council may, acting by a qualified majority on a proposal from the Commission, which shall first request the opinion of the Economic and Social Committee, issue directives for the application of this Article.</p>	yes – as public policy	no	no	Public security, public health
Traité instituant la Communauté européenne de	<p>Article 96</p> <p>Les États membres suppriment toute restriction, fondée sur la nationalité, à l'accès</p>	yes	no	no	Securite publique,

l'énergie atomique (EURATOM) 1957	<p>aux emplois qualifiés dans le domaine nucléaire, à l'égard des nationaux d'un des États membres, sous réserve des limitations qui résultent des nécessités fondamentales <b>d'ordre public</b>, de sécurité publique et de santé publique.</p> <p>Après consultation de l'Assemblée, le Conseil, statuant à la majorité qualifiée sur proposition de la Commission qui demande au préalable l'avis du Comité économique et social, peut arrêter les directives touchant les modalités d'application du présent article.</p>				santé publique
	<p>Article 10 – Freedom of expression</p> <p>1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.</p> <p>2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of <b>national security</b>, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.</p> <p>Article 11 – Freedom of assembly and association</p> <p>1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.</p> <p>2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of <b>national security</b> or public safety, 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 article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.</p>				
<b>Other multilateral (commercial and related) agreements</b>					
United Nations Convention on the Recognition and Enforcement of	<p>Article V</p> <p>2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought</p>	yes – as public policy	no	no	

<p>Foreign Arbitral Awards (New York, 10 June 1958)</p>	<p>finds that: (b) The recognition or enforcement of the award would be contrary to the <b>public policy</b> of that country.</p>				
<p>United Nations Convention on the Assignment of Receivables in International Trade (2001)</p>	<p>Article 23 - Public policy and mandatory rules</p> <p>1. The application of a provision of the law of the State in which the assignor is located may be refused only if the application of that provision is manifestly contrary to the <b>public policy</b> of the forum State.</p> <p>2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located.</p> <p>3. Notwithstanding paragraph 2 of this article, in an insolvency proceeding commenced 161 in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 22. A State may deposit at any time a declaration identifying any such preferential right.</p>	<p>yes – as public policy</p>	<p>no</p>	<p>no</p>	
<p>United Nations Convention Against Corruption (2003)</p>	<p>Article 13 - Participation of society</p> <p>1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non- governmental organizations and community- based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:</p> <p>(a) Enhancing the transparency of and promoting the contribution of the public to decision- making processes;</p> <p>(b) Ensuring that the public has effective access to information;</p> <p>(c) Undertaking public information activities that contribute to non- tolerance of corruption, as well as public education programmes, including school and university curricula;</p> <p>(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:</p>	<p>yes –as “ordre public”</p>	<p>no</p>	<p>yes</p>	<p>Rights or reputation of others, public health, public morals</p>

	(i) For respect of the rights or reputations of others; (ii) For the protection of <b>national security</b> or <b>ordre public</b> or of public health or morals.				
Convention On The Law Applicable To International Sale Of Goods (The Hague, 1955)	Article 6 In each of the Contracting States, the application of the law determined by this convention may be excluded on a ground of <b>public policy</b> .	yes – as public policy	no	no	
Convention on The Law Applicable to Agency (The Hague, 14 March 1978)	Article 17 The application of a law specified by this Convention may be refused only where such application would be manifestly incompatible with public policy ( <i>ordre public</i> ).	yes – as public policy	no	no	
Convention on the Law Applicable to Contracts for the International Sale of Goods (The Hague, 1986) (This Convention has not yet entered into force.)	Article 18 The application of a law determined by the Convention may be refused only where such application would be manifestly incompatible with public policy ( <i>ordre public</i> ).	yes – as public policy	no	no	
<b>Selected Bilateral Friendship Treaties<sup>57</sup></b>					
Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (signed 1955)	Article XX, paragraph 1 (d) The present Treaty shall not preclude the application of measures:.....  (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its <b>essential security interests</b> .	n/a	yes	no	International peace and security
Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States (1956)	<i>Article XXI 1(d)</i> 1. The present Treaty shall not preclude the application of measures: . . . . . .....  (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its <b>essential security interests</b> . . .	n/a	yes	no	International peace and security

**Table 2. Security-related provisions in selected international model laws and other sources**

		Public order	Essential security interests	National security	Other
UNCITRAL Model Law on International Commercial Arbitration (1985)	<p>Article 34 - Application for setting aside as exclusive recourse against arbitral award</p> <p>... 2. An arbitral award may be set aside by the court specified in article 6 only if:</p> <p>... (b) the court finds that:</p> <p>(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or</p> <p>(ii) the award is in conflict with the public policy of this State.</p>	yes – as public policy	no	no	
UNIDROIT Principles of International Commercial Contracts (2004)	<p>ARTICLE 1.4</p> <p>(Mandatory rules)</p> <p>Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.</p>	yes – as mandatory rules	no	no	
United Nations Model Law on Cross Border Insolvency (1997)	<p>Article 6. Public policy exception</p> <p>Nothing in this Law prevents the court from refusing to take an action governed by this 32</p> <p>Law if the action would be manifestly contrary to the public policy of this State.</p>	yes – as public policy	no	no	

**ANNEX 2.  
TABLE OF BILATERAL TREATIES AND RTAS  
CONTAINING PROVISIONS ON ESSENTIAL SECURITY INTERESTS<sup>58</sup>**

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>Model BITs</b>		
<b>1.</b>	<b>Canada Model BIT (2004)</b>	<p><b>Article 10 – General Exceptions</b></p> <p>[...]</p> <p>4. Nothing in this Agreement shall be construed:</p> <p>(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;</p> <p>(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests</p> <p style="padding-left: 40px;">(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,</p> <p style="padding-left: 40px;">(ii) taken in time of war or other emergency in international relations, or</p> <p style="padding-left: 40px;">(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or</p> <p>(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</p>
<b>2.</b>	<b>France Model Treaty</b>	<b>None</b>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>3.</b>	<b>German Model Treaty (2005)</b>	<p style="text-align: center;"><b>Protocol to the Treaty</b></p> <p>3. Ad Article 3</p> <p>(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3 (2): the management, maintenance, use, enjoyment and disposal of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.</p>
<b>4.</b>	<b>India Model BIT (2003)</b>	<p style="text-align: center;"><b>Article 12 Applicable Laws</b></p> <p>(1) Except as otherwise provided in this Agreement, all investment shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.</p> <p>(2) Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.</p>
<b>5.</b>	<b>UK Model Treaty (2005)</b>	<b>None</b>
<b>6.</b>	<b>US Model Treaty (2004)</b>	<p style="text-align: center;"><b>Article 18: Essential Security</b></p> <p>Nothing in this Treaty shall be construed:</p> <p>1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or</p> <p>2. to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>Sample BITs and RTAs</b>		
Substantial exclusions (treatment, protection...)		
<b>7.</b>	<b>Argentina-Belgium BIT</b> (Brussels, 28 June 1990)	<p style="text-align: center;"><b>Artículo 5</b> <b>Medidas Privativas y Restrictivas de Propiedad</b></p> <p>[...]</p> <p>1. En caso de que imperativos de utilidad pública, de seguridad o de interés nacional justifiquen una derogación de lo indicado en el párrafo 1, deberán cumplirse las siguientes condiciones:</p> <p style="margin-left: 40px;">a/ que las medidas sean tomadas según el respectivo procedimiento legal;</p> <p style="margin-left: 40px;">b/ que ellas no sean discriminatorias, ni contrarias a un compromiso específico;</p> <p style="margin-left: 40px;">c/ que las mismas estén acompañadas de disposiciones que prevean el pago de una indemnización adecuada y efectiva.</p>
<b>8.</b>	<b>Australia –India BIT</b> (New Delhi, 26 February 1999) Entry into force: 4 May 2000	<p style="text-align: center;"><b>Article 15</b> <b>Prohibitions and restrictions</b></p> <p>Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.</p>
<b>9.</b>	<b>Belgian-Luxembourg economic union – China BIT</b> (Brussels, 4 June 1984) Entry into force: 5 October 1986	<p style="text-align: center;"><b>Article 4</b></p> <p>1. Neither Contracting Party shall in its territory take the measure of expropriation, nationalization or other similar measures on the investment of the investor of the other Contracting Party except for the necessity of security and public interest under the following conditions:</p> <p style="margin-left: 40px;">(1) measures taken pursuant to the domestic legal procedure;</p> <p style="margin-left: 40px;">(2) measures are non-discriminatory if compared with the measures taken against the investment or investor of a third State;</p> <p style="margin-left: 40px;">(3) rules on the payment of compensation are provided.</p>
<b>10.</b>	<b>Chile-Germany BIT</b> (Bonn, 21 October 1991) Entry into force: 18 July 1999	<p style="text-align: center;"><b>PROTOCOLO</b></p> <p>(2) Ad Artículo 3</p> <p>a) Por "actividades" en el sentido del párrafo 2 se entenderán en especial, pero no exclusivamente la administración, la utilización, el uso y el aprovechamiento de una inversión. Se considerará especialmente como trato "menos favorable" en el sentido del Artículo 3: la limitación en la adquisición de materias primas e insumos auxiliares, energía y combustibles, así como cualesquiera medios de producción y explotación, la</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
		obstaculización de la venta de productos en el interior del país y en el extranjero, y toda medida de efectos análogos. Las medidas que haya que adoptar por razones de seguridad y de orden público, de salud pública o de moralidad, no se considerarán como trato "menos favorables" en el sentido del Artículo 3.
<b>11.</b>	<b>China-Philippines BIT</b> (Manila, 20 July 1992) Entry into force: 8 September 1995	<p style="text-align: center;"><b>Article 4</b></p> <p>1. Either Contracting Party may, for reasons of national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting Party in its territory, but the following conditions shall be met:</p> <p>a) under domestic legal procedure;</p> <p>b) without discrimination;</p> <p>c) upon payment of fair and reasonable compensation.</p>
<b>12.</b>	<b>Czech Republic – United States BIT</b> (Washington Signed 22 October 1991) Entered into Force 19 December 1992	<p style="text-align: center;"><b>Article X</b></p> <p>1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p> <p>2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.</p>
<b>13.</b>	<b>Estonia – United States BIT</b> (Washington, 19 April 1994) Entered into Force 16 February 1997	<p style="text-align: center;"><b>Article IX</b></p> <p>1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p>
<b>14.</b>	<b>France – Bangladesh BIT</b> (Paris, 10 September 1985) Entry into force: 3 October 1986	<p style="text-align: center;"><b>Echange de Lettre n°3</b></p> <p>[...]</p> <p>a) L'expression « activité » signifie, dans le paragraphe 1 de l'article 5 particulièrement, mais non exclusivement, la gestion, la maintenance, l'usage et la jouissance d'un investissement. L'expression « traitement moins favorable » signifie dans le paragraphe 1 de l'article 5 notamment : toute restriction à l'achat de matière premières ou de matières auxiliaires, d'énergie ou de combustible ou de moyens de production ou d'exploitation de out genre, toute entrave, ainsi que toute autre mesure ayant un effet analogue, dans le cadre de la réglementation de chacune des Parties contractantes. Les mesures qui ont été prises pour des motifs de sécurité publique et d'ordre, de santé publique ou de moralité ne sont pas considérées comme un « traitement moins favorable » au sens de l'article 5...</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>15.</b>	<b>Germany – Russian Federation BIT</b> (Bonn, 13 June 1989) Entry into force: 5 August 1991	<p style="text-align: center;"><b>Protocol to the Agreement</b></p> <p>[...]</p> <p>(2) <i>In relation to article 3</i></p> <p>[...]</p> <p>(c) "Discriminatory measures" within the meaning of article 3, paragraph 4, should include, in particular, unjustified restrictions on the acquisition of raw materials and auxiliary materials, energy and fuel, all types of means of production and revolving resources, obstacles to the marketing of products and the use of credits, and restrictions on the work of personnel and other measures having similar consequences.</p> <p>Measures undertaken in the interests of law and order and security, morality or public health shall not be regarded as "discriminatory measures".</p>
<b>16.</b>	<b>Hungary – India BIT</b> (New Delhi, 3 November 2003)	<p style="text-align: center;"><b>Article 12</b> <b>Applicable Laws</b></p> <p>1. Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.</p> <p>2. Notwithstanding paragraph 1 of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.</p>
<b>17.</b>	<b>India – Czech Republic BIT</b> (Prague, 11 October 1996) Entry into force: 6 February 1998	<p style="text-align: center;"><b>Article 12</b> <b>Exception</b></p> <p>The provisions of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a non discriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.</p>
<b>18.</b>	<b>Israel – Germany BIT</b> (Bonn, 24 June 1976)	<p style="text-align: center;"><b>Protocol</b></p> <p>[...]</p> <p>(2) Ad Article 3</p> <p>(a) The following shall more particularly, though act exclusively, be deemed 'activity' within the meaning of paragraph 2 of Article 3: the management, maintenance, use, and enjoyment of an investment. The following shall, in particular, be deemed 'treatment less favourable' within the meaning of paragraph 2 of Article 3: restricting the purchase of raw or auxiliary materials of energy or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects, if directed in a discriminatory way against nationals or companies of the other Contracting Party. Measures that have to be taken for reasons of public security and order, public health or</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
		morality shall not be deemed 'treatment less favourable' within the meaning of Article 3.
<b>19.</b>	<b>Japan – China BIT</b> (Beijing, 27 August 1988) Entry into force: 14 May 1989	<p style="text-align: center;"><b>Protocol</b></p> <p>[...]</p> <p>3. For the purpose of the provisions of paragraph 2 of Article 3 of the Agreement, it shall not be deemed “treatment less favourable” for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it is really necessary for the reason of public order, national security or sound development of national economy.</p>
<b>20.</b>	<b>Korea – China BIT</b> (Beijing, 30 September 1992) Entered into force: 4 December 1992	<p style="text-align: center;"><b>Protocol</b></p> <p>[...]</p> <p>2. For the purpose of the provisions of paragraph 2 of Article 3 and (2) of Article 13 of the Agreement, it shall not be deemed "treatment less favourable" for the Government of either State to accord discriminatory treatment, in accordance with its applicable laws and regulations, to investors of the other State, in case it is indispensable for the reason of a public purpose, national security or sound development of national economy and, provided that such discriminatory treatment undertaken for the reason of a public purpose, national security or sound development of national economy shall not aim at specifically investors of the other State or at joint companies in which investors of the other State have holdings.</p>
<b>21.</b>	<b>Latvia – United States BIT</b> (Washington, 13 January 1995) Entered into force: 26 December 1996	<p style="text-align: center;"><b>Article IX</b></p> <p>1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p>
<b>22.</b>	<b>Lithuania – Belgium BIT</b> (Brussels, 15 October 1997) Entered into force: 4 April 1999	<p style="text-align: center;"><b>Art.4. Mesures privatives et restrictives de propriété.</b></p> <p>[...]</p> <p>2. Si des impératifs d'utilité publique, de sécurité ou d'intérêt national justifient une dérogation au paragraphe 1er, les conditions suivantes doivent être remplies :</p> <p>a) les mesures sont prises selon une procédure légale;</p> <p>b) elles ne sont ni discriminatoires, ni contraires à un engagement spécifique;</p> <p>c) elles sont assorties de dispositions prévoyant le paiement d'une indemnité adéquate et effective.</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>23.</b>	<b>New Zealand – China BIT</b> (Wellington, 22 November 1988) Entry into force: 25 March 1989	<p style="text-align: center;"><b>Article 11</b> <b>Prohibitions and Restrictions</b></p> <p>The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action directed to the protection of its essential security interests, or to the protection of public health or the prevention of disease and pests in animals or plants.</p>
<b>24.</b>	<b>Poland – United States BIT</b> (Washington, 21 March 1990) Entry into force: 6 August 1994	<p style="text-align: center;"><b>Article XII</b> <b>Reservation of Rights</b></p> <p>[...]</p> <p>3. This Treaty shall, not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p>
<b>25.</b>	<b>Portugal – India BIT</b> (Lisbon, 28 June 2000)	<p style="text-align: center;"><b>Artigo 12</b> <b>Leis aplicáveis</b></p> <p>[...]</p> <p>2 — Apesar do previsto no n.º 1 do presente artigo, nada neste Acordo impede a Parte Contratante receptora do investimento de tomar medidas para a protecção dos seus interesses essenciais de segurança, ordem pública ou, em circunstâncias de emergência extrema, de acordo com a respectiva legislação, aplicada de forma não discriminatória.</p>
<b>26.</b>	<b>Romania-Egypt BIT</b> (Cairo, 24 November 1994) Entry into force: 3 April 1996	<p style="text-align: center;"><b>Protocol</b></p> <p>[...]</p> <p>(1) Referring to Article 2</p> <p>a) "Less favourable treatment" shall mean particularly : any limitation imposed upon buying of raw materials and auxiliary materials, energy and fuel as well as of means of production and exploitation of any kind and any obstacle to the sale of products on the territory of the country and abroad, as well as any other measures to the same effect . Measures taken on security, order, public health and morality grounds are not considered to mean "less favourable treatment" in the sense of Article 2.</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>27.</b>	<b>Russia-Hungary BIT</b> (Moscow, 6 March 1995) Entry into force: 29 May 1996	<p style="text-align: center;"><b>Article 2</b> <b>Promotion and Reciprocal Protection of Investments</b></p> <p>[...]</p> <p>3. This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health.</p>
<b>28.</b>	<b>Slovak Republic – United States BIT</b> (Washington Signed 22 October 1991) Entered into Force 19 December 1992	<p style="text-align: center;"><b>Article X</b></p> <p>1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p> <p>2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.</p>
<b>29.</b>	<b>Spain – Bolivia BIT</b> (Madrid, 29 October 2001) Entry into force: 9 July 2002	<p style="text-align: center;"><b>Artículo 4. Trato nacional y cláusula de nación más favorecida.</b></p> <p>[...]</p> <p>5. Las medidas que se adopten por razones de orden público o seguridad y salud pública no se considerarán tratamiento «menos favorables» en el sentido del presente artículo.</p>
<b>30.</b>	<b>Sweden – Russia BIT</b> (Moscow, 19 April 1995) Entry into force: 7 June 1996	<p style="text-align: center;"><b>Article 3 Treatment of Investments</b></p> <p>[...]</p> <p>(3) Each Contracting Party may have in its legislation limited exceptions to national treatment provided for in Paragraph (2) of this Article. Any new exception will not apply to investments made in its territory by investors of the other Contracting Party before the entry into force of such an exception, except when the exception is necessitated for the purpose of the maintenance of defence, national security and public order, protection of the environment, morality and public health.</p>
<b>31.</b>	<b>Turkey – United States BIT</b> (Washington, 3 December 1985) Entry into force: 18 May 1990	<p style="text-align: center;"><b>Article X</b></p> <p>1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p> <p>2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>32.</b>	<b>United Kingdom – India BIT</b> (London, 14 March 1994) Entry into force: 6 January 1995	<p style="text-align: center;"><b>Article 11</b> <b>Applicable Laws</b></p> <p>[...]</p> <p>(2) Notwithstanding paragraph (1) of this Article nothing in this agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonable applied on a non-discriminatory basis.</p>
<b>33.</b>	<b>United States – Argentina BIT</b> (Washington, 14 November 1991) Entered into Force 20 October 1994	<p style="text-align: center;"><b>Article XI</b></p> <p>This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.</p>
<b>34.</b>	<b>United States-Australia FTA</b> (18 May 2004) Entered into force: 1 January 2005	<p style="text-align: center;"><b>CHAPTER TWENTY-TWO. GENERAL PROVISIONS AND EXCEPTIONS</b></p> <p style="text-align: center;"><b>Article 22.2: Essential Security</b></p> <p>Nothing in this Agreement shall be construed:</p> <p>(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or</p> <p>(b) to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.</p>
<b>Dispute Settlement Mechanism Exclusions</b>		
<b>35.</b>	<b>Austria – Mexico BIT</b> (29 June 1998) Entry into force: 26 March 2001	<p style="text-align: center;"><b>ARTICLE 19</b> <b>Exclusions</b></p> <p>The disputes settlement provisions of this Part shall not apply to the resolutions adopted by a Contracting Party which, for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by investors of the other Contracting Party, according to the legislation of each Contracting Party.</p>

	<b>BIT</b>	<b>Provisions on essential security interests</b>
<b>36.</b>	<b>Finland – Mexico BIT</b> (22 February 99) Entry into force: 30 August 2000	<b>Artículo 18 Exclusiones</b> El mecanismo de solución de controversias de esta Sección no será aplicable a las resoluciones adoptadas por una Parte Contratante, la cual, de acuerdo con su legislación y por razones de seguridad nacional, prohíban o restrinjan la adquisición por inversionistas de la otra Parte Contratante de una inversión en el territorio de la primera Parte Contratante, que sea propiedad o esté efectivamente controlada por sus nacionales.
<b>37.</b>	<b>Mexico – Sweden BIT</b> (3 October 2000) Entry into force: 1 July 2001	<b>Article 18 Exclusions</b> The dispute settlement provisions of this Section shall not apply to the resolutions adopted by a Contracting Party which, in accordance with its legislation, and for national security reasons, prohibit or restrict the acquisition by investors of the other Contracting Party of an investment in the territory of the former Contracting Party, owned or controlled by its nationals.
<b>38.</b>	<b>NAFTA (Canada, Mexico and United States)</b>	<b>Article 1138: Exclusions</b> 1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions. 2. The dispute settlement provisions of this Section and of Chapter Twenty shall not apply to the matters referred to in Annex 1138.2.
<b>39.</b>	<b>Netherlands –Mexico BIT</b> (13 May 1998)	<b>Article Twelve Exclusions</b> The dispute settlement provisions of this Schedule shall not apply to the resolutions adopted by a Contracting Party for national security reasons.
<b>40.</b>	<b>Switzerland – Mexico BIT</b> (10 July 1995) Entry into force: 14 March 1996	<b>Article 12 Exclusions</b> The dispute settlement provisions of this Schedule shall not apply to the resolutions adopted by a Party which, for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by investors of the other Party, according to the legislation of each Party.

### ANNEX 3. NATIONAL SECURITY AS AN EVOLVING CONCEPT: SELECTED QUOTES

<p>Australia (2005 address by the Australian Federal Police Deputy Commissioner)</p>	<p>It doesn't seem that long ago that national security was a subject most people read about in history books rather than in the daily newspapers. Responsibility for maintaining it fell largely with the military, as it generally related to concerns about protection against armed forces, physical threats from abroad or from matters that were the purview of our intelligence agencies.</p> <p>But as we all know, 11 September 2001 changed all that, demonstrating in dramatic fashion trends that had been developing in the previous decade – the erosion of national borders under the pressure of globalization, the emergence of non-state based threats, and the vulnerability of national symbols and national infrastructure to attack. Today, the definition of 'national security' has been significantly broadened.</p>
<p>Austria (Sicherheitsdoktrin 2001)</p>	<p>Profound change of security policy following the end of the cold war</p>
<p>France (White Paper June 2008, Defence and national security; Preface by the President of the Republic)</p>	<p>Le clivage traditionnel entre la sécurité intérieure et la sécurité extérieure s'est encore davantage effacé.</p> <p>De ce travail émerge un nouveau concept ; celui d'une stratégie de sécurité nationale qui associe, sans les confondre, la politique de défense, la politique de sécurité intérieure, la politique étrangère et la politique économique.</p>
<p>Mexico (Mexican National Security Act, 2005)</p>	<p>« constant adaptation to change » is one of the fundamental principles established for the design of Mexican National Security Plan.</p>
<p>United Kingdom ( The National Security Strategy, Introduction, 2008)</p>	<p>The scope and approach of this strategy reflects the way our understanding of national security has changed. In the past, the state was the traditional focus of foreign, defence and security policies, and national security was understood as dealing with the protection of the state and its vital interests from attacks by other states. Over recent decades, our view of national security has broadened to include threats to individual citizens and to our way of life, as well as to the integrity and interests of the state. That is why this strategy deals with transnational crime, pandemics and flooding – not part of the traditional idea of national security, but clearly challenges that can affect large numbers of our citizens, and which demand some of the same responses as more traditional security threats, including terrorism. The broad scope of this strategy also reflects our commitment to focus on the underlying drivers of security and insecurity, rather than just immediate threats and risks.</p>
<p>United States (National Strategy for Homeland Security, 2007)</p>	<p>Our understanding of homeland security continued to evolve after September 11, adapting to new realities and threats. As we waged the War on Terror both at home and abroad, our Nation endured Hurricane Katrina, the most destructive natural disaster in U.S. history. The human suffering and staggering physical destruction caused by Katrina were a reminder that threats come not only from terrorism, but also from nature.</p>
<p>European Union (A Secure Europe in a Better World: European Security Strategy. 2003)</p>	<p>Our traditional concept of self- defence – up to and including the Cold War – was based on the threat of invasion. With the new threats, the first line of defence will often be abroad. The new threats are dynamic. The risks of proliferation grow over time; left alone, terrorist networks will become ever more dangerous. State failure and organised crime spread if they are neglected – as we have seen in West Africa. This implies that we should be ready to act before a crisis occurs.</p>

## ANNEX 4. NATIONAL SECURITY PLANS DEALING WITH INVESTMENT POLICY

<p>France (White Paper on Defence and national security, June 2008)</p>	<p>En outre, à l'instar de plusieurs pays européens, la France s'est dotée d'un régime de contrôle des investissements étrangers dans onze secteurs économiques « protégés ». Ce mécanisme lui permet de s'opposer à la prise de contrôle d'une entreprise française détenant des actifs stratégiques, ou de poser des conditions préservant ses intérêts de sécurité. En outre, à l'instar de plusieurs pays européens, la France s'est dotée d'un régime de contrôle des investissements étrangers dans onze secteurs économiques « protégés ». Ce mécanisme lui permet de s'opposer à la prise de contrôle d'une entreprise française détenant des actifs stratégiques, ou de poser des conditions préservant ses intérêts de sécurité. p 281</p> <p><b>BOX Investissements étrangers : onze secteurs d'activité soumis à autorisation</b></p> <p>Les onze secteurs d'activité dans lesquels un investissement étranger doit faire l'objet d'une autorisation préalable du ministre chargé de l'Économie sont : 1° les jeux d'argent ; 2° la sécurité privée ; 3° la recherche, le développement ou la production de moyens destinés à faire face à une attaque terroriste chimique ou bactériologique ; 4° les matériels conçus pour l'interception des correspondances et la détection à distance des conversations ; 5° l'évaluation de la sécurité offerte par les produits et les systèmes des technologies de l'information ; 6° la sécurité des systèmes d'information d'une entreprise opérant dans le domaine des secteurs d'activité d'importance vitale ; 7° les biens et les technologies à double usage ; 8° les moyens et les prestations de cryptologie ; 9° les activités exercées par les entreprises dépositaires de secrets de la défense nationale ; 10° la recherche, la production et le commerce de matériels de guerre ; 11° l'étude et la fourniture d'équipements au profit du ministère de la Défense. ( page 282)</p>
<p>United States (National Infrastructure Protection Plan, 2003)</p>	<p><b>International Coordination:</b> The United States-Canada-Mexico Security and Prosperity Partnership; the North Atlantic Treaty Organization's (NATO's) Senior Civil Emergency Planning Committee; certain government councils, such as the Committee on Foreign Investment in Organizing and Partnering for CI/KR Protection 52 National Infrastructure Protection Plan the United States (CFIUS); and consensus-based nongovernmental or public-private organizations, such as the global Forum of Incident Response and Security Teams (FIRST), enable a range of CI/KR protection coordination activities associated with established international agreements. (Pages 51 and 52)</p> <p>4.1.4.4 Foreign Investment in CI/KR</p> <p>CI/KR protection may be affected by foreign investment and ownership of sector assets. This issue is monitored at the Federal level by the CFIUS. The committee provides a forum for assessing the impacts of proposed foreign investments on CI/KR protection, government monitoring activities aimed at ensuring compliance with agreements that result from CFIUS rulings, and supporting executive branch reviews of telecommunications applications to the FCC from foreign entities to assess if they pose any national security threat to CI/KR (see appendix 1B.4.4). (page 57)</p> <p>1B.4.4 Foreign Investment in U.S. CI/KR</p> <p>CI/KR protection may be affected by foreign investment and ownership of sector assets. At the Federal level, this issue is monitored by the CFIUS. The committee is chaired by the Secretary of the Treasury, with membership including the Secretaries of State, Defense, Commerce, and Homeland Security; the Attorney General; the Directors of the OMB and the OSTP; the U.S. Trade Representative; the Chairman of the Council of Economic Advisers; the Assistant to the President for Economic Policy; and the Assistant to the President for National Security Affairs. DHS has important responsibilities regarding various government commissions that support the NIPP. These include:</p> <ul style="list-style-type: none"> <li>● As a member of the CFIUS, DHS examines the impact of proposed foreign investments on CI/KR protection. The committee coordinates the development and negotiation of security agreements with foreign entities that may be necessary to manage the risk to CI/KR that a foreign investment may pose. DHS leads government monitoring activities aimed at ensuring compliance with these agreements.</li> <li>● DHS acts as a partner with DOJ and other executive branch departments in supporting executive branch reviews of applications to the FCC from foreign entities pursuant to section 214 of the Communications Act of 1934 to assess if they pose any threat to CI/KR protection. (Page 132)</li> </ul>

## NOTES

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- <sup>1</sup> This guidance is found in the OECD Guidelines for Recipient Country Investment Policies Relating to National Security (adopted by governments participating in the OECD's October 2008 "Freedom of Investment" Roundtable) and the 2008 OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies. Both are available at [www.oecd.org/daf/investment/foi](http://www.oecd.org/daf/investment/foi).
- <sup>2</sup> Based on the outcome of this fact-finding effort, the first edition of this paper proposed an approach to and a draft for an OECD Council Recommendation on Guidelines for Recipient Country Investment Policies Relating to National Security[, since adopted. It is available at xxx].
- <sup>3</sup> The paper builds on earlier studies dealing with bilateral investment agreements and critical infrastructure protection prepared for the Freedom of Investment Roundtables. These are "Essential Security Interests under International Investment Law" 2007 and "Protection of Critical Infrastructure and the Role of Investment Policies relating to National Security" 2008. Both are available at: [www.oecd.org/daf/investment/foi](http://www.oecd.org/daf/investment/foi).
- <sup>4</sup> See Article 3 of the Codes. Formatting of text cited here has been changed for the purposes of this paper.
- <sup>5</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*. I.C.J. Reports 1986, p. 14, at p. 102-103 (describing both individual and collective self defense as belonging in customary international law); see also Charter of the United Nations, Article 51 ("Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [emphasis added].").
- <sup>6</sup> The Council adopted the 1961 Codes on the basis of OECD/C(61)37 including the Codes as annex I and II. A note appears in Article 3 of each of the Codes: "This article is intended to be a restatement of generally-accepted principles of international law." OECD/C(61)37 at Annex I, p. 17, and Annex II, p. 18. In the body of the report was an explanation: "*Following the example of certain international agreements*, a new article (Article 3) has been added to each Code which provides that its provisions shall not prevent Members from taking action which they consider necessary for the maintenance of public order, or the protection of public health, morals or safety, or for the protection of essential security interests, or the fulfillment of obligations relating to international peace [emphasis added]."
- <sup>7</sup> Fitzmaurice's use of the French term "ordre public" reflects the difficulty of finding a suitable translation for this term into English. In the European Union, "public policy" is today the preferred term, but the International Court of Justice persists in using *ordre public* without translation (see *e.g.* International Court of Justice, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, General List No. 136, 2008 ICJ LEXIS 1, at 30 (4 June 2008)).
- <sup>8</sup> Fitzmaurice, Sir Gerald (1959) Law of Treaties, 4<sup>th</sup> Report, Yearbook of the United Nations International Law Commission, volume II, pp. 37 et seq., Articles 9-23; See also Sir Hersch Lauterpacht's opinion, *Guardianship of Infants case (Holland v. Sweden)*, I.C.J. Reports 1958, at pp. 91, 92. In these texts, the source for the international law rule – and for the content of the term *ordre public* – is domestic courts.
- <sup>9</sup> Provisions of two bilateral treaties were selected as particularly interesting because treated in jurisprudence.
- <sup>10</sup> These texts appear in the Annex of Yannaca-Small, Katia (2007), "Essential Security Interests under International Investment Law" in *International Investment Perspectives 2007*, OECD, Paris, France. [www.oecd.org/daf/investment/foi](http://www.oecd.org/daf/investment/foi) .
- <sup>11</sup> For example, in the sample of 38 bilateral investment treaties presented in Annex 2, 16 use the expression "essential security" interests, 10 use "national security" and 10 use "public order".

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- 12 The term “public policy” is used 19 times in the treaty texts reproduced in Annex 1.
- 13 Balyete, Jean *et al.*, eds. (2000) *Dictionnaire Economique et Juridique*, 5<sup>th</sup> edition, Librairie Generale de Droit et de Jurisprudence, EJA, Paris, France. See also American Law Institute (1987), *Restatement of the Law, Third, Foreign Relations Law of the United States*, American Law Institute, Philadelphia, Pennsylvania (“All states decline to recognize some judgments on the basis of conflict with their *public policy* or “*ordre public*,” but these terms have different meaning from state to state [emphasis added].”)
- 14 See *e.g.* International Court of Justice, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, General List No. 136, 2008 ICJ LEXIS 1, at 30 (4 June 2008).
- 15 Like the Hague convention series, more recent treaties relating to the European Communities or European Union use the term “public policy.” (See Annex). This practice has evolved: In the earliest EEC treaty, the term “public order” is found as the English-language equivalent of “ordre public” in the equally-authentic French version (1957). Public order is also found in subsequent legislation adopted by the European institutions pursuant to the provisions of the treaties, including Directives and Regulations (“secondary law”), and in jurisprudence interpreting these texts. Later treaties use “public policy” in equivalent provisions (although the equally-authentic French version continues to use “ordre public”). More recent secondary law, and jurisprudence interpreting more recent texts, also use the term “public policy.”
- 16 Karsten, I.G. F. (1978) “Explanatory Report on the 1978 Convention on the Law Applicable to Agency” in *Acts and Documents of the Thirteenth Session (1976)*, tome IV, Agency Hague Conference on Private International Law, The Hague, the Netherlands, p.430.
- 17 It is often the case that international treaties do not define terms.
- 18 See in Annex 1 *e.g.* OECD Investment Codes, Article 3 i); Article 36 of the consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union.
- 19 See *e.g.* OECD Investment Codes, Article 3 i); General Agreement on Trade in Services (GATS) (1994), Article XIV (a); Article 30 of the Treaty Establishing the European Community (public morality, public policy or public security, etc); See *e.g.* UN Convention against Corruption, Article 13 1. (d) (ii). See also Article 12 of the International Convention on Civil and Political Rights (1966).
- 20 Article 34 of the Constitutions and Convention of the International Telecommunications Union, 2003.
- 21 Japan-China BIT of 1988.
- 22 The Russia-Hungary BIT of 1995.
- 23 This awkward use of a foreign language term can be interpreted as a way to avoid confusion. But see Karsten, I.G. F. (1978) “Explanatory Report on the 1978 Convention on the Law Applicable to Agency” in *Acts and Documents of the Thirteenth Session (1976)*, tome IV, Agency Hague Conference on Private International Law, The Hague, the Netherlands, p.430 (suggesting that the civil law “ordre public” term is broader than the common law “public policy”). For uses of the French term and mixed uses, see *e.g.* International Court of Justice, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, General List No. 136, 2008 ICJ LEXIS 1, at 30 (4 June 2008); Sir Hersch Lauterpacht opinion in the 1958 *Guardianship of Infants case (Holland v. Sweden)*, I.C.J. Reports 1958, , at pp. 91, 92 (using “ordre public – public policy”).
- 24 See *e.g.* Dugard, John and Christine Van den Wyngaert (1998) “Reconciling Extradition with Human Rights”, *American Journal of International Law*, Volume 92, p. 194 (for cites to cases from several countries in which concepts equivalent to “ordre public” were used in refusing application of extradition treaties, including: “unconscionability” “blatantly unjust,” “violate the principles of fundamental justice,” “shock the conscience of jurists,” or result in a punishment that “is wholly inappropriate or unconscionable.”)

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- 25 Case C-54/99 *Eglise de Scientologie v. France*, ECR [2000] I-01335 (measures must provide clear indications as to the specific circumstances in which the measure will be applicable); Case 153/78, *Commission of the European Communities v. Germany* [1979] ECR 02555 (cannot reserve an exclusive area of competence for Member States); Case 36/75 *Rutili* [1975] ECR 1219 (cannot be “invoked to service economic ends”); See, in addition, the Court’s judgments in Case 7/61 *Commission v Italy* [1961] ECR 317 and Case 72/83 *Campus Oil* [1984] ECR 2727.
- 26 When a Directive completely harmonizes a policy area, including all necessary measures to protect public policy concerns, member states do not have competence to define their own policy needs, including public interest considerations related to public policy, beyond what was agreed. See Case C-50/06, *Commission v. The Netherlands* [2007] ECR I-04383; See also Case 5/77 *Denkavit* [1977] ECR 01555.
- 27 Kassedjian, Catherine (2007), “Public Order in European Law”, *Erasmus Law Review*, Volume 01, Issue 01, Erasmus University Rotterdam, Rotterdam, The Netherlands; See e.g. Directives 64/221, 68/360 and 73/148. See also e.g. Directive 2004/38/EC (concerning freedom of movement of persons); Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM/99/0372 final.
- 28 Case C-369/96, *Arblade* [1999] ECR I-08453, §30; see also Case C-100/01 *Olazabal* [2002] ECR I-10981, §39; Case 30/77, *Regina v. Pierre Bouchereau* [1977] ECR 1999, §35.
- 29 See, e.g., Case C-367/98 *Commission v. Portugal*, ECR [2002] I-04731, §52.
- 30 Case C-54/99, *Eglise de Scientologie v. France*, ECR [2000] I-01335, §17; see, in addition, the Court’s “golden share”-jurisprudence, e.g. Cases C-503/99 *Commission v. Belgium* ECR [2002] I-04809; *Commission v. France* C-483/99 2002 Page I-04781; Joined Cases C-282/04 and 283/04 *Commission v. Netherlands* ECR [2006] I-09141.
- 31 Case 177/83, *Kohl* [1984] ECR 3651.
- 32 Case C-367/89 *Richardt* [1991] ECR I-4621, paragraphs 19, 20; see also Case 72/83 *Campus Oil* [1984] ECR 2727, paragraphs 32-37. Also, note the ECJ’s dictum that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.” Case C-55/94 *Gebhard* ECR I-4165, paragraph 37.
- 33 Quotes from page 2 of “*Libertés et ordre public*” by Pierre Mazeaud, member of the French Constitutional Council; undated monograph [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/pdf/Conseil/libpub.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/libpub.pdf).
- 34 *Lexique de termes juridiques* Dalloz, Paris, 1985.
- 35 In German: “*die Unverletzlichkeit der Rechtsordnung, der subjektiven Rechte und Rechtsgüter des Einzelnen sowie des Bestandes, der Einrichtungen und Veranstaltungen des Staates oder sonstiger Träger der Hoheitsgewalt*“. Gesetz über die öffentliche Sicherheit und Ordnung des Landes Sachsen-Anhalt in der Fassung der Bekanntmachung vom 23. September 2003; (Law on the public security and order of the Land Saxe-Anhalt in the form of the public announcement of 23 September 2003).
- 36 In German: “*die Gesamtheit der im Rahmen der verfassungsmäßigen Ordnung liegenden ungeschriebenen Regeln für das Verhalten des Einzelnen in der Öffentlichkeit, deren Beachtung nach den jeweils herrschenden Anschauungen als unerlässliche Voraussetzung eines geordneten staatsbürgerlichen Zusammenlebens betrachtet wird*” Gesetz über die öffentliche Sicherheit und Ordnung des Landes Sachsen-Anhalt in der Fassung der Bekanntmachung vom 23. September 2003; similar terminology in Decisions of the Federal Constitutional Court, volume 69, p. 315 [at p. 352].

- 37 *Introduction to German Law*, Mathias Reimann and Joachim Zekoll. 2005. Google Online. [www.books.google.com](http://www.books.google.com) page 109.
- 38 The source of the information provided in this paragraph is “Burqa, Chador e Costituzione europea” Ciavola, Antonnino. Source : <http://www.altalex.com/index.php?idstr=24&idnot=7735> September 20, 2004.
- 39 La definizione di ordine pubblico è stata resa in modo magistrale dalla nostra Corte Costituzionale, con sentenza 16 marzo 1962 n. 19: “*l’ordine pubblico è un valore costituzionalmente protetto, quale patrimonio dell’intera collettività; sono pertanto costituzionalmente legittime le norme che effettivamente, ed in modo proporzionato, siano rivolte a prevenire e a reprimere i turbamenti all’ordine pubblico (intesi come insorgere di uno stato concreto ed effettivo di minaccia all’ordine legale mediante mezzi illegali idonei a scuoterlo) eventualmente anche mediante la limitazione di altri diritti costituzionalmente garantiti*” . Source : <http://www.altalex.com/index.php?idstr=24&idnot=7735>.
- 40 Article 185 of the Federal Constitution. The Federal Constitution is available in French at <http://www.admin.ch/ch/f/rs/1/101.fr.pdf>. An unofficial English translation is available at <http://www.admin.ch/ch/e/rs/1/101.en.pdf>. Art. 185 External and internal security 1 The Federal Council shall take measures to safeguard external security, independence and neutrality of Switzerland. 2 It shall take measures to safeguard internal security. 3 It may in direct application of this Article issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.
- 41 Article 52 of the Federal Constitution.
- 42 See article 71 of the Constitution of the Canton of Zurich for an example in German language (<http://www.admin.ch/ch/d/sr/1/131.211.de.pdf>) and article 126 of the Constitution of the Republic and the Canton of Geneva for an example of the use in French (“l’ordre public et la sûreté de l’Etat”; <http://www.admin.ch/ch/f/rs/1/131.234.fr.pdf>).
- 43 See examples in articles 5, 59, 62, 63, and 64 of the [Federal Law on Foreigners](#); and article 16 of the [Law on Pubs of the Canton of Zurich](#).
- 44 See the [explanatory report](#) on the *Modification of the Federal Law on Foreigners* by the Federal Bureau on Migration, p.14, (January 2009).
- 45 See for example Article 80 of the Federal Order on Admission, Stay and Exercise of a Lucrative Activity [of Foreigners] ([French](#)).
- 46 Written submission by delegate of Peru, at OECD Freedom of Investment Roundtable X, 26 March 2009.
- 47 The Lexis Nexis search was run on 17 January 2009 on a combined source database of Federal and State cases, codes, and statutes, and its over 7000 initial “hits” were reduced to around 2000 by reducing criminal law references; a subsequent search on 18 February 2009 limited the search differently by requiring the addition of either “maintain public order” or “preservation of public order” and including only the last 10 years in the set).
- 48 See *e.g.* concurring opinion of Judge Hand [Moore v. Mitchell, 30 F.2d 600, 604 \(CA2 1929\)](#) (L. Hand, J., concurring).
- 49 See Supreme Court decision; *United Paper Workers International Union v. Nisco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 373, 98 L. Ed.2d 286.
- 50 American Law Institute (1988), *Restatement, Second, Conflicts of Law*, American Law Institute, Philadelphia, Pennsylvania.
- 51 Nolan, Joseph. *et al.*, eds. (1990), *Black’s Law Dictionary*, 6<sup>th</sup> Ed., West Publishing Co. St. Paul, Minn., p. 1231, citing *Hammonds v. Aetna Cas. & Sur. Co.*, D.C. Ohio, 243 F. Supp. 783, 796. See

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also Garner, Bryan, *et al.*, eds. (1999) *Black's Law Dictionary*, 7<sup>th</sup> edition, West Group, St. Paul, Minnesota, p. 1245.

52 These plans are: Australian National Security [www.nationalsecurity.gov.au](http://www.nationalsecurity.gov.au); Austria: 2001 comprehensive, open-ended Security Doctrine [www.bka.gv.at](http://www.bka.gv.at); Canada: *Securing an Open Society: Canada's National Security Policy* [www.publicsafety.gc.ca](http://www.publicsafety.gc.ca); France: 2008 Livre Blanc Défense et Sécurité Nationale. [www.lesrapports.ladocumentationfrancaise.fr](http://www.lesrapports.ladocumentationfrancaise.fr) ; Germany: 2006 White Paper on German Security Policy and the Future of the Bundeswehr. [www.bmvg.de](http://www.bmvg.de); Italy: various governmental websites; Mexico: Mexican National Security Act [www.cisen.gob.mx](http://www.cisen.gob.mx). United Kingdom: National Security Strategy. [www.interactive.cabinetoffice.gov.uk/documents/security](http://www.interactive.cabinetoffice.gov.uk/documents/security); United States: various plans including: 2006 National Security Strategy [www.whitehouse.gov](http://www.whitehouse.gov) and 2007 National Strategy for Homeland Security [www.dhs.gov](http://www.dhs.gov) (where the National Infrastructure Protection Plan can also be found); European Security Strategy; [www.consilium.europa.eu](http://www.consilium.europa.eu).

53 For example, Mexico's National Security Plan states that security measures must conform to the principles of "lawfulness", "legitimacy" and "democratic participation". The French plan refers to "democratic legitimacy", "public support" (mentioning explicitly the support of Parliamentary), transparency and accountability.

54 See "Critical Infrastructure Protection and the Role of Investment Policies relating to National Security." <http://www.oecd.org/dataoecd/2/41/40700392.pdf>. A 2008 background paper prepared for the Freedom of Investment Process.

55 This guidance is found in the OECD Guidelines for Recipient Country Investment Policies Relating to National Security (adopted by governments participating in the OECD's October 2008 "Freedom of Investment" Roundtable) and the 2008 OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies. Both are available at [www.oecd.org/daf/investment/foi](http://www.oecd.org/daf/investment/foi).

56 These tables result from a non-exhaustive study of treaties related to international commerce (treaties of alliance and collective defence were intentionally excluded; two human rights texts are included), irrespective of whether in force, generally relying on key word searches of electronic copies of texts located on official sites of the organizations concerned (including the treaty depositories). Keywords included "public," "mandatory" and "security". When available, table of contents were also examined. Materials examined that did not contain provisions of this type were not included (with the exception the OECD Convention); a list is available from the authors. The study took place between 11 January and 19 February 2009.

57 These provisions are selected because they resemble the OECD language, and were interpreted by the International Court of Justice (ICJ), and dissenting and separate opinions of presiding judges explain alternative views for the interpretation of these particular provisions. See cases *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment*, I. C. J. Reports 1996, p. 803 at p 811, and dissenting and separate opinions; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. *Merits, Judgment*. I.C.J. Reports 1986, p. 14, and dissenting and separate opinions.

58 Adapted from "Essential security interests in international investment law" Katia Yannaca Small, *International Investment Perspectives*, 2007.