



**NATIONAL SECURITY  
EXCEPTIONS IN  
INTERNATIONAL INVESTMENT  
AGREEMENTS**

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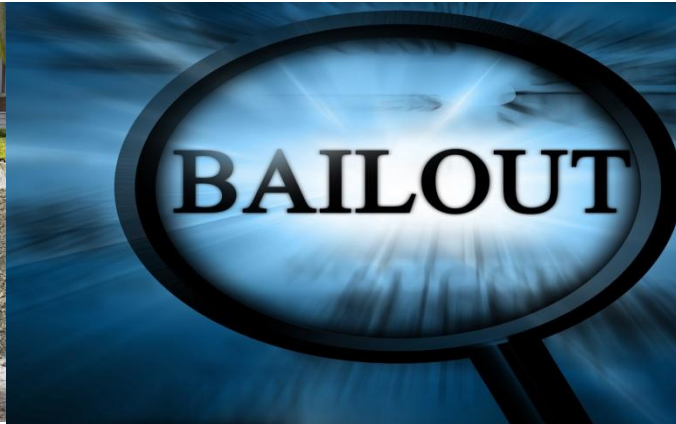
# I. Introduction

Financial and economic crises are recurring events





✦ Countries may want to take emergency measures in a financial crisis such as capital transfer restriction, individual rescue packages and economic stimulus programs



❖ Questions whether emergency measures could amount to a violation of IIA obligations and what role national security exceptions plays in this context



## II. IIA provisions possibly affected by emergency measures

### ✦ Freedom of Capital Transfer

- ✦ Transfer restrictions may violate guarantees under IIAs

### ✦ Respect Clause

- ✦ During a financial crisis, governments may no longer be able to honour commitments that they have entered into with regard to an investment

### ✦ Expropriation

- ✦ There may be cases where emergency measures amount to an expropriation and therefore give or go along with rise to compensation





## ❖ Fair and equitable treatment

- ❖ Tribunals often interpret this term broadly (*i.e.* breach of “legitimate expectation”)

## ❖ Principle of non-discrimination

- ❖ State aid programmes and individual rescue packages might favour domestically-owned companies



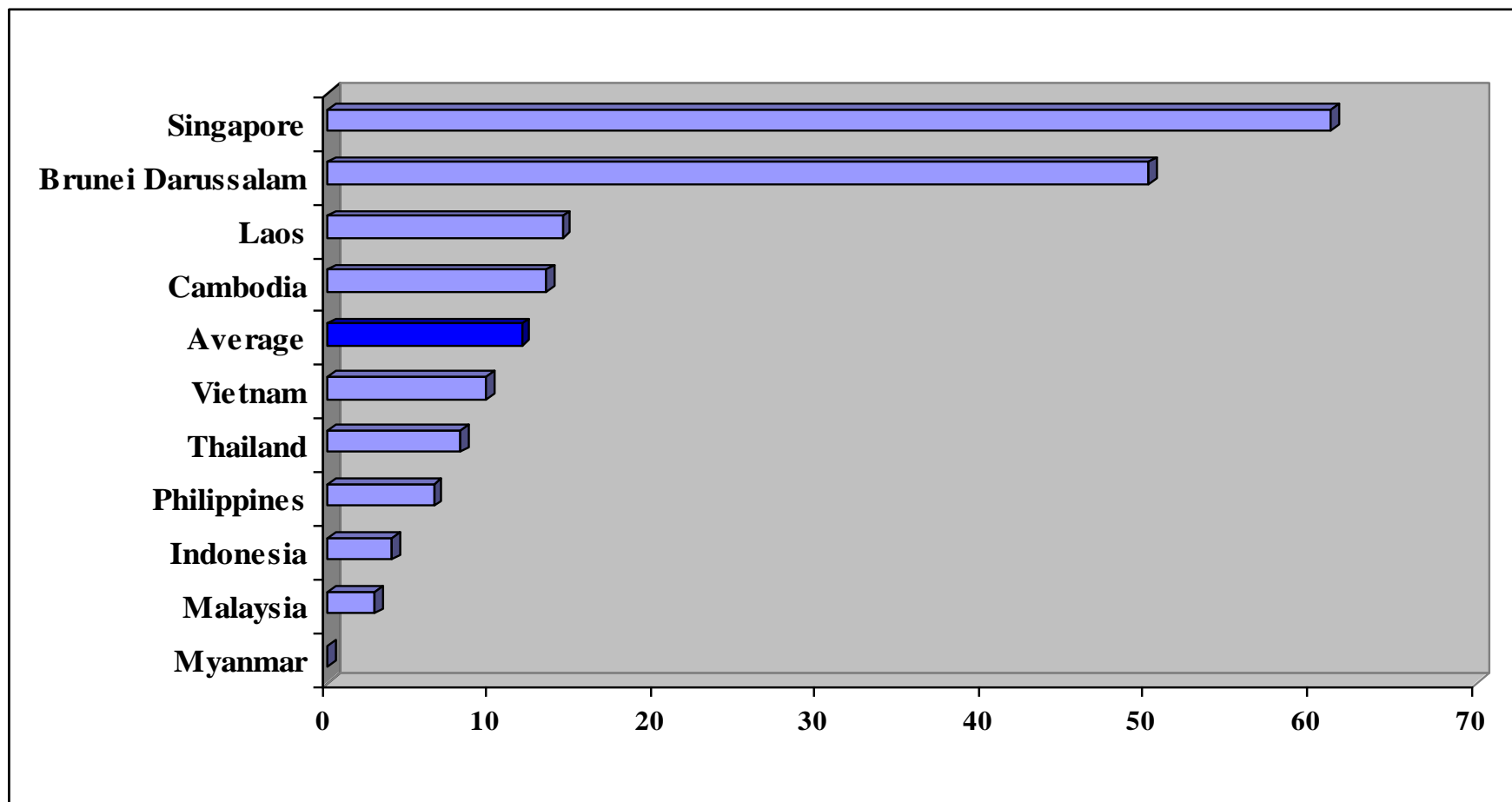
### **III. Financial crises as a national security issue (The Case of Argentina)**

- ⊕ Tribunals concurred that financial crisis can constitute a national security risk**
- ⊕ Tribunals had different views on the severity of the economic crisis as preconditions for a national security exception and the scope of the interpretation of the provision.**
  - ❖ LG&E tribunal: The essential interests of the Argentine State were threatened**
  - ❖ Continental, Enron and Sempra Tribunals: Crisis did not amount to a threat to the country's essential security interests**



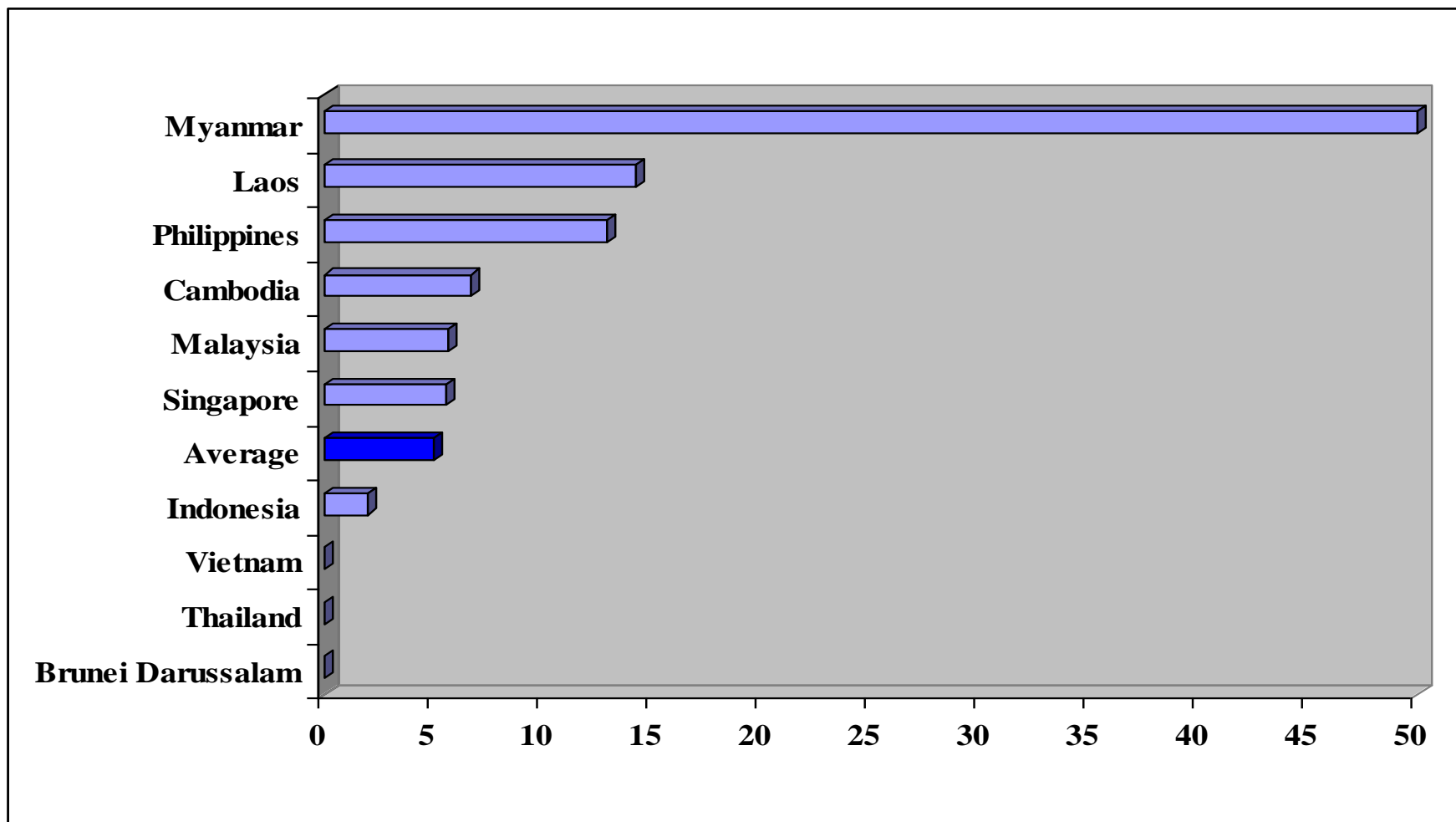
## IV. Current IIA practice in ASEAN countries

### Percentage of BITs of ASEAN Countries Containing National Security Exceptions





## Percentage of BITs of ASEAN Countries Containing Balance-of-Payment Exceptions







# National Security Exceptions in IIAs: Terms and Definition

- ❖ **Terms to describe “national security” in IIAs**
  - ❖ **National security**
  - ❖ **Essential security interests**
  - ❖ **Extreme emergency**
  - ❖ **Others**
  
- ❖ **Definition of “national security” in the exception clause**
  - ❖ **Trafficking in arms**
  - ❖ **War and other emergencies in international relations**
  - ❖ **Policies concerning the non-proliferation of nuclear weapons**
  - ❖ **Domestic unrest/ internal disturbance**
  - ❖ **Non-exhaustive definition**



# Conditions for invoking a national security exception

**Some IIAs contain additional requirements for invoking national security exceptions**

## ⊕ **Non-discrimination-**

- ⊞ require that emergency measures are not applied in a manner which constitute means of arbitrary or unjustifiable discrimination against foreign investors.

## ⊕ **No investment protectionism**

- ⊞ Prohibition of protectionism in favour of domestic industries when applying emergency measures for national security reasons

## ⊕ **Consistency with domestic law**

- ⊞ Emergency measures must be in conformity with domestic law



# Limiting the applicability of the national security exception to particular IIA provisions

## ⊕ Right of establishment

- ⊞ Security related to admission in the host country, ex EU Treaty

## ⊕ Non-discrimination

- ⊞ Measures taken for reasons of security are outside the scope of national and most-favoured-nation treatments

## ⊕ Transfer of funds

- ⊞ Distinct from BOP crisis

## ⊕ Dispute settlement

- ⊞ Exclude investors dispute settlement from security exceptions



# **Non-applicability of national security exceptions with regard to individual IIA provisions**

- ⊕ **National security clause is applicable to the whole treaty, but not to some particular IIA provisions**
  - ⊞ **Mostly on expropriation and compensation for losses clauses**
  - ⊞ **For instance, the Energy Charter Treaty**



## **V. Policy options for IIA negotiators**

- ⊕ **No national security exception**
- ⊕ **General national security exception**
- ⊕ **Clarification of the term “national security interest”**
- ⊕ **Necessity: self-judging nature of the exception?**
- ⊕ **Means of further limiting the scope of the national security exception**
  - ⊕ **“Good faith” requirement**
  - ⊕ **Non-applicability of the national security clause in respect of certain IIA provisions**
- ⊕ **Clarification of the relationship to a “balance-of-payments” clause**



## VI. Conclusion

- ⊕ **Financial crisis is only one, and probably not the most important consideration for countries when deciding whether to have a national security exception in the IIA. However, financial crisis considerations may tilt the decision in favour of such a clause where countries would otherwise hesitate.**
- ⊕ **Decision also depends on whether countries see a BoP clause as a sufficient alternative to a national security exception.**
  - ⊕ **Emergency means do not necessarily require a derogation from ALL IIA obligations. Recent crisis, for instance, was by and large managed without violating IIAs.**



- ❖ **If countries opt for a national security exception, delimiting its scope becomes a crucial policy challenge.**
- ❖ **Self-judging or not is the most important issue and has huge implications.**
- ❖ **Even if the clause is self-judging, IIA negotiating parties have various means to narrow the discretion of contracting parties.**
- ❖ **Such a balanced approach would be based on the consideration that no country knows in advance whether and how it might be affected by a financial crisis and what kind of policies it may need to respond to it without negatively affecting its development objectives.**



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