Understanding how the 'exception' provisions of the TRADE Act operate

Section 4(13)(A) and (B) of the TRADE Act is designed to provide a defense for a country that reverses a privatization or excludes a particular foreign investor who would otherwise have rights under an agreement to have self-determination regarding what is in the country's essential security interest. This provision is included in the TRADE Act in response to the fatal flaw in trade agreements' existing essential security clauses: now when a country seeks to use this defense to claim that an action that conflicts with a trade agreement is taken in the name of that country's essential security, the trade tribunal – *not the country taking the action* – gets to decide what is in the country's 'essential security' interest.

This provision only applies as a defense if a law is challenged: All of Section 4(13) relates to exceptions that must be included in all future trade agreements. Exception clauses in trade agreements *only* come into play *after* a law or action of a signatory country has been challenged in the agreements dispute settlement system. That is to say that such provisions may be raised by a country defending a law that Is being challenged to provide an excuse for an action that would otherwise violate the country's obligations under an agreement. While the TRADE Act seeks to ensure that agreement's affirmative rules will not expose public interest laws to attack or in the future be used to force priovatizations and new investor rights, these clauses provide an insurance policy just in case the affirmatives provisions do not fully cover every conceivable situation.

If the trade agreement in question does not require a specific action, this defense does not apply: This provision only provides a defense to a government action that violates a trade agreement requirement. That is to say that if a government, on its own volition, decides to do something objectionable but not subject to challenge under a trade agreement, this clause is irrelevant. For example, the TRADE Act section 4 provisions state that trade agreements cannot require service sector privatization or deregulation. However, if a right wing government decides to take such action on its own, even if the trade agreement does not require it, it is a matter that must be fought against by civil society by other means. What the TRADE Act ensures is that future trade agreements do not continue to require such retrograde actions – nor lock in past such privatizations so that citizen activism to change governments can translate into policy changes. Thus, for instance, if this provision were in the Peru FTA, if a future Peruvian president and Congress sought to reverse the port privatization there, even if the Peru FTA included service sector commitments on ports, the government could reverse the privatization and if challenged, could avoid sanctions by raising this 'self-judging' exception.

The text:
Section 4(13) EXCEPTIONS FOR NATIONAL SECURITY AND OTHER REASONS.—Each agreement shall—
(A) include an essential security exception that permits a country that is a party to the agreement to apply measures that the country considers necessary for the maintenance or restoration of international peace or security, or the protection of its own essential security interests, including regarding infrastructure, services, manufacturing, and other
sectors;
(B) explicitly state that if a country invokes the essential security exception in a dispute settlement proceeding, the dispute settlement body hearing the matter shall find that the exception applies;

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