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Incomplete Agreements on Trade in Services: Causes and Problems - Applying Incomplete Contract Theory

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INCOMPLETE AGREEMENTS ON TRADE IN SERVICES: CAUSES AND PROBLEMS—APPLYING INCOMPLETE CONTRACT THEORY

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I. INTRODUCTION

The negotiations on the Association of Southeast Asian Nations ("ASEAN")–Japan Comprehensive Economic Partnership ("AJCEP") Agreement commenced in April 2005 and, after eleven rounds of negotiations, were substantially concluded in November 2007.[1] Japan and the ten ASEAN countries (Brunei, Burma [Myanmar], Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam) negotiated for three years before finally concluding the regional trade agreement. However, the agreed-upon trade in services ("TIS") agreement consists of only one article: a renegotiation clause. Thus, after three years of negotiation, the ASEAN countries and Japan made no progress but to agree to renegotiate.

Japan and the ASEAN countries are not the only countries that failed to complete an agreement on TIS.[2] In fact, many incomplete TIS agreements are concluded each year. For instance, India and China have repeatedly concluded agreements with numerous incomplete provisions.[3] Similarly, various Latin American countries have failed to

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1. *The Eleventh Round of Negotiations on the ASEAN-Japan Comprehensive Economic Partnership Agreement*, MINISTRY OF FOREIGN AFF. OF JAPAN, (Nov. 2, 2007), http://www.mofa.go.jp/announce/event/2007/11/1176091_860.html [hereinafter *Eleventh Round of Negotiations on the AJCEP*].

2. "Trade in services" agreements are regional or plurilateral agreements that, like their "trade in goods agreement" counterparts, establish international commerce "rules aimed at promoting fair and open trade across the full spectrum of service sectors." *Trade in Services Agreement*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/TiSA (last visited Aug. 31, 2017). The 1995 World Trade Organization General Agreement on Trade in Services is the foundation upon which regional and plurilateral TIS agreements are based. Countries negotiate TIS agreements in order to "develop[] . . . strong, transparent, and effective regulatory policies, which are so important to enabling international commerce." *Id*.

3. AUSTRALIAN DEP'T OF FOREIGN AFFAIRS & TRADE, CHINA-AUSTRALIA FREE TRADE AGREEMENT (CHAFTA): SUMMARY OF CHAPTERS AND ANNEXES, http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Documents/chafta-summary-of-chapters-and-annexes.pdf (last visited Aug. 26, 2017).

complete their TIS agreements, New Zealand recently concluded an incomplete agreement with China,[4] and the European Union ratified another incomplete agreement with Mexico.[5]

Why do countries fail to complete agreements on TIS? Why do they break their promises to renegotiate and postpone the correction of incomplete treaties? Academic research has never focused on why countries such as Japan and members of ASEAN ratify incomplete TIS agreements or why countries fail to comply with renegotiation clauses to correct incomplete agreements. This Article employs incomplete contract theory to explain these phenomena and suggest a solution to this problem.[6]

An incomplete contract assumes that both contracting parties lack complete knowledge of the world and thus face future uncertainties and risks. This differs from hypothetical and imaginary contracts, which are perfect complete contracts.[7] A perfect complete contract assumes contracting parties have complete knowledge of the world. Thus, risks and obligations can be assigned to parties without any problems or costs. Parties would have no reason to insert missing or incomplete articles, because they would have complete knowledge of when, how, and why countries would discriminate against foreign suppliers of services in the future. The parties could easily agree on the details of most-favored-nation ("MFN") status or national treatment ("NT") articles included in the agreement. Nevertheless, a perfect complete contract exists only in theory—in practice, parties always deal with incomplete contracts full of uncertainties and risks.

In this regard, parties can also view the incomplete investment treaty as an incomplete contract. This Article draws on incomplete contract theory to identify reasons parties include incomplete provisions and the problems associated with these provisions. Section II lays out examples of the puzzle in the agreement in TIS: incomplete provisions in the main text and a reservation list. Section III applies the incomplete contract theory to address the causes and problems of incomplete provisions in the agreements. Section VI concludes the Article.

II. INCOMPLETE PROVISIONS IN AGREEMENTS ON TRADE IN SERVICES

This section illustrates the various ways in which negotiating partners fail to complete TIS agreements. First, this section classifies two types of incomplete provisions in the main text of many TIS agreements: missing text and unfinished articles. Missing text occurs when negotiating partners fail to agree on any articles and leave the text blank. Unfinished articles appear when the parties partly complete the main text but decide to fully complete the text during a renegotiation phase.

Second, this section briefly discusses the two different reservation-scheduling

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4. Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China, China-N.Z., N.Z. DEP'T FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/China-FTA/NZ-ChinaFTA-Agreement-text.pdf [hereinafter NZCFTA].

5. Decision 2/2001 of the EU-Mexico Joint Council of 27 Feb. 2001, Implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement, 2001 O.J. (L 70) 7 [hereinafter Decision 2/2001].

6. For incomplete contract theory in the legal studies, see Richard Craswell, *The "Incomplete Contracts" Literature and Efficient Precautions*, 56 CASE W. RES. L. REV. 151, 151 (2005); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006); Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 187 (2005).

7. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 225 (Denise Clinton et al. eds., 5th ed. 2008).

approaches, namely a positive[8] and a negative list approach, [9] and then classifies two types of incomplete provisions that regularly appear under each approach: 1) missing schedules of commitments or nonconforming measure and 2) unfinished schedules of commitments or nonconforming measures.

Missing schedules or nonconforming measures appear when the parties fail to add any schedules of commitments or lists of nonconforming measures and simply insert clauses to renegotiate this at a later time. Unfinished schedules or nonconforming measures occur when the parties partly complete the schedules or nonconforming measures and decide to fully complete these aspects of the agreement afterward.

Lastly, this section introduces two types of renegotiation clauses: 1) one with less stringent requirements and 2) one with more stringent requirements. Renegotiation clauses with less stringent requirements do not impose strong legal obligations on the parties to renegotiate. For instance, such clauses simply state that parties "shall endeavor" to renegotiate the text. In contrast, renegotiation clauses with more stringent requirements use stronger legal terms, such as "shall enter" into the renegotiation, and set beginning and concluding deadlines to strengthen the parties' commitment to renegotiating the text. Sometimes the clause specifically assigns renegotiation agendas to avoid unnecessary debate.

A. Incomplete Provisions

1. Incomplete Text

a. Missing Text

Missing text problems occur when negotiating partners agree to leave the main text of TIS agreements blank. That is, they spend years negotiating, only to omit all clauses related to substantive obligations from the main text. Instead, they simply include a clause to renegotiate the content later. The AJCEP provides a good example of this:

> Chapter 6 Trade in Services
> Article 50 Trade in Services
> 1. Each Party shall endeavour to, in accordance with its laws, regulations and policies, take further steps towards the expansion of trade in services among or between the Parties consistent with [the General Agreement on Trade in Services].
> 2. The Parties shall, with the participation of Japan and all ASEAN Member States, continue to discuss and negotiate provisions for trade in services with a view to exploring measures towards further liberalisation and facilitation of trade in services among Japan and ASEAN Member States and to enhance cooperation in

8. *See generally* EUROPEAN COMMISSION, SERVICES AND INVESTMENT IN EU TRADE DEALS: USING 'POSITIVE' AND 'NEGATIVE' LISTS (2016), http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf. The positive listing recognizes four "modes" of trading in services: 1) across the border (e.g., the internet); 2) consumption abroad (e.g., a tourist); 3) establishing a commercial presence (foreign direct investment); and 4) the temporary presence of a natural person to deliver a service. *Id.* Governments can make different levels of commitment for each mode in relation to each of the market access and national treatment rules. *Id.*

9. *Id.* Under the negative listing the main features of the non-conforming measures must be specified in detail. These measures include the following elements: 1) the economic sector in which the reservation is taken; 2) the specific industry in which the reservation is taken; 3) the activity covered by the reservation; 4) the substantial or procedural obligation under which a reservation is taken (e.g., MFN or national treatment); and 5) a description of the specific law, regulation, or other measure for which the reservation is taken. *Id.*

> order to improve the efficiency and competitiveness of services and service suppliers of Japan and the ASEAN Member States. For this purpose, a Sub-Committee on Trade in Services, which shall be composed of representatives of the Governments of Japan and all ASEAN Member States, shall be established in accordance with Article 11 within one (1) year from the date of entry into force of this Agreement pursuant to paragraph 1 of Article 79.
> 3. The results of the negotiations referred to in paragraph 2, if any, shall be incorporated into this Chapter in accordance with Article 77.[10]

ASEAN and Japan decided to include only a single renegotiation clause, Article 50. This renegotiation clause is the only article in the chapter related to TIS. As described in the second paragraph of the article, both negotiating partners have a legal obligation to continue their negotiations to complete the agreement, and the negotiation should be held within one year of the date of entry into force of the AJCEP. That is, both negotiating partners should initiate the renegotiation within one year of the ratification of the AJCEP. Once the parties agree to complete Article 50, the agreed-upon text will be incorporated into the chapter, as indicated in paragraph 3.

The "negotiations . . . commenced in April 2005, . . . and after eleven rounds of negotiation," both partners signed the AJCEP on April 14, 2008.[11] The eleven rounds of negotiation produced nothing more than a consensus to continue the negotiations at a later date. Due to the missing text, the AJCEP TIS agreement is incomplete.

b. Unfinished Articles

The unfinished articles problem occurs when both negotiating partners successfully agree upon most of the text but fail to complete certain parts of an article or the text. The chapter on TIS in the Free Trade Agreement ("FTA") between New Zealand and China (the "NZCFTA") is a good example of this:

> Article 124 Review
> The Parties shall consult within 2 years of entry into force of this Agreement and at least every 3 years thereafter, or as otherwise agreed, to review the implementation of this Chapter and consider other trade in services issues of mutual interest, including the extension of most-favoured-nation treatment to additional services sectors not listed in Annex 9, with a view to the progressive liberalisation of the trade in services between them on a mutually advantageous basis. [12]

This article imposes an obligation on both New Zealand and China to renegotiate Annex 9, which lists the MFN coverage sectors—that is, the sectors that will be affected by MFN status.[13] Currently, the annex lists only nine economic sectors, such as the environmental and construction sectors. Thus, New Zealand and China agreed to commit

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10. *Eleventh Round of Negotiations on the AJCEP*, *supra* note 1.

11. MALAY. MINISTRY OF INT'L TRADE & INDUS., *ASEAN–Japan: Background*, MALAYSIA'S FREE TRADE AGREEMENTS, http://fta.miti.gov.my/index.php/pages/view/asean-japan (last visited Aug. 27, 2017).

12. NZCFTA, *supra* note 4.

13. "Most-favoured-nation" provisions in TIS agreements secure "trade without discrimination" by requiring all countries treat their trading partners equally. "In general, MFN means that every time a country lowers a trade barrier or opens up a market [for one country], it has to do so for the same goods or services from all its trading partners." In international agreements, the concept of MFN status is so important that it occupies the second article of the General Agreement on Trade in Services. WORLD TRADE ORG., UNDERSTANDING THE WTO 11 (2005), https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf.

only nine economic sectors for MFN coverage. As indicated in Article 124, both parties recognized the incomplete nature of the list and therefore agreed to expand it by initiating renegotiations within two years of the ratification of the NZCFTA and agreeing to continue the discussion at least every three years thereafter. Due to Article 124 being unfinished, the NZCFTA TIS agreement is incomplete.

B. Incomplete Schedules of Commitments or Nonconforming Measures

Incomplete provisions may also be classified based upon which reservation-scheduling approach the countries utilize for their TIS agreement. "To slightly simplify international trade agreements, there are two basic ways in which countries make liberalizing concessions."[14] Under the positive list approach, "countries specifically list which products or services they agree to lower tariffs on (or decrease non-tariff barriers on)."[15] Under the negative list approach, "countries specifically list which products or services they will maintain trade barriers on."[16] Either approach can result in an incomplete TIS agreement, as discussed below.

1. Under Positive List Approach

a. Missing Schedules of Commitments

Under the positive list approach, countries frequently fail to complete the schedule of commitments, which lists the specific economic sectors bound by TIS obligations, and instead simply include a renegotiation clause. That is, the parties agree to ratify the TIS agreement without explaining what economic sectors are bound by the agreement. The TIS agreement in the European Union–Mexico FTA is a good example of this:

> Article 7 Trade liberalisation
> As provided for in paragraphs 2 to 4, the Parties shall liberalise trade in services between themselves, in conformity with Article V of [General Agreement on Trade in Services].
> From the entry into force of this Decision, neither Party shall adopt new, or more, discriminatory measures as regards services or service suppliers of the other Party, in comparison with the treatment accorded to its own like services or service suppliers.
> 1. No later than three years following the entry into force of this Decision, the Joint Council shall adopt a decision providing for the elimination of substantially all remaining discrimination between the Parties in the sectors and modes of supply covered by this Chapter[1]. That decision shall contain:
> (a). A list of commitments establishing the level of liberalisation which the Parties agree to grant each other at the end of a transitional period of ten years from the entry into force of this Decision.
> (b). A liberalisation calendar for each Party in order to reach at the end of the

14. Daniel O'Connor, *When a Negative Is a Positive: Updating International Trade Agreements for the 21st Century*, DISRUPTIVE COMPETITION PROJECT (July 6, 2012), http://www.project-disco.org/information-flow/when-a-negative-is-positive-updating-international-trade-agreements-for-the-21st-century/#.WajRXrKGO70.

15. *Id.*

16. *Id.*

> ten-year transitional period the level of liberalisation described in subparagraph (a).
>
> Except as provided in paragraph 2, Article 4, 5 and 6 shall become applicable in accordance with the calendar and subject to any reservations stipulated in the Parties' lists of commitments provided for in paragraph 3.The Joint Council may amend the liberalisation calendar and the list of commitments established in accordance with paragraph 3, with a view to remove or add exceptions. [17]

The European Union and Mexico successfully agreed on all the substantive obligation clauses such as MFN and NT,[18] yet failed to reach consensus on inserting a schedule of commitments for both countries. Instead, they decided to renegotiate the schedule after the ratification of the treaty. Both parties agreed to initiate the renegotiation no later than three years following ratification, and the joint councils of both countries would adopt a decision containing a schedule of commitments as the renegotiation proceeded. Because of the missing schedules, both negotiating partners may not understand which economic sectors are bound by the substantive obligations in the main text.

b. Unfinished Schedules of Commitments

Unfinished schedules of commitments occur when both countries fail to fully complete the schedules of commitments before the conclusion of negotiations. During the negotiation period, both may agree to draft and exchange schedules of commitments, but they fail to agree on most of the economic sectors. Thus, the countries agree to open their markets only to a few economic sectors.

The Australia–Thailand FTA (the "ATFTA") is a good example of this:

> Article 812 Review of Commitments
>
> In pursuance of the objectives of this Chapter, the Parties shall enter into further negotiations on trade in services within three years from the date of entry into force of this Agreement with the aim of enhancing the overall commitments undertaken by the Parties under this Agreement.
>
> In negotiating further commitments in accordance with this Article, the Parties shall recognise the provisions of Article V (1) and (3) of [General Agreement in Trade in Services].
>
> If, after this Agreement enters into force, a Party enters into any agreement on trade in services with a non-Party, it shall consider a request by the other Party for the incorporation in this Agreement of treatment no less favourable than that provided under the former agreement.
>
> If, after this Agreement enters into force, a Party further liberalises any of its services sectors, sub-sectors or activities, it shall consider a request by the other Party for the incorporation in this Agreement of the unilateral liberalisation.
>
> If, after this Agreement enters into force, a service previously supplied in the exercise of governmental authority is subsequently supplied on a commercial basis

17. Decision 2/2001, *supra* note 5.

18. Like MFN, "national treatment" provisions are designed to secure fair, non-discriminatory trade conditions. National treatment requires countries "treat[] foreigners and locals equally." In other words, when countries agree to national treatment, they agree that "the same regulations . . . apply to foreign suppliers as to nationals," subject to any exceptions in the TIS agreement. *See* WORLD TRADE ORG., *supra* note 13, at 11, 38.

> or in competition with one or more service suppliers, the Party concerned shall consider a request by the other Party for the incorporation in this Agreement of new commitments relating to that service. [19]

As stated in paragraph 1 of Article 812, both countries agreed to renegotiate in order to enhance the overall schedule of commitments. Thailand's schedule of commitments covers only nine economic sectors. To correct the incomplete schedules, the countries agreed to initiate the renegotiation within three years of ratification of the treaty. During the renegotiation, Thailand would gradually complete the schedule and decide whether it will open the market to the rest of the economic sectors. Upon Australia's request, more complete schedules would be incorporated into the original ratified agreement, as indicated in paragraph 4.

2. Under Negative List Approach

a. Missing Nonconforming Measures

Under the negative list approach, missing nonconforming measures issues arise when countries decide to exclude the nonconforming measures list from the text. "A non-conforming measure is any law, regulation, procedure, requirement or practice" which exists at the time of negotiation and does not conform to the obligations of the TIS agreement.[20] Nonconforming measures are exceptions to the TIS agreement. However, countries frequently ratify their TIS agreement without listing the nonconforming measures—the exceptions—to the treaty. The following example is from the ASEAN–Korea FTA (the "AKFTA"):

> Article 27 Work Programme
> 1. Parties shall enter into discussions on:
> (a) Article 4 (Most-[Favored]-Nation Treatment);
> (b) TRIMS-Plus elements to Article 6 (Performance Requirements);
> (c) Schedules of Reservations to this Agreement;
> (d) Procedures for modification of Schedules of Reservations that will apply at the date of entry into force of the Schedules of Reservations to this Agreement;
> [. . .]
> 2. The Parties shall conclude the discussion referred to in paragraph 1, within five years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Implementing Committee established under Article 5.3 of the Framework Agreement.
> 3. Schedules of Reservations to this Agreement referred to in paragraph 1 shall enter into force on a date agreed to by the Parties.[21]

As paragraph 1 (c) and (d) states, Korea and ASEAN countries agreed to renegotiate

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19. Australia-Thailand Free Trade Agreement, Austl.-Thai., July 5, 2004, Austl. Gov't Dep't Foreign Aff. & Trade, http://dfat.gov.au/trade/agreements/tafta/fta-text-and-implementation/Documents/aus-thai_FTA_text.pdf.

20. *Nonconforming Measures*, SICE DICTIONARY OF TRADE TERMS, http://www.sice.oas.org/dictionary/IN_e.asp (last visited Aug. 27, 2017).

21. Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, June 2, 2009, ASEAN-Korea Free Trade Area, http://akfta.asean.org/uploads/docs/agreements/Investment-Full.pdf.

the reservation list (i.e., nonconforming measures under the negative list approach), as well as the procedures for modifying the reservation list. As indicated in paragraph 2, the countries agreed to complete the renegotiation within five years of ratification of the treaty.

b. Unfinished Nonconforming Measures

The problem of unfinished nonconforming measures arises when negotiating partners agree to include an incomplete version of the reservation list. That is, they add their domestic measures and their descriptions to the nonconforming measures list, but the list lacks specificity and detailed information of the domestic measures. The Japan–Singapore Economic Partnership Agreement (the "JSEPA") is a good example of this:

> Matter: privatization
> Legal source or authority: N/A
> Relevant obligation: National Treatment (Article 73), Prohibition of Performance requirements (Article 75)
> Description: National treatment and prohibition of performance requirement shall not apply to the privatization or divestment of assets owned by government.[22]

The above is Singapore's nonconforming measure in the area of privatization, which lacks details regarding the legal source or authority. As the description indicates, the Singaporean government wanted to carve out their domestic policies related to privatization in a certain sector. However, because the legal source is missing, readers of the treaty have no way to determine which economic sectors allow privatization. The plain language approach tells us that Singapore carved out all the privatization related laws and policies, but it is unclear whether this is what the Singaporean government intended.

C. Renegotiation Clause: Response to the Incomplete Provisions

1. Renegotiation Clause with Less Strict Requirements

Even if the negotiating partners recognize the necessity to renegotiate the incomplete provisions, they sometimes include a renegotiation clause with less strict requirements to avoid strong legal obligations to renegotiate the treaty. The following example appears in the India–Singapore Comprehensive Economic Cooperation Agreement (the "ISCECA").

> ARTICLE 7.9: PROGRESSIVE [LIBERALISATION]
> The Parties shall endeavour to review their schedules of specific commitments at least once every three years, or earlier, at the request of either Party, with a view to facilitating the elimination of substantially all remaining discrimination between the Parties with regard to trade in Services covered in this Chapter over a period of time. In this process, there shall be due respect for the national policy objectives and the level of development of the Parties, both overall and in individual sectors.[23]

Here, India and Singapore agreed to use a renegotiation clause to correct the

22. MINISTRY OF FOREIGN AFF. OF JAPAN, ANNEX V-B: LIST OF EXCEPTIONS IN THE AREA OF INVESTMENT (SINGAPORE) 556–57, http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-6-2.pdf.

23. Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, India-Sing., U.N. CONF. ON TRADE & DEV., http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707 [hereinafter ISCECA].

unfinished schedules of commitments.[24] They agreed to use the term "shall endeavor" to renegotiate the schedules, and this term imposes upon both governments the obligation to do their best to renegotiate without any strong legal obligations. The text does not specify what level of effort is required, but simply states that both parties should do their best to complete their unfinished schedules of commitments. There is no way for the other negotiating partner to establish whether the party in fact did its best to correct the schedule to enhance the level of liberalization and market openings. Moreover, there is no way to sanction the party if it failed to do so.

2. Renegotiation Clause with More Strict Requirements

The parties could fully commit themselves by inserting terms that require strong obligations to correct the incomplete provisions problems. They could use the term "shall" and establish a review mechanism to regularly follow up with a procedure for specifying the incomplete provisions. The following is an example of a trilateral investment agreement between ASEAN, Australia, and New Zealand (hereinafter the "AANZFTA"):

> Article 6 Review of Commitments
> The Parties shall enter into successive rounds of negotiations, beginning not later than three years from the date of entry into force of this Agreement, and periodically thereafter as determined by the FTA Joint Committee, with a view to further improving specific commitments under this Chapter so as to progressively liberalise trade in services among the Parties. . . .
> Article 24 Committee on Trade in Services
> 1. The Parties hereby establish a Committee on Trade in Services (Services Committee), consisting of representatives of the Parties.
> 2. The Services Committee's functions shall be:
> (a) to conduct reviews of commitments in accordance with Article 6 (Review of Commitments);
> (b) if the multilateral negotiations referred to in Article 19.1 (Safeguard Measures) have not concluded within three years from entry into force of this Agreement, to enter into discussion on the question of emergency safeguard measures based on the principle of non-discrimination for the purpose of considering appropriate amendments to this Chapter;
> (c) to enter into discussions on the application of most-favoured-nation treatment to trade in services for the purpose of considering appropriate amendments to this Chapter, in conjunction with the first review of commitments under Article 6 (Review of Commitments);
> (d) to review the implementation of this Chapter;
> (e) to consider any other matters identified by the Parties; and
> (f) to report to the FTA Joint Committee as required.
> 3. The Services Committee shall conclude the discussions referred to in Paragraph 2(a) to (c) within five years of entry into force of this Agreement, unless the Parties agree otherwise.
> 4. The Services Committee shall meet as mutually determined by the Parties as required under this Article and Article 6 (Review of Commitments). Meetings may be conducted in person, or by any other means as mutually determined by the

24. *Id.*

Parties.[25]

Unlike India and Singapore, Australia, ASEAN, and New Zealand were fully committed to fixing the incomplete provisions problems, as evidenced by their use of terms that impose strong legal obligations and creation of a monitoring mechanism. First, they used the term "shall enter into" instead of "shall endeavor."[26] This requires the three countries start and finish the renegotiations within five years of the date of ratification. Otherwise, it would be a violation of international law. Moreover, they successfully set up a monitoring device, the Committee on Trade in Services, through Article 24.[27] Article 24 specifies when to meet first and what to do for the incomplete provisions.[28] The parties are obligated to initiate renegotiation of the incomplete provisions within three years of ratification of the treaty.[29] Moreover, as indicated in paragraph 3, the parties set a deadline of five years after ratification of the treaty to finalize a completed version of the agreement.[30] This is quite different from previous examples of the renegotiation clause in the India-Singapore CECA because it requires active participation for correcting the incomplete provision problems.

III. APPLYING INCOMPLETE CONTRACT THEORY: CAUSES OF, PROBLEMS RELATED TO, AND SOLUTIONS TO INCOMPLETE PROVISIONS IN AGREEMENTS ON TRADE IN SERVICES

So far, this Article illustrated some examples of the recurring enigma of many agreements on trade in services: the incompleteness in both the main text and the schedules of commitments. This part of the Article draws on incomplete contract theory to explain why negotiators leave the provisions incomplete. After highlighting the problems associated with incompleteness, this Article provides a solution to the problem.

A. Overview of Incomplete Contract Theory

1. Transaction Cost and Incomplete Contract

Coase pioneered the concept of transaction costs.[31] Coase's work challenges the neoclassical assumptions of complete information and costless exchanges in contractual arrangements. He argues that a market transaction requires different costs to be considered, including the searching cost and the negotiation cost.[32] He indicates that if transaction costs

25. The ASEAN-Australia-New Zealand Free Trade Agreement was executed on February 27, 2009 and entered into force on January 1, 2010 for Brunei, Malaysia, Myanmar, the Philippines, Singapor, Vietnam, Australia, and New Zealand; March 12, 2010 for Thailand; January 1, 2011 for Laos; January 4, 2011 for Cambodia; and January 10, 2012 for Indonesia. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ASEAN-Austl.-N.Z., Thai. Free Trade Area Dep't Trade Negots. 104–05, http://www.thaifta.com/Engfta/Portals/0/AANZFTA.pdf [hereinafter AANZFTA].

26. *Id.* at 89; ISCECA, *supra* note 23.

27. AANZFTA, *supra* note 25.

28. *Id*.

29. *Id*.

30. *Id*.

31. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

32. Ronald H. Coase, *The Problems of Social Costs*, 3 J.L. & ECON. 1, 15 (1960). Coase argues that the costs inure to transactions. "In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading

were considered, many contractual arrangements would not be made.[33]

Williamson subsequently refined the concept of transaction costs.[34] According to him, transaction costs are the costs of negotiating a contract ex ante and monitoring it ex post as opposed to the production costs, which are the costs of enacting the contract.[35] This view is accepted by many economists, and now the concept of transaction costs encompasses all of the impediments to bargaining. The view has three forms: 1) search cost, 2) bargaining cost, and 3) enforcement cost.[36] Search cost is required for deciding whether one's preferred goods or negotiating partners are available on the market. Bargaining cost is a cost that requires one to complete an acceptable agreement with the other negotiating partners to the transaction. The negotiation and legal skills for drafting an agreement could be an example of the bargaining cost. Enforcement cost is the cost of ensuring that the other negotiating partners stick to the terms of the agreement. In general, enforcement cost is low when violations of the agreement are easy to observe and punishment is cheap to administer.

What if a transaction cost is zero and both contracting parties enjoy perfect information of the world? Then we can expect a perfect and complete contract. Every contingency is anticipated; the associated risks are efficiently allocated between the parties because all relevant information has been communicated. A perfect contract is also efficient. Each resource is allocated to the party that values it the most and each risk is allocated to the party that bears risk with the least cost. The contract would perfectly assign risks and obligations in every state. A zero-bargaining cost would make it easier for both contracting parties to agree on any special circumstances. Opportunism is not a problem. Opportunistic behavior tends not to arise in the complete contract because even if it arises, both parties will have inserted the terms in the contract to prevent and punish such opportunistic behavior.

In reality, however, there is no perfect and complete contract because the transaction cost cannot possibly be zero and there is no way for the parties to foresee every possible scenario that will arise in the future. A contract always requires a cost of finding the right contracting partners, the right drafting skills, et cetera. In fact, a contract will always be incomplete in the sense that the parties will fail to include all the variables that are potentially relevant to it.[37]

Because of the difficulty of predicting and evaluating all the variables, the parties face a risk. A risk of a natural disaster is a good example of this. To respond to risk, the parties do their best to allocate the risks that can arise. For example, the contract may stipulate that the completion date will be deferred in the event of a natural disaster. However, in many cases, the contract may say nothing about who bears the risk. When the

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up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on." *Id.*

33. RONALD H. COASE, NOTES ON THE PROBLEMS OF SOCIAL COSTS, IN THE FIRM, THE MARKET, AND THE LAW 157–58 (1988).

34. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 15–32 (1985).

35. *Id.* at 21.

36. Carl Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979) ("[A] transaction cost [includes]: 1) search and information cost; 2) bargaining and decisions costs; and 3) policing and enforcement costs.").

37. SCOTT & STEPHAN, *supra* note 6, at 76.

contract remains silent about a risk, the contract has a gap. Why do parties decide to omit something about a certain condition by leaving a gap in a contract? Of the various reasons for leaving a gap, the most important one is related to the effort and costs of anticipating possible contingencies, bargaining about their solution, and then describing them adequately.[38] In particular, parties will tend not to specify terms and to leave a gap in relation to low probability events because the expected loss from the gap will be minimal, whereas the cost of including the terms would be significant. For instance, it may take only a minute to discuss and agree on a term about what to do if a lawyer is involved in a car accident on the way to signing a deal, but if such an event is unlikely to occur, it would not be worthwhile to include a provision for such an outcome in the contract. To express this as an equation, suppose the cost of including a term for an (anticipated) contingency is C, that the likelihood of the contingency is P, and that the loss that the parties would jointly suffer by failing to include a term for the contingency is L. The following equation would apply:

Leave a gap → Expected loss of PL < C
Fill the gap → Expected loss of PL > C

2. Problems of Incomplete Contract – Opportunistic Behavior

The incomplete contract always suffers from opportunism problems. In other words, the gap may encourage contracting parties to engage in opportunistic behavior.[39] The incomplete contract theory explains that when a party has the flexibility to adjust its performance in the future as conditions change, the party will always choose the best alternative option for itself, even though the option may not be the best for both negotiating parties.[40] One party may have private knowledge of the occurrence of a contingency at hand, which it can strategically withhold. Suppose a seller and a buyer agreed to include a warranty provision in the contract that obligated the seller to do their utmost to fix a machine. Both parties would leave a gap with respect to an obligation when the cost of fixing the machine arises because it would have been impossible for the parties to foresee the increase in the cost of the nuts and bolts required to fix the machine. If the cost of fixing the machine actually rises, the seller might have an economic incentive not to fix the machine and still argue that he or she did their best to fix it. The seller is the one who knows about the level of his or her efforts, and therefore is likely to abuse the information that is only known to him or her.

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38. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 299 (2004) (providing several reasons for the incompleteness of contracts such as the cost of enforcing a contractual term and difficulties verifying contingencies or variables); SIMON A.B. SCHROPP, TRADE POLICY FLEXIBILITY AND ENFORCEMENT IN THE WTO: A LAW AND ECONOMICS ANALYSIS 74 (2014) (classifying two types of gaps: inadvertent gaps and foreseeable gaps).

39. William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT'L ECON. L. 996, 1008 (1996).

40. SCOTT & STEPHAN, *supra* note 6, at 76; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989) (recognizing the possibility that one party might strategically withhold information that would increase the total gains from contracting in order to increase her private share of the gains from contracting).

3. The Application of Incomplete Contract Theory to International Law

Incomplete contract theory has recently been applied to international law.[41] It is the application of economic incomplete contract theory, assuming that states are rational actors when they conclude the international agreements. Schropp applied the incomplete contract theory to the WTO system to seek various trade policy flexibility mechanisms.

Recently, Van Aaken took a first step in applying the incomplete contract theory in the field of international investment law.[42] She argues that a soft term or gap should be inserted in an international investment agreement because inserting a hard term, which is less open to interpretation, will always turn out to be suboptimal in the future.[43] Once conditions change, a contract with a hard term will lead to outcomes that are less desirable than the parties would have agreed upon had they known of the uncertainties in advance. Accordingly, Van Aaken argues that gaps such as escape or exception clauses should be inserted to compensate for an unpredictable future. Alschner is another researcher who recently recognized an international investment agreement as an incomplete contract.[44] He observes that first generation investment treaties are highly incomplete contracts containing only brief and vague provisions and delegating much of the gap-filling to tribunals, whereas the degree of incompleteness in the second-generation investment treaties is considerably lower. He argues that the second-generation investment treaties should assist arbitral gap-filling in first generation treaties.

However, despite the excessive number of TIS agreements ratified with incomplete provisions, the literature never touched on describing the incompleteness problems in these agreements. Thus, in the section that follows, the Article examines why TIS agreements contain many incomplete provisions and the problems associated with those provisions. Subsequently, the Article proposes a practical solution by employing incomplete contract theory.

B. Why Have Incomplete Provisions in an Agreement on Trade in Services?

The incomplete provisions are, in fact, gaps in the incomplete contract theory. Many nations spend years in negotiations and decide to leave a gap by not specifying the terms or not putting anything in the text. Why do both parties leave gaps? As noted, in order for a gap to be efficient, the following equation should be established: A gap should be left when the expected loss of PL is less than C (PL<C). That is, the cost of filling out the gaps should be greater than the probability of the loss multiplied by the loss that the parties

41. *See generally* Kenneth Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 348–54 (1989); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Anne Van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law',* 17 EUR. J. INT'L L. 289 (2006); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008); JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (2008); ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW (2013).

42. Anne Van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory*, 12 J. INT'L ECON. L. 507, 507 (2009) (arguing that contract theory could be utilized in international investment law similar to how its used in international trade law).

43. *Id.*

44. Wolfgang Alschner, Interpreting Investment Treaties as Incomplete Contracts: Lesson from Contract Theory (July 18, 2013) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241652.

would jointly suffer from failing to include the terms.

When negotiating partners leave a gap either in the text or the schedule of commitments, both of them presumably believe that the cost of including the terms would outweigh the joint loss incurred from not including the terms, considering the probability of the loss. It is not always true that the cost of filling the term (C) is much higher than the possible joint loss (PL) from having the gap. In fact, the equation still holds if the joint loss (L) is higher than the cost of filling the terms (C) when the probability of joint loss (P) is extremely small. There are different types of cases where the equation justifies leaving gaps. It would be difficult to discover all the variables that would fit into the equation, but this Article seeks to examine some possible factors that constitute determining P, L, and C.

What would constitute the cost of filling the term (C)? The high cost of filling the term is probably the major reason for leaving a gap. It is extremely costly for host developing nations to collect and examine their domestic laws and policies. There are many reasons that explain these difficulties. First, many host developing countries are currently renovating and reforming their domestic laws. After Washington-consensus policies failed, many host developing nations learned that market-oriented rules and regulations work only if there are appropriate domestic institutions. Particularly, they realized that establishing the "appropriate economic and legal policies"[45] (i.e. policies that reflect local environment and social-political culture) is critical for the success of further economic development.[46] Thus, many host countries are establishing their appropriate domestic economic and legal policies. Because the rules and regulations are in the process of reformation, it is difficult for negotiation teams to gather data and examine how these laws and policies will interact with TIS agreements. For instance, determining how domestic policies interact with MFN or NT clauses in a main text is challenging when domestic policies are evolving. The rules and regulations are frequently changing, and it is difficult to predict the legal consequences of inserting MFN or NT clauses in the text. Additionally, it is difficult to see which rules and regulations should be carved out from

45. DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 229 (2008). Appropriate economic and legal policies refer to policies that are tailored to local environments or to the culture of a society. Because host developing nations are different from advanced countries in that they face many constraints and challenges, institutions that performed well in the advanced countries may not work as well in developing nations. Host developing nations do not require an extensive set of institutional reforms. Rather, they need to evaluate their institutions and find "appropriate" institutional arrangements to further their growth. *Id. See also* Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 100, 100–04 (2008); DANI RODRIK, THE GLOBALIZATION PARADOX 171 (2011); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004).

46. Law and development studies have been rapidly growing for the past few years. However, there is no consensus as to what this field is or whether it is an academic field at all. Different scholars have different answers to these questions. Some focus on formal institutions, describing how enforcement of contracts or an independent judiciary protects investors and improve economic growth in developing nations. Others have not focused on economic development, but instead on social development such as democracy or freedom. *See* DAVID TRUBEK, LAW AND DEVELOPMENT 50 YEARS ON, INT'L ENCYCLOPEDIA SOC. & BEHAV. SCI. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2161899. *See also* DAVID TRUBEK & ALVAROS SANTOS, THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (2006); Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 54 AM. J. COMP. L. 895 (2008); Yong S. Lee, *Call for a New Analytical Model for Law and Development*, 8 L. & DEV. REV. 1, 1 (2015) (establishing foundational work for the development of the analytical law and development model, or "ADM"); MICHAEL J. TREBILCOCK & MARIANA M. PRADO, ADVANCED INTRODUCTION TO LAW AND DEVELOPMENT (2014).

the main text by listing in the nonconforming measures list. They presumably want the appropriate economic and legal policies to be carved out from the text, but they are simply not ready because it is in the middle of the reform process.

Second, host developing nations face extreme difficulties in obtaining cooperation from other line ministries.[47] Of course, there are exceptions when the negotiation team has strong political power and is prioritized, such as the United States Trade Representative, which is part of the executive office of the President. However, most host developing nations experience difficulties in cooperating with line ministries, especially with respect to collecting measures for the preparation of a schedule of commitments or a nonconforming measures list. For instance, a negotiation team under a Ministry of Foreign Affairs or Trade may send a request to the Ministry of Land to prepare a schedule of commitments with respect to land measures because it has no expertise in this area. However, in many cases, a Ministry of Land frequently postpones submitting the analysis of the domestic measures to the negotiation team because such preparation is simply not its principal function. Thus, even if the analyses of the domestic measures are easily obtainable by line ministries, administrative inefficiencies and lack of cooperation between ministries may become a big hurdle to listing the measures in the reservation list.

Lastly, lack of expertise and low negotiation skills are also significant factors that influence the cost of filling the terms. In fact, it is difficult for host developing nations to carve out appropriate laws in the main text because most home countries negotiate with the model treaty template, aiming at a high level of market opening and liberalization. They seek to persuade host nations not to deviate from any terms of the model treaty, requesting them to carve out as little as possible. Host countries have little bargaining power or negotiation skills to modify the terms of the model treaty and, thus, tend to merely accept most of its terms.[48] It is well known that most ratified services and investment agreements have an extremely similar appearance, being almost identical to the terms in the model treaty.

Surprisingly, for most of the readers of this Article, negotiators with expertise from home nations frequently hold question-and-answer sessions ("Q&A sessions") parallel to main investment negotiations.[49] This shows a dramatic inequality of bargaining power between negotiating parties. The Q&A sessions usually consist of discussions about the meanings of provisions or articles and the consequences of adopting them. The lecturers–usually the negotiators from home-developed countries–would have the maximum amount of bargaining power depending on how they shape their Q&A sessions. This is probably

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47. There is a debate about whether to place trade representatives under a ministry, such as the ministry of trade or foreign affairs, or as part of the executive office of the president. Many suggest host countries conduct a structural reform of the trade representative so that it becomes an independent entity under the executive office of the president. *See, e.g.*, Gi H. Kim, *The Change of Trade Negotiation Agency and Negotiation Power in Korea*, 37 KOR. TRADE REV. 69 (2012).

48. Zeng Huaqun, *Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice*, 17 J. INT'L ECON. L. 299, 302–04 (2014).

49. Bilateral or multilateral negotiation of investment treaties in the real world involves more dramatic inequality of bargaining power than anyone could expect. Negotiators from host countries ask questions during breaks, and home countries' negotiating partners answer their questions. Moreover, most negotiators from host countries handle the majority of ongoing investment treaties, so they do not have sufficient time to analyze or prepare the text of treaties. They are busy participating in negotiations, and therefore can accumulate expertise only by diligently participating in Q&A sessions and asking peers from home countries questions.

why all services and investment agreements look the same. Negotiators simply copy and paste the treaty from a previously concluded text because they have no expertise in modifying the terms.[50]

What about the probability of the loss (P)? It is difficult to tell whether a probability of loss is high or low. There are unlimited numbers of variables to consider, such as the frequency that a host country exercises the domestic measures, the possibilities of a settlement before a lawsuit, and the possibilities of changes in rules and regulations in the near future. Unlimited variables make it difficult for us to definitely say that P should be high or low.

What about a joint loss (L)? Incomplete provisions have a mixed effect for both negotiating partners. Incomplete provisions definitely have a negative effect on both foreign investors in a home state and on host countries, as they reduce transparency and predictability for foreign investors. For instance, if the treaty is ratified without any schedule of commitments, foreign investors cannot identify the legally permitted boundaries of investments. Therefore, investors cannot make confident investments, rendering it difficult for a host developing country to attract foreign investment.[51]

On the other hand, incomplete provisions can be beneficial to some countries if those countries are not ready to sign treaties. Incomplete provisions and a single renegotiation clause allow host developing nations to maintain a high level of market protection for their domestic policies and comply with the main text of the TIS agreements, all while avoiding obligations to renovate or establish new rules. This gives the countries additional time and flexibility to adjust to and prepare for new market openings and liberalization moves.

It is difficult to figure out the exact quantitative numbers that constitute P, L, and C, since treaties are assumed to be incomplete contracts with incomplete information. There are an unlimited number of factors to consider, and the mixed effect of incomplete provisions makes it even more difficult to analyze the decision-making process of the parties concerned.

C. The Problems Related to Incomplete Provisions: Opportunistic Behavior

As noted, gaps in contracts raise the problem of opportunistic behavior.[52] A party that has the flexibility to adjust its performance in the future as conditions change will always choose the best alternative option for itself, even though the option may not be the best for both parties.[53]

In this regard, a country may choose to behave opportunistically when conditions change after ratification of a treaty. To be specific, they might not comply with the renegotiation clause by avoiding renegotiating the incomplete provisions as their

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50. Huaqun, *supra* note 48, at 302–04.

51. *See generally* U.N. CONFERENCE ON TRADE & DEV., TRANSPARENCY: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2012). The report contains comprehensive analysis of how international investment agreements ("IIAs") could enhance transparency and predictability for investors. The report examines: (1) the way in which traditional transparency issues have been addressed in IIAs since 2004; (2) the emergence of investor responsibilities as a consideration within transparency issues; and (3) the introduction of a transparency dimension into investor-State dispute settlement. *Id.*

52. Aceves, *supra* note 39, at 1009.

53. SCOTT & STEPHAN, *supra* note 6, at 76; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989).

conditions change after ratification. Just as in the example of the seller with a warranty, India or Singapore might choose not to complete the agreement and argue that it did its best, since they put the term "shall endeavor" to fix incomplete provisions in their TIS agreement.

In addition to the problems of avoiding and postponing renegotiation, the possibility for opportunism arises once renegotiation begins. The parties may opportunistically drag out the selection of the agenda for the renegotiation. Generally, the renegotiation requires the parties to select agendas based on the issues in the TIS agreements that need to be renegotiated. For example, a party may view amending coverage of a MFN clause as a priority, while the other negotiating partner may prefer to insert the missing schedules of commitments, or complete the unfinished schedules or nonconforming measures list. The parties usually debate over establishing the agenda for the renegotiation, and many negotiating partners intentionally drag out the process to procrastinate on the correction of gaps.

Why do many nations act opportunistically to postpone the renegotiation? Many nations have various reasons to act opportunistically after ratification of a treaty.[54] As noted above, they may opportunistically stick to the previously concluded TIS agreements by postponing the renegotiation. Many nations sign amended TIS agreements to commit to higher liberalization. However, if the country still believed that it was not ready for the market opening and services liberalization, it could simply procrastinate on the renegotiation and enjoy the lesser degree of liberalization. If countries fail to insert anything in the agreement under negotiation and instead just leave the agreement blank with a renegotiation clause, there is no change in the degree of liberalization between negotiating partners. In turn, a party could enjoy a less stringent obligation to protect foreign investors by maintaining the less liberalized agreement that they have previously signed with negotiating partners.

Likewise, countries could opportunistically postpone the renegotiation to maintain their protectionist policies derived from the vague and unfinished nonconforming measures list. In the example of unfinished nonconforming measures in the JSEPA, Singapore wanted to carve out its privatization policies but did not stipulate the legal citation and source of the measure in the non-conforming measure list. In fact, any privatization rules and regulations in all different sectors of the economy could arguably be carved out from the main text. The Singaporean government could enjoy this advantage by not specifying the nonconforming measures, while Japanese investors would face difficulties identifying the boundaries of their investment projects.

The cost of examining and finding domestic laws and policies may remain high even after ratification of treaties, and thus parties may decide not to initiate the task. Because of ongoing legal reforms, many nations, especially host developing nations, face extreme difficulties identifying the domestic laws and policies that will be affected by the TIS agreement. In this respect, these countries would have an incentive to wait and postpone the renegotiation until they are certain which domestic measures and economic sectors will

54. GUZMAN, *supra* note 41, at 135. Countries frequently resist drafting detailed and comprehensive obligations because, although such obligations increase credibility and lead to higher compliance rates, they also increase the penalties the countries face if they violate the agreement. *Id.* The countries take this cost into account when drafting the agreements. *Id.*

be affected by the TIS agreement, and until they know what the legal consequences will be. Thereafter, they may be willing to produce complete forms of the agreement by reducing incomplete provisions in the renegotiation phase.

IV. CONCLUSION

The Regional Comprehensive Economic Partnership ("RCEP") is a proposed FTA between the ten member states of the ASEAN and the six states with which ASEAN has existing FTAs (Australia, China, India, Japan, South Korea, and New Zealand). RCEP negotiations were formally launched in November 2012 at the ASEAN Summit in Cambodia, and the tenth round of negotiations finished in South Korea in early October 2015.

RCEP members originally agreed to conclude all the negotiations by the end of 2015, but they failed to do so.[55] They recently scheduled another five rounds of negotiations by the end of 2016 to conclude the agreement. Among the many working groups in the negotiation, the TIS working group showed the slowest progress. In fact, they have not agreed to any terms of the main text. Over the last four years, they have agreed on nothing. The member states have only a few months left to conclude the RCEP. Could they possibly complete the treaty within a few months? Probably not. They will probably conclude it with many incomplete provisions. This Article strongly suggests that member states agree on establishing a strict renegotiation clause to repeatedly monitor and complete the treaty. In that way, we can expect a more complete treaty that reduces its transaction cost.

55. Deborah Elms, *RCEP Shifts Into a New Gear?*, ASIAN TRADE CENTRE: TALKING TRADE BLOG (Aug. 6, 2015), http://www.asiantradecentre.org/talkingtrade/2015/8/6/rcep-shifts-into-a-new-gear ("The original intention was to complete the agreement by the end of [2015]. The timing had been chosen to link up RCEP with the introduction of the ASEAN Economic Community. However, when RCEP ministers met in Kuala Lumpur last month, they finally agreed that closure in 2015 was not possible.").