Letter to the *Journal*

**The COVID-19 Pandemic, Regional Cooperation Economic Partnership (RCEP) and the Rise of Investment Facilitation**

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**I. Introduction**

1. Fidler, in a recent Letter to the *Journal*, states that in the context of turbulent context of power and ideas, international law proved vulnerable and inadequate to support robust pandemic cooperation. Looking at the statement from the perspective of international investment law and policy framework, we tend to agree with Fidler’s assertion.

2. Our assertion is that, during and post-COVID-19 pandemic, international investment policies as reflected in the domestic policies and international investment agreements (IIAs) require a bigger role of States in the investment scene, especially in facilitating both domestic and foreign investment through a more structured and effective investment facilitation. Countries around the world need to facilitate new investments especially in the medical related products and services; and to facilitate the implementation of approved investments. Investment facilitation is also important to ensure business continuity, especially those highly impacted by the COVID-19 pandemic including logistics and air services. These two sectors of service are keys to

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1 D.P. Fidler, Letter to the Journal: To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence, 19 Chinese JIL (2020), 207, para.3.
ensuring safe and efficient cross-border movement of goods including medical products and food items.

3. Investment facilitation is important, as, according to Berger, its main objective seems to be providing investors with a transparent, predictable, and efficient regulatory and administrative framework. Moreover, Novik and Crombrugghe assert that investment facilitation also relates to the improvement of government tools and services to help investors, to ensure sustainable development, capacity building, and private-public relations.

4. For many years, the neo-liberal ideology has promoted higher levels of liberalisation, allowing more private sector participation in the economy, and the reduced role of States. However, in the era of COVID-19 pandemic, the private sector and the States should work together to encourage and to facilitate domestic and foreign direct investments (FDI). IIAs have to reflect investment facilitation in the relevant provisions.

5. The recently signed Regional Cooperation Economic Partnership Agreement (RCEP) includes in its objectives the facilitation of investments. RCEP, involving 10 ASEAN Member States, Australia, China, Japan, Kore and New Zealand, forms the world’s largest free trade area. Article 1.3 of RCEP states that the objectives of the agreement include progressive liberalization of trade in services and to create a liberal, facilitative and competitive investment environment in the region. The RCEP provision is consistent with the similar provisions in the ASEAN Comprehensive Investment Agreement (ACIA) 2009 and The World Trade Organisation (WTO) negotiations on the Investment Facilitation for Development, just launched in September 2020, as discussed below.

6. With the more challenging economic environment, investors expect a higher level of assistance in ensuring continuity and sustainability of their investments. However, with the changing global trend, where investors may look for new markets and new investment sectors or activities, some least developing and developed countries (LDCs) may find it hard to compete even if they do offer similar investment facilitation to investors.

II. The increased importance of investment facilitation at the regional setting

7. The provision of the investment chapter in the RCEP indicates the increased importance of investment facilitation, especially in ensuring economic recovery post-

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2 Berger, et.al, Investment facilitation for development: a new route to global investment governance, DIE Briefing Paper No 5: 2019.
3 Ana Novik and Crombrugghe, Towards an International Framework for Investment Facilitation, OECD: 2018.
COVID-19 pandemic. The recent Global Investment Trends Monitor No. 35 of the United Nations Conference on Trade and Development (UNCTAD) predicts a drastic drop in global FDI flows up to 40 percent for 2020-2021, reaching the lowest level of the past two decades. As a result of COVID-19, more than two-thirds of multinational investors in developing countries are reporting disruptions in supply chains, declines in revenues, and falls in production. The World Bank’s Global Investment Competitiveness Report 2019/2020 reports that, due to the COVID-19 pandemic, there will be a worsening investment scenario in the coming months. The same report, citing a survey of 2,400 global business executives in 10 large middle-income economies, asserts that government policies can influence FDI location decisions. Governments are expected to provide facilitation in investment project implementation, funding, incentives, and investment after-care.

8. Efficient investment facilitation may assist investment promotion agencies to bring investments into new growth areas such as digital technology, circular economy, communication technology, e-commerce, and agriculture. States can leverage on FDI for robust economic recovery from COVID-19 by avoiding protectionist policies, seizing new opportunities from changing FDI and supply chain trends, and fostering global cooperation. This is because investors seek a more efficient and effective investment facilitation as the COVID-19 pandemic can no longer ensure the policy stability even in the more developed countries. To ensure investors’ retention, countries may increase coordination between central and sub-central agencies, and sectoral agencies and introduce investment facilitation tools such the One Stop Centre (OSC) and investor-after care services need improvements.

9. The signing of RCEP is timely, as, according to the UNCTAD Investment Trends Monitor November 2020, the agreement could give a significant boost to FDI in the region. Several RCEP parties like China, Indonesia, and Malaysia have introduced new measures to attract, promote or facilitate investment. China introduced direct measures to assist investors facing COVID-19, through the Circular on Responding to Novel Coronavirus Pneumonia, Stabilizing Foreign Trade and Foreign Investment and Promoting Consumption, dated 18 February 2020, which provides for paperless management of foreign investment records and issuance for foreign companies failing to execute contracts during the COVID-19 crisis. Indonesia introduced the Omnibus Law 2020 to reduce red-tapes at the provincial and local government levels. Malaysia has also introduced special investment promotion fund for the Malaysian Investment Development Authority (MIDA) to assist existing investors to implement their investment projects.

10. Apart from RCEP, the Asia-Pacific Economic Cooperation (APEC), which 12 Parties of RCEP are part of the 21 APEC economies, also adopted the APEC Investment Facilitation Action Plan in 2008, which is further enhanced in the Kuala Lumpur Declaration and the Putrajaya Vision 2040, endorsed by the APEC Leaders Meeting in November 2020. ASEAN Member States may adopt measures to facilitate
investment post-COVID-19 pandemic by adhering to Article 25 of the ASEAN Comprehensive Investment Agreement (ACIA).\(^4\) ACIA supports several measures such as creating the necessary environment for all forms of investments, streamlining and simplifying procedures for investment applications and approvals, promoting the dissemination of investment information, including investment rules, regulations, policies, and procedures, establishing one-stop investment centres, strengthening databases on all forms of investments for policy formulation to improve ASEAN’s investment environment, undertaking consultation with the business community on investment matters, and providing advisory services to the business community of the other Member States.

III. Investment facilitation and post-COVID-19 in the multilateral setting

11. To ensure robust recovery of the FDIs post-COVID-19, regional efforts like RCEP, APEC and ASEAN alone may not be enough. These regional efforts will have to be supported by the multilateral approach to implement similar measures around the world. Hence, to ensure consistent post-COVID-19 recovery around the world, the global community has to support the WTO negotiations on the Investment Facilitation for Development. The WTO negotiations are part of the international traction on investment facilitation gained since the conclusion of the WTO Trade Facilitation Agreement in 2014.

12. For example, in 2016, UNCTAD released the “Global Action Menu for Investment Facilitation”, consisting of 10 Action Plans.\(^5\) Among the key components of the UNCTAD’s 10 Action Plans are to promote accessibility and transparency in the formulation of investment policies and regulations and procedures relevant to investors; to enhance predictability and consistency in the application of investment policies; to improve the efficiency of investment administrative procedures; and to build constructive stakeholder relationships in investment policy practice. Also, in 2016, Group of 20 (G20) trade ministers agreed on the non-binding “Guiding Principles for Global Investment Policymaking”. The Organisation for Economic Cooperation and Development (OECD) adopted the Policy Framework for Investment 2015.

\(^4\) For discussion on ACIA see J. Chaisse and S. Jusoh, The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investment, (2016), Elgar.

\(^5\) UNCTAD, Global Action Menu for Investment Facilitation Trade and Development Board Sixty-third session Geneva, 5–9 December 2016, TD/B/63/CRP.2.
13. The WTO negotiation on the Investment Facilitation for Development is mainly driven by emerging economies, many of whom are also Parties to RCEP. The initiatives for the investment facilitation multilateral framework started by the Friends of Investment Facilitation for Development (FIFD), who launched an open-ended Informal Dialogue on Investment Facilitation for Development in the WTO. It continues as an Informal Dialogue, which was developed to a Joint Ministerial Statement (JMS), co-sponsored by 70 WTO Members at the 11th WTO Ministerial Conference in December 2017. The JMS aimed to form structured discussions to develop a multilateral framework on investment facilitation.

14. As a result, Structured Discussions were held in 2018, 2019 and 2020 addressing issues related to unnecessary red tape, out-of-date procedures and bureaucratic overlap which can become costly impediments to investment. These issues are consistent with the need to accelerate post-COVID-19 economic recovery. In 2018, the Structured Discussion focused on the possible elements of the framework, addressing their interaction with existing WTO provisions with current investment commitments among Members along with the investment facilitation work of other international organizations such OECD, UNCTAD, International Trade Centre (ITC), and World Bank. In 2019, the Structured Discussions focused on the development of those possible elements of the multilateral framework, drawing on the issues raised by the members based on WTO agreements, FTAs, and IIAs. The Structured Discussion in 2019 also discussed cross-cutting issues such as domestic institutional relation, corruption, corporate social responsibility, and women empowerment. The Structured Discussion in September 2020 participated by 105 WTO members, began as formal negotiations on a multilateral agreement with a view of achieving a concrete outcome by the 12th Ministerial Meeting in 2021.

IV. The struggle of the developing countries post-COVID-19

15. According to the OECD Report on the foreign direct investment flows in the time of COVID-19, FDI flows to developing countries are expected to drop even more because sectors that have been severely impacted by the pandemic, such as the primary and manufacturing sectors, account for a larger share of their FDI than in developed economies. These countries need FDI more in helping them bring in development and recover from the economic downturn post-COVID-19. Certain countries, especially from lower income and lower-middle income countries like Lao People’s Democratic Republic (Lao PDR) and Myanmar will face more competition.
from the more developed countries, like China, Malaysia, and Vietnam in attracting investors.

16. In addition, the WTO Information Note on the COVID-19 pandemic and Trade Related Developments in the LDCs, states that COVID-19 poses the most daunting challenges to the trade of LDCs. This is mainly due to the LDC’s lack of resources to support economic rebound and the limited number of product ranges exported to few markets. The downward trend of trade in products like textiles and clothing and in services mainly in tourism revenues have increased pressure on the LDCs. LDCs are also facing reduced remittances, increasing the needs for FDIs.

17. Even Malaysia, an upper-middle income country, faces uncertainty in approved investment and in the implementation of the approved FDI projects during the time of the COVID-19 pandemic. The Malaysian central bank, Bank Negara Malaysia in its Economic and Monetary Review 2019, published in 2020, is concerned with the economic complexity gains in Malaysia which have been slower than most regional economies. According to the Bank Negara Malaysia, Malaysia has not transitioned towards more productive assets (e.g. research and development, ICT equipment and computer software).

18. MIDA states that total approved investments dropped by 5.25 percent in January and February 2020 and probably declined by 11.4 percent in 2020. According to MIDA, there are 644 of approved non-essential projects and 1,015 manufacturing projects yet to be implemented, and it is unclear how these projects are to be implemented due to the uncertainties brought by the COVID-19 pandemic. These projects carry investments worth RM 235.2 billion (about US$ 56 billion) and 177,000 potential jobs.

19. To facilitate investment entry and approvals of incentives, Malaysia has established the National Committee of Investment (NCI). NCI has overall oversight of the program and of strategic investments that require bespoke arrangements and is empowered to make decisions on investment projects received by all Investment Promotion Agencies (IPAs).

20. Myanmar, an LDC, is facing a more difficult challenge compared to Malaysia. Myanmar’s FDI inflow to GDP ratio has been fluctuating in the past few years. According to the World Development Indicator issued by the World Bank, actual FDI inflows as a percentage of GDP grew considerably in the post-liberalisation period starting in 2011. However, the FDI inflow to GDP ratio has been on a downward trend, from 6.8 percent in 2015 to 5.2 percent in 2016, 6.0 percent in 2017 and down to 1.8 percent in 2018, mainly due to the perceptions of slowing government reforms.

21. As a result of COVID-19, the World Bank Myanmar Economic Monitor June 2020 (MEM) states that Myanmar’s GDP growth forecast for FY2019/20 has been revised downward from 6.4 percent to just 0.5 percent, as all sectors are hit, with adverse effects of varying intensity projected across all sectors. Due to COVID-19, the
following sectors in Myanmar are identified by the World Bank as vulnerable: agriculture, tourism, garment sectors and the small and medium enterprises. Compared to Myanmar, Cambodia and Vietnam have seen an upward movement of the FDI inflow to GDP ratio between 2015 and 2018. Hence, Myanmar is facing intense competition in getting FDIs into the country from its peers in ASEAN.

22. Myanmar must also improve on investment facilitation, i.e. retaining investment and reinvestment from existing investors; assisting these investors to resolve their issues mainly in relation to licensing and permits and land registration; and improving access to land. These also include issues of an unfinished reform agenda, especially in improving access to licenses and permits, improving the functions of the One-Stop Service Centre, and ensuring investors have unimpeded access to land.

23. The third country under review is Lao PDR, which faces a bigger challenge compared to Myanmar during the COVID-19 pandemic. FDI in Lao PDR is highly concentrated in natural resource-seeking investments and market seeking investments. Between 2003 and 2018, FDI in Lao PDR is concentrated in hydropower, construction, and mining. However, according to the Lao PDR Investment Reform Map Report, 2020, investment in hospitality (hotels) and tourism has received much attention from foreign investors in recent years, attracting 7 percent of greenfield FDI. These sectors face higher risk post-COVID-19 if the travel restrictions around the world are not lifted soon enough, where Lao PDR faces a downward trend in tourism receipts.

24. The complexity of post-COVID-19 investment recovery is further exacerbated by the existing weaknesses in the investment policies in Lao PDR. For example, investment entry into Lao PDR is not straightforward. The Investment Promotion Law (IPL 2017) falls under the jurisdiction of the Ministry of Planning and Investment (MPI), which governs Controlled Business and Concession Business. IPL 2017 must be read together with the Enterprise Law, under the Ministry of Industry and Commerce (MOIC), which governs General Business and Enterprise Registration. As a result, investors intending to invest in Lao PDR need to identify the sector of investments in which they are investing before approaching the relevant agencies or the One Stop Service Office (OSSO) if they are investing in a Controlled Business. Further, upon obtaining an Investment Approval, investors face burdensome procedures, unpredictable law enforcement, and a discriminatory regulatory environment conspiring to hamper investment. Lao PDR ranks 154 out of 190 countries in the 2019 and 2020 Ease of Doing Business reports, trailing far behind regional average and peer countries. In addition, Lao PDR’s poor logistics impede private investment and disincentivize efficiency-seeking investment. With the completion of the Vientiane-Kunming Railway Project being built under the Belt and Road Initiatives, Lao PDR hopes to have a better logistic system and better access to the world market, from a land-locked to a land-linked country.
V. Conclusions and recommendations: repositioning investment facilitation

25. Based on the above, investment authorities charged with attracting and facilitating FDI must continue working with investors and other related stakeholders to facilitate investments in their respective countries. Investment facilitation can be a powerful means to ensure investors are able to implement their investment projects successfully. As discussed above, among measures to be taken by the countries, especially the LDCs and the developing countries, are greater regulatory simplicity, transparency, and predictability.

26. There are few areas requiring the investment authorities’ attention. One, countries need to develop a strong co-ordination body between central and sub-central investment bodies and sectoral ministries and agencies. Two, one-stop service centres must effectively and efficiently serve investors. Three, investment authorities may provide targeted “investor aftercare initiatives” to key investment sectors and their lead local suppliers through higher level and coordinated linkages, to preserve supply chains. Four, countries may introduce conflict management system through investor grievance mechanism (IGM). The IGM essentially provides minimum institutional infrastructure that enables governments to identify, track and manage grievances arising between investors and public agencies as early as possible. The tool, therefore, ensures governments respond to investor grievances in a timely manner. Five, specific investment services to be prioritized by IPAs include (a) identifying and directly contacting at-risk or systemically strategic firms according to number of employees, region, or sector; (b) expediting foreign exchange approvals; and (c) advocating for urgent government actions to solve the firms’ grievance issues more systematically.