The Importance of Intellectual Property and International Investment Agreements for Overcoming the "Peripheral Economy Trap": A Response to Ian Taylor's "Sixty Years Later: Africa's Stalled Decolonization

By:

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Introduction

This paper engages in a critical legal analysis of Professor Ian Taylor's article, ***Sixty Years Later: Africa's Stalled Decolonization***. It is not meant to be an exhaustive analysis but will provide a limited legal perspective of the article's foundational arguments on the underlying causes of Africa's economic

underdevelopment, through a legal lens rooted in intellectual property (IP) law and international investment law (IIL). This paper suggests that Taylor has 1.) mis-identified the underlying problem of post-colonial economic development as "***stalled decolonisation***" and has 2.) disregarded the highly constitutive role of the law of international trade, investment, IP treaties and global financial regulation (i.e. the rule of international economic law) in sustainable development outcomes.1 The role of international economic treaty obligations in national and international economic relations, and the development policies flowing from them, are key to understanding what I will label as the "***peripheral economy trap"***, a legal variation of the World Bank's "***middle income trap***".2 The United Nations, in §7 of the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels saw Member States reaffirmed their conviction that,

> *"…the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda."3*

The UNGA reiterated these views in *Resolution 66/115 §12* noting that *"…effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty…".4* How well placed are African and Caribbean post-colonial economies to harness the benefits of the laws and treaties of the international economic order? I suggest that what Taylor sees as economic underdevelopment, fuelled by the persistence of lingering neo-colonial economic relations, in reality is a phenomenon sustained in part, by a more generalised diffusion of specific normative economic philosophies, into the drafting practice of international economic treaties. These normative philosophies on the regulation of the global economy, now constitute the accepted rules of the international economic system, to which all countries are subject. I argue that post-colonial African and Caribbean nations, along with

other developing economies find themselves structurally located within this legally constituted, ***"peripheral economy trap".*** Taylor is simply asking the wrong questions. He surveys the evidence of low job creation performance for foreign direct investments in Sub-Saharan Africa and asks, "How did stalled decolonization cause this?". This is a question that has no practical legislative and policy responses, upon which countries can build coherent development strategies.

Lastly, I suggest that a policy programme targeted at transforming the regulatory environment around creation, ownership and control of knowledge assets through IP rights, and the rules underpinning capital inflows and foreign investment partnerships could provide a possible route out of the, "***peripheral economy trap***". The first part of this paper sets out the concept of the "***peripheral economy trap***" as a structural category which is legally constituted and specifically related to the coherence of countries' IP, international trade and investment legal systems, institutions, and policies. The second part of this paper discusses the importance of law, legal systems, and international treaty obligations, to persistent economic underdevelopment, a variable which Taylor touches on tangentially but quickly discards. The third part of this paper then discusses legal systems, policies and institutions related to innovation, intellectual property, FDI, and capital inflows as a viable route out of the "***peripheral economy trap***".

The Peripheral Economy Trap, Middle-Income Trap, and International Economic Law Norms

The ***"peripheral economy trap"*** is characterised by the disadvantageous legal and regulatory position of LDC and developing countries in international economic treaty making and implementation, diminishing the impact of their development policies, while stagnating growth. Employing a syncretic analytical approach from the economic literature on ***"poverty traps"*** and ***"middle income traps"***, the ***"peripheral economy trap"*** is identified as an enduring fringe status in the international economic law making infrastructure, held static by continuing poorly conceived, self-reinforcing legal and policy choices, determined by the disadvantageous location of countries on the periphery of the IEL regime. This proposition steers clear of the foreign aid prescriptions found in the *"poverty traps"* literature, toward the more regulatory approach of

*"middle income trap"*analysis. The "peripheral economy trap" is characterised by self-defeating legislative, treaty and policy programmes which are further solidified by the resulting narrowing of policy space, and lack of coherence in institutional development, stymying achievement of defined development goals and creating an endless self-reinforcing cycle. Having identified the "***peripheral economy trap***" as a phenomenon of law, what documented evidence (of legal and economic relations) can we find to support this position? Here, a brief analysis of two legal case studies proffers examples of the ***"peripheral economic trap"*** in action, while evidence from already well-established data sets and indices, that address the correlation between law and economic outcomes, will be used to illustrate this. Associated with the literature and economic surveys on ***"middle income traps",*** is the ***Economic Freedom Report*** **(EFW)** and associated indices, which provide a wealth of data and evidence of the role of law, law making processes and implementing institutions, including regulatory structures, as significant determinants of which economies become trapped on the periphery. It is stressed that the data underlying the construction the EFW index ratings, are primarily taken from the data sets of the International Monetary Fund (IMF), World Bank, and World Economic Forum (WEF). The index put forward in the *EFW* studies, describes its function as measuring the extent to which "*policies and institutions of countries are supportive of economic freedom*." Some of the variables defined as denoting the level of economic freedom can be used as proxies for understanding the relationship between law (whether municipal or international) and static economic development.

The report looks at five broad areas including 1.) *Size of Government*, 2.) *Legal System and Property Rights,* 3.) *Sound Money*, 4.) Freedom to *Trade Internationally,* and 5.) Regulation. It is clear that the indicators incorporated under, *Legal System and Property Rights*; *Freedom to Trade Internationally* and *Regulation* are all useful for establishing evidence that the ***"peripheral economy trap"*** is a legal phenomenon which results in static development outcomes. By using the EFW component data points that are specifically targeted at extracting evidence on the economic development impact of law as a proxy, we can get a glimpse of the nature of the law constituting the economic periphery. The EFW identifies the weakness in the rule of law and property rights(p.8) as being pronounced in Sub-Saharan Africa. It also

highlights that "*Latin America and Southeast Asia also score poorly for rule of law and property rights*". The figure below shows the disaggregated data points which can be used as a proxy for fleshing out "the peripheral economy trap. In *figure 1* below *Legal Systems and Property Rights* is composed of several data point including "integrity of the legal system", "protection of property rights", "legal enforcement", etc. setting out municipal legal criteria for a stable commercial environment.

[caption id="" align="aligncenter" width="480"]
Figure 1: Source EFW Report: https://www.fraserinstitute.org/sites/defa ult/files/economic-f
Figure 1: Source EFW Report: https://www.fraserinstitute.org/sites/defa ult/files/economic-freedom-of-the-world-[/caption]

In *figure 2* on issue 4, "*Freedom to Trade Internationally*", encompasses the role of international trade law and global financial regulation in point "b" on regulatory trade barriers and "d" controls of the movement of capital and people.
Figure 2 : Source EFW Report 2020 : https://www.fraserinstitute.org/sit es/default/files/eco

Figure 2 : Source EFW Report 2020 : https://www.fraserinstitute.org/sit es/default/files/economic-freedom-of-the-world-2020.pdf

In *figure 3* below which directly addresses regulation the rules applicable to credit market, the labour market and business are accounted for.
Figure 3: Source EFW Report: https://www.fraserinstitute.org/sites/default/f iles/economic-f

Figure 3: Source EFW Report: https://www.fraserinstitute.org/sites/default/f iles/economic-freedom-of-the-world-2020.pdf

These indicators can provide an approximation of the peripheral legal position of African countries in the global economy. Of course, the compilation of a similar index, accounting for all international economic treaties and municipal laws deriving from same, alongside their development impact, would provide a more precise picture. However, the *EFW Index* provides a good approximation for our limited purposes here. The importance of the EFW index in framing the case study analyses shall be seen later on in this paper.

The Role of Law in Economic Development

In its opening article titled, *Empowerment and Innovation Strategies for Law, Justice and Development*, the 2013 edition of the*World Bank Legal Review* recognised that "the regulatory environment in most countries is significantly shaped by the values and practices of international legal regimes and organizations." It is well-established that the foundational values, practices and norms of international economic legal regimes and institutions, have been shaped to a significant degree by former European colonial powers, the United States, and a limited group of allied economies such as Japan. An illustration of this is the EU and US dominance in the creation of the WTO legal and trading system. The role of the EU and the U.S. in shaping the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) in the Uruguay Round captures this more succinctly. A European Commission memo following the Uruguay Round negotiations states in §3.11 that,

> *"The establishment of clear, stringent and enforceable international disciplines on intellectual property rights was one of the EU's biggest priorities in the Uruguay Round. Its objectives were largely met.... In addition, the European pharmaceuticals and chemicals industry will receive patent protection for their inventions in many developing countries that have refused such protection thus far."* 12

Whether or not the provisions of these treaties addressed the development needs of peripheral states was a secondary issue, as a legal order which substantially satisfied the needs of the leading economies had been established by the end of 1994. This is supported by the fact that the 2005 Protocol amending the TRIPS Agreement, toward establishing a normative legal basis for exporters and importers to adopt legislation, which facilitates access to affordable generic medicines for member states with limited, or no production capacity, only entered into force on January 23rd of 2020. It is important to note that this shift in favour of rules that directly benefit peripheral economies, was achieved largely through the efforts of WTO's African members; in sharp contrast to their passive participation in the shaping of the WTO Legal System in the 1990s. Establishing permanent legal access to affordable generic

medicines within the TRIPS Agreement, has been on the table since after the conclusion of the Treaty in 1995.

Fig 4 : Source EFW 2020
https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2020.pdf

The problem of the "***peripheral economy trap***" is often clearly displayed by treaty making and legislative choices in IP law and international investment and trade agreements. In *Figure 4* above, Mozambique is in 120th place for *Legal Systems and Property Rights*, 122nd place for *Freedom to Trade Internationally* and 137th place for *Regulation*. Starting from this threshold, the engagement of a country like Mozambique with international economic law, can lead to the selection of treaty provisions in investment and trade agreements that are not development oriented. Instead, provisions are aimed solely at de-risking the municipal legal environment, from the perspective of investors and their home states. An example of this can be seen in §VI (e) of the 2005 United States - Mozambique bilateral investment treat (BIT) which deals with prohibition of performance requirements in the,

> *"…establishment, acquisition, expansion, management, conduct or operation of a covered investment under this treaty, any requirement…. (e) to transfer technology, a production process or other proprietary knowledge to a national or company in the Party's territory, except pursuant to an order, commitment or undertaking that is enforced by a court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws;"*

In this agreement Mozambique has agreed to provisions which would create a disadvantageous starting point for any investment negotiations involving patents, transfer of technology or technical know-how. These provisions also potentially undermine the benefits of the implementation of Article 66.2 of the TRIPS Agreement on transfer of technology, which requires developed member states to provide incentives for technology transfer. Mozambique is not the only African WTO member, nor is it the only developing country to have signed BITs containing clauses on prohibition of performance of requirements with respect to technology and know-how. The WTO reports on the implementation of Article 66.2 demonstrate how African states, including Mozambique actively insist on Article 66.2 as an **obligation** for developed Member States, while simultaneously concluding bilateral investment treaties which chill any discussions on technology transfer focussed investments. In the latest transfer of technology discussions in the TRIPS Council and speaking on behalf of the LDC Group, Chad, notes the ambiguity in ***Article 66.2 on technology transfer.***

From the Council of TRIPS meeting and older meeting reports, it is clear a WTO legal technology transfer mechanism is unlikely to become an effective legal obligation for developed country members any time soon. This places many LDCs in a ***"peripheral economytrap"*** when negotiating bilateral/plurilateral trade and investment agreements. It is difficult to confidently negotiate more balanced performance requirement clauses, without the legal basis of a well-defined Article 66.2 mechanism. Furthermore, despite the existence of Article 66.2 on technology transfer, it would still be possible for U.S. investors to lodge an investment claim against Mozambique on the basis of the 2005 BIT, should that investor perceive any evidence that admission of investments was subject in any way to transfer of technology requirements. It is this kind of regulatory incoherence when engaging with the international economic order, which produces the "***peripheral economy trap***" and persistent underdevelopment.

Therefore, when African, Caribbean and all other peripheral economies engage in treaty and policy making in international economic law, they are no longer engaging directly in colonial relationships but are instead complying with their *erga omnes*obligations, in line with the treaties which establish the norms and ground rules of the international economic order. Taylor states, that "the saliency of neo-colonialism is that it remains a powerful analytical category to

understand contemporary Africa's political economy." While this paper does not dispute the influence of neo-colonialism on the policy choices of African States, it suggests that the current rules of international economic law may be more impactful on development outcomes for these states. Failure to implement municipal legislation or draft treaties which comply with obligations and norms established by the WTO Single Undertaking, the International Convention on the Settlement of Investment Disputes (ICSID), the WIPO Treaties, The World Bank Treaties, and several other international economic agreements, will often result in legal consequences that reinforce the ***"peripheral economy trap***" and reduce economic development policy choices even further. The economic development decisions of post-colonial African and Caribbean countries are therefore not truly a function of direct and lingering colonial economic relations. Instead, a significant portion of the incoherent decisions of these states can be accounted for by their legal and policy attempts at generating economic development policies which are compliant with their international legal obligations, as constituted by legal regimes such as the WTO Single Undertaking, the ICSID Convention System, the WIPO Treaties and others.

The Role of Intellectual Property and Investment Law in Overcoming the "Peripheral Economy Trap"

The conventional economic literature holds that FDI and the treaties and agreements which facilitate such flows, are key for the transfer of technology to developing economies. The rationale for this position is based on the fact that FDI flows are associated with knowledge spill overs of new technologies and technical know-how. Therefore, foreign investment facilitation and the associated legal frameworks, allow developing countries to learn from imported technologies and build on these innovations. In the 2020 WIPO Global Innovation Index (GII) the top three innovation economies for Sub-Saharan Africa were 1.) South Africa & Mauritius 2.) Kenya and 3.) The United Republic of Tanzania. Within the economies classed in the low-income group worldwide, two African countries came within the top three, 1.) The United Republic of Tanzania and 2.) Rwanda; the third country being Nepal in Asia. However, getting out of the ***"peripheral economy trap"*** and moving toward increased economic development, requires more than passing IP laws and signing BITs and free trade Agreements (FTAs). Legal and economic studies often tout the correlation between strong IP laws and economic development. However, the

correlation is not straight-forward. Strong IP laws must be combined with clear and detailed strategies to promote innovation and R&D. Both R&D strategies and IP laws must be backed by strong, well-resourced institutions, with the latitude to operate effectively. This must then be underpinned by well-designed foreign direct investment strategies that prioritise not only the development of a knowledge-based economy, but a knowledge generating economy.

A knowledge generating economy has its own a stock of IP assets which reduces the negotiating asymmetries when concluding international investment agreements (IIAs) and FTAs; slowly alleviating the effects of the ***"peripheral economy trap"***. The WIPO GII indicators captures this complex relationship between IP law, investment strategies and economic development. The report provides an overall picture of Africa which indicates that innovation systems on the continent tend toward, "*low levels of science and technology activities, high reliance on government or foreign donors as a source of R&D, limited science-industry linkages, low absorptive capacity of firms, limited use of IP, and a challenging business environment*." Placing this statement within the context of the discussion on the ***"peripheral economy trap",*** the ***EFW Index*** identification of law as a determinant of development outcomes and our analysis of Mozambique's treaty choices along with the problem of TRIPS Article 66.2's ambiguity on transfer of technology, the effect of constrained legal choices on development becomes clear. In conclusion, the issue for any country that sets out to free itself from the "***peripheral economy trap"*** is that IP and FDI rule-making systems are mutually re-enforcing, where *"the institution of intellectual property establishes the legal monopoly on knowledge"* which is then buttressed by regulatory control of capital flows to invest in development and commercialisation of that knowledge. African and Caribbean countries are in the position of having to import a significant percentage of the knowledge inputs for their products and services, with significant limitations on access to capital.

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