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# Samuel Kwadwo Boaten Asante and the United Nations Centre on Transnational Corporations (1975–1992)

Kehinde Folake Olaoye\*

## Abstract

*This article uses Samuel Kwadwo Boaten Asante's career at the United Nations Centre on Transnational Corporations (UNCTC) as a prism for examining the place of Third World Approaches to International Law within mainstream international organizations (IO) law. By focusing on his role as chief legal adviser, director and highest-ranking legal civil servant at the UNCTC during the heydays of the New International Economic Order (NIEO), it uncovers a less-examined international institution and the dilemmas faced by the Third World international legal civil servant. By examining Asante's intellectual history and publications during the operational years of the UNCTC, it identifies three main under-explored typologies of Third World approaches to IO law. It argues that the low visibility of Third World approaches within mainstream IO law is closely linked to the failures of the NIEO movement, the abolition of the UNCTC, which symbolized the non-realization of aspirations to codify the principles of the NIEO through IOs, and minimal engagement by IO law scholars with Third World problems. This article argues that, even though the UNCTC ceased to exist in 1992, it created a lasting legacy through its advisory services, which forms part of IO law history.*

## 1 Introduction: 'The Private Lawyer Turned International Lawyer'

On 27 June 1990, an ad hoc tribunal of three arbitrators gave a final award in the very first investment treaty arbitration award.<sup>1</sup> Even though the majority composed

\* City University of Hong Kong, Hong Kong Special Administrative Region. Email: [kfolaoye@cityu.edu.hk](mailto:kfolaoye@cityu.edu.hk). I am grateful to the symposium editors and Sundhya Pahuja for comments on earlier drafts.

<sup>1</sup> ICSID, *Asian Agricultural Products Ltd v. Republic of Sri Lanka – Award*, 27 June 1990, ICSID Case no. ARB/87/3.

of Berthold Goldman and Ahmed El-Kosheri found that Sri Lanka's responsibility to a foreign investor had been established under international law, Samuel Kwadwo Boaten Asante, in his dissenting opinion, opined that the tribunal had failed to reach the logical conclusion that Sri Lanka was not liable.<sup>2</sup> This award attracted debates from highly qualified legal scholars.<sup>3</sup> The most striking commentary was made by Chittharanjan Felix Amerasinghe in the immediate aftermath of the decision.<sup>4</sup> In his criticism of the award, without mentioning names, Amerasinghe questioned the competence of Asante as an arbitrator, stating that 'the third was really a private lawyer, albeit trained both as an academic and in practice, who has some association with international law mainly working for the Centre for Transnational Corporations of the UN [United Nations] but really has no formal training in international law'.<sup>5</sup>

Amerasinghe's verdict on Asante's arbitral appointment in the first investment treaty arbitration under the International Centre for Settlement of Investment Disputes (ICSID) and fleeting reference to the United Nations Centre for Transnational Corporations (UNCTC) must be examined from an intellectual context that is at the heart of this article. Like Asante, Amerasinghe was an international civil servant, a well-known scholar of foreign investment protection law, a first-generation 'Third World' international scholar and an observer of the unforgotten UN-based battle for a New International Economic Order (NIEO) of the 1970s and 1980s. However, a key divergence is that, unlike Asante, Amerasinghe is recognized as a leading scholar of international organizations (IO) law and an adherent of the functional approach.<sup>6</sup> Amerasinghe's statement, which belittled Asante's professional life spent advising governments and IOs at the World Bank and the UN, begs a deeper sociological inquiry on the place of Third World approaches within IO law.<sup>7</sup> It also obscures the political, legal, economic and historic contexts in which key international economic institutions have emerged, disappeared or attained greater importance.<sup>8</sup> Amerasinghe's

<sup>2</sup> ICSID, *Asian Agricultural Products Ltd v. Republic of Sri Lanka – Dissenting Opinion of Samuel K.B. Asante*, 15 June 1990, ICSID Case no. ARB/87. Berthold Goldman is known for his conceptualization of 'transnational law', which he famously wrote on after the nationalization of the Suez Canal Company by Gamal Abdel Nasser Hussein in 1956. Ahmed Sadek El-Kosheri was an Egyptian arbitrator and a pioneer of international arbitration in the Arab world.

<sup>3</sup> Sornarajah, 'ICSID Involvement in Asian Foreign Investment Disputes: The AMCO and AAPL Cases', 4 *Asian Yearbook of International Law* (1994) 69.

<sup>4</sup> Amerasinghe, 'The Prawn Farm (AAPL) Arbitration', 4 *Sri Lanka Journal of International Law* (1992) 155, at 155.

<sup>5</sup> Compare with Schwebel, 'Concluding Observations: The Flame Rekindled: New Hopes for International Arbitration', 6 *Leiden Journal of International Law (LJIL)* (1993) 375, at 381 (describing Asante as a 'senior international civil servant with great experience in problems of investment and arbitration in Africa and other developing countries').

<sup>6</sup> Sinclair, 'Towards a Postcolonial Genealogy of International Organizations Law', 31 *LJIL* (2018) 841, at 845; Klabbbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *European Journal of International Law (EJIL)* (2015) 9, at 11; Amerasinghe, 'Judging with and Legal Advising in International Organizations', 2 *Chicago Journal of International Law* (2001) 283.

<sup>7</sup> Asante, 'Good Governance and Sustainable National Development: The Imperatives', 27 *University of Ghana Law Journal* (2014) 181, at 182.

<sup>8</sup> See Sauvart, 'Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned', 16 *Journal of World Investment and Trade* (2015) 11.

statement also underscores the importance of examining the intellectual histories of individuals and institutions that may not feature in mainstream accounts.

Even though the UN is usually the starting point for modern accounts of IO law,<sup>9</sup> with very few exceptions, the UNCTC is missing from leading legal texts.<sup>10</sup> Although the UN Commission on Transnational Corporations United Nations Commission on Transnational Corporations (UNCmTC) has been examined by legal scholars, the UNCTC has not attracted significant debates in legal circles.<sup>11</sup> More so, personal histories of the UNCTC have been more readily told by non-legal scholars. While we may know more about the role of individuals like John Dunning,<sup>12</sup> less is known about the role of international lawyers like Thomas Wälde, Detlev F. Vagts, Seymour J. Rubin and Asante. Asante may be considered a hidden gem partly because international lawyers from the Third World and Africa are often relegated to footnotes in mainstream accounts<sup>13</sup> and because international legal civil servants may remain overshadowed in state-based accounts of IOs.<sup>14</sup> And while there has been a recent shift in IO law towards studying the intellectual histories of key individuals, despite calls for Third World IO law intellectual histories, few Third World scholars feature in these accounts.<sup>15</sup> This is in spite of some consensus that Third World countries and scholarship played a major role in the emergence of modern IO law. Except for a few studies, engagement by mainstream IO law scholars with Third World approaches has remained limited. Even still, Third World approaches to IO law are almost non-existent. While this is somewhat surprising considering the proliferation of IOs over the last few decades, it is also an indictment on the state of the field, evidence of some marginalization from within and a pointer to Third World Approaches to International Law's (TWAIL) blind spots. These raise three fundamental questions. First, why has the

<sup>9</sup> Lauwaars, 'The Interrelationship between United Nations Law and the Law of Other International Organizations', 82 *Michigan Law Review* (1983) 1604.

<sup>10</sup> S. von Schorlemer, 'The United Nations', in J. Klabbers and A. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011) 466, at 505. See 'Resolution 1908 (LVII): The Impact of Transnational Corporations on the Development Process and on International Relations', UN Doc. E/RES/1908(LVII) OXIO 581, 2 August 1974 (headnote entry in Oxford Public International Law online resource titled Oxford International Organizations, updated 11 March 2020).

<sup>11</sup> See Kelsall, 'Poisonous Flowers on the Dust-heap of a Dying Capitalism: The United Nations Code of Conduct on Transnational Corporations, Contingency and Failure in International Law', in I. Venzke and K. Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (2021) 463, at 464; Pahuja and Saunders, 'Rival Worlds and the Place of the Corporation in International Law', in J. Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019) 141.

<sup>12</sup> J.H. Dunning, *Seasons of a Scholar: Some Personal Reflections of an International Business Economist* (2009).

<sup>13</sup> Asante, 'Doctrinal Differences on the Code' in K. Hamdani and L. Ruffing (eds), *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (2015) 91, at 95; R. Frimpong Oppong and K. Agyebeng (eds), *A Commitment to Law, Development and Public Policy: A Festschrift in Honour of Nana Dr. SKB Asante* (2016).

<sup>14</sup> D. Van den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (2022), at 6; A.H. Qureshi, *International Economic Organizations and Law: The Perspective and Role of the Legal Counsel* (2012).

<sup>15</sup> I. Tallgren (ed.), *Portraits of Women in International Law: New Names and Forgotten Faces?* (2023); Klabbbers and Fiti Sinclair, 'On Theorizing International Organizations Law: Editors' Introduction', 31 *EJIL* (2020) 489.

engagement with IO law by both generalist and specialist Third World international law scholars not been very visible; second, how have Third World scholars engaged with the law of IOs and, third, is it necessary or plausible to broaden alternative approaches to IO law from a Third World perspective?

To answer these three questions, this journal article responds to calls for alternative approaches to IO law and identifying hidden gems. It invites the reader to examine one ‘international organization’ from the perspective of an ‘outsider’.<sup>16</sup> The key question that this article addresses is what lessons does Asante’s intellectual history and career at the UNCTC teach us about the place of Third World approaches within IO law? By centring an account of the UNCTC around Asante, this article examines the limits of state-centred accounts of IO law, arguing that a richer analysis can emerge from examining the historical and political context in which IOs emerge and operate. This article makes two major arguments. First, while ‘Third World’ scholars like Amerasinghe may have more visible presence in mainstream IO law than scholars like Asante, Mohammed Bedjaoui and Georges Abi-Saab, the failure of mainstream scholars to actively engage with the ‘Third World’, the NIEO and its institutions like the UNCTC may be one major reason why Third World approaches to IO law never fully materialized. Second, it argues that, while a functional approach remains essential, future studies can pursue alternative theories and methods that are crucial for future engagement with IO law.

This article uses three main methods. First, the author has examined the UN online archives and digital library that include yearly reports and meeting records of the UNCTC; General Assembly official records; and resolutions and decisions of the UN Economic and Social Council. UN multimedia files have also provided helpful references. Second, an extensive review has been carried out of Asante’s publications and publications by other Third World scholars. Third, this article relies on email exchanges and interviews with Asante between October 2021 and February 2022. Asante also shared private files that include his publications and private letters during his UNCTC years. Although these interviews may provide a one-sided account, they have provided important explanations for some undocumented events. A major challenge encountered while carrying out research for this article was accessing records and reports of the UNCTC. Even though plans were made to fully digitalize these documents,<sup>17</sup> key files have remained strictly confidential.<sup>18</sup>

This article is about theorizing IOs and IO law; it is also an article about international economic law institutions and the Third World international civil servant. It

<sup>16</sup> Klabbers, ‘The Transformation of International Organizations Law: A Rejoinder’, 26 *EJIL* (2016) 977, at 976 (noting that authors such as Mohammed Bedjaoui, Georges Abi-Saab, Grigoriĭ Tunkin and Antony Anghie, who may have written quite a bit on international organizations but relatively little on international organizations law, may teach us more about international organizations).

<sup>17</sup> United Nations Conference on Trade and Development (UNCTAD), List of Publications on Foreign Direct Investment and Transnational Corporations (1973–2003) (2004), at 5, available at [https://unctad.org/system/files/official-document/ite20041\\_en.pdf](https://unctad.org/system/files/official-document/ite20041_en.pdf).

<sup>18</sup> Asante and Brown, ‘Negotiating with Transnationals: The Technical Assistance Programme of United Nations Centre on Transnational Corporations (UNCTC)’, 16 *International Business Law* (1988) 425, at 426.

is an article that uncovers a prelude to the post-1990 rise of more ‘powerful and functional’ international economic law organizations like the World Trade Organization (WTO). The first section provides a background and context to the research questions. In the second section, I discuss Asante’s educational background and professional career before his 1977 UNCTC appointment, showing that, even though his career trajectory was similar to the path taken by other prominent first-generation Third World scholars, it was very unique and crucial to his UNCTC career. The third section provides a description of the UNCTC’s mandate and the historical context in which it emerged, showing that the UNCTC was an institutional crucible of the pre-1990 NIEO law era. The fourth section focuses on the UNCTC by examining Asante’s publications during his UNCTC career, highlighting how opposition from the USA in response to the UNCTC’s advisory services played a key role in the UNCTC’s demise. The fifth section examines in closer detail three typologies of Third World scholarship in IO law by locating Asante within what may be described as ‘the unostentatious’ generation marked by a functional pragmatic approach to IOs. The conclusion examines the legacy of the UNCTC within IO law 30 years after its demise. While acknowledging the limits of geographical labels in approaches to IO law, it argues that the UNCTC is an important part of IO law’s history and a harbinger of what could have been, albeit idealist, a Third World approach to IO law.

## 2 From Ghana to the World Stage

Samuel Kwadwo Boaten Asante was born in May 1933 in the Asante region of the British Gold Coast Colony. As there were no law schools in British colonial West Africa,<sup>19</sup> he completed a first degree in law in England in 1956 at the age of 23 at the University of Nottingham, one year before Ghana (the Gold Coast) became the first sub-Saharan African colony to gain independence from Britain.<sup>20</sup> This was followed by a master’s in law from the University of London (King’s College London and the Institute of Advanced Legal Studies) in 1958. Asante’s educational path was common for many first-generation Third World international law scholars who were born in colonies as subjects of European colonial powers, obtained legal education in European metropolises and later became representatives of newly independent states in IOs. While most of these scholars returned home after foreign studies to pursue careers in academia and in the civil service, a few scholars like Asante worked on the global scene as international civil servants and contributors to new Asian and African approaches to international law.

<sup>19</sup> Nkrumah, ‘Ghana: Law in Africa’, 6 *Journal of African Law* (1962) 103, at 108. Because there were no law schools in British colonies, students went to England to study law. This was, however, accessible only to students from wealthy families or students like Asante who received merit-based scholarships. As Ghana prepared for self-governance, it decided to award law scholarships for study in England with the aim of training government law officers.

<sup>20</sup> De Smith, ‘The Independence of Ghana’, 20 *Modern Law Review* (1957) 347.

In London, Asante learned from the ‘best of English tradition’ in international law.<sup>21</sup> He studied the law of international institutions at the London School of Economics and Political Sciences where he was taught by D.H.N. Johnson and Michael Mann.<sup>22</sup> He also attended lectures on international law under the instruction of Georg Schwarzenberger, Bin Cheng and L.C. Green.<sup>23</sup> Asante’s international law studies occurred during the golden age of IOs law, which was characterized by ‘unbridled enthusiasm for international organizations’.<sup>24</sup> It was also a period when the dimensions of international law underwent changes largely as a result of the admission of newly independent states to the UN and due to key events like the Suez crisis.<sup>25</sup> Asante would remark much later that classes during his graduate studies ‘introduced him to the law and practices of the United Nations, International Court of Justice and international arbitration which came in handy in later years’.<sup>26</sup> In 1960, Asante became a solicitor of the Supreme Court of England and was called to the Ghana Bar. Shortly after, he joined Ghana’s Ministry of Justice to work as an assistant state attorney in the newly established Commercial Law and International Business Transactions Department where he worked on the legal aspects of Ghana’s international commercial transactions.<sup>27</sup> In 1961, Asante joined the newly established Faculty of Law at the University of Ghana where he taught real property and trusts.<sup>28</sup>

In 1963, Asante left Ghana on a study leave and registered for the doctor of juridical science (JSD) program in New Haven where he was a Sterling Fellow. At Yale, Asante also registered for jurisprudence and international law classes before writing his thesis, which he completed in 1965.<sup>29</sup> His graduate thesis, which was supervised by Myres McDougal and assessed by Elias Clark, Quinton Johnson and John Simon, was titled ‘The Concept of Trusteeship in Ghana Land Law’. Like Asante, McDougal was a property law expert but more closely associated with his policy-oriented approach to international law. At Yale, Asante attended McDougal’s famous lectures on ‘law, science and policy’, which focused on the realist school of jurisprudence.<sup>30</sup> He also attended a seminar on public international law taught by McDougal and Oscar Schachter who was a UN legal officer. Reflecting on the influence of these

<sup>21</sup> See generally Johnson, ‘The English Tradition in International Law’, 11 *International and Comparative Law Quarterly (ICLQ)* (1962) 416.

<sup>22</sup> S. Anti, ‘Placing Nana Susubribi Krobea Asante in the Context of Ghana’s History and Development 1933–2014’ (2016) (Mphil thesis on file at the University of Ghana, Accra) at 59.

<sup>23</sup> *Ibid.*, at 59.

<sup>24</sup> Klabbbers, ‘The Life and Times of the Law of International Organizations’, 70 *Nordic Journal of International Law* (2001) 287, at 300.

<sup>25</sup> Friedmann, ‘The Changing Dimensions of International Law’, 62 *Columbia Law Review* (1962) 1147, at 1148.

<sup>26</sup> Anti, *supra* note 22; Johnson, ‘Recent Developments in International Law Studies in England’, 10 *Journal of Legal Education* (1957) 29, at 41.

<sup>27</sup> Nana S.K.B. Asante curriculum vitae, 2021 (on file with the author).

<sup>28</sup> Hedges, ‘Legal Education in West Africa’, 6 *Journal of the Society of Public Teachers of Law* (1961) 75, at 75. The University of Ghana was the first institution in West Africa to award degrees in law.

<sup>29</sup> Anti, *supra* note 22, at 68.

<sup>30</sup> H.D. Lasswell and M.S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (1992), at xxi.



studies, Asante has stated that ‘I was influenced by Professor Harry Street, my former professor at Nottingham University who subscribed to sociological jurisprudence, possibly because he had spent a year as a visiting scholar at Columbia Law School in the USA. However, I recognize that my Yale Law School experience was the most critical factor in my general jurisprudential approach which emphasized a relationship between law and social and economic phenomena’.<sup>31</sup>

After completing his JSD, Asante joined the School of Law at the University of Leeds, where he taught the law of international institutions and gave tutorials in public international law between 1965 and 1967.<sup>32</sup> In 1967, Asante joined the World Bank, the first African south of the Sahara to be appointed to the Legal Department of the World Bank, where he was a member of a team of 25 lawyers working under Aron Broches.<sup>33</sup> At the World Bank, he was involved in negotiating and drafting loan agreements, investment agreements and other international business transactions. He also gave lectures on international business transactions at the Howard University Law School as an adjunct professor from 1967 to 1969.

Asante left the World Bank in 1969 and returned to Ghana where he had been appointed the solicitor-general of Ghana. He held this position until 1974, when he was promoted to deputy attorney-general of Ghana, a post he held until 1977. During this period, which coincided with Ghana’s second republic, Ghana underwent significant economic and political changes, especially after the military overthrow of Kwame Nkrumah, Ghana’s first president and prominent leader of the Non-Aligned Movement, in 1966.<sup>34</sup> The Ghanaian government nationalized foreign-owned petroleum companies and implemented broad indigenization programmes.<sup>35</sup> As attorney-general, Asante led Ghana’s renegotiations for acquisition of majority equity interests in foreign-owned companies including Ashanti Goldfields Corporation and Consolidated African Selection Trust. Asante was the lead adviser to the Ghana government on international law and international business transactions.<sup>36</sup> In March 1977, Asante received a telex from Klaus Sahlgren, the first executive director of the UNCTC, inviting him to be the senior legal adviser at the centre in New York.<sup>37</sup> John Dunning describes this as one of the two most influential appointments made by Sahlgren.<sup>38</sup>

<sup>31</sup> Email interview with S.K.B. Asante, 20 January 2022.

<sup>32</sup> *Ibid.*

<sup>33</sup> Anti, *supra* note 22, at 131.

<sup>34</sup> Gassama, ‘Bandung 1955: The Deceit and Conceit of Post-Colonial Leadership’, in L. Eslava, M. Fakhri and V. Nesiah (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (2017) 126, at 134.

<sup>35</sup> Rood, ‘Nationalisation and Indigenisation in Africa’, 14 *Journal of Modern African Studies* (1976) 427, at 432.

<sup>36</sup> Asante and Date-Bah, ‘From Concession to Joint Venture Agreement: Restructuring Mineral Agreements – A Case Study from Ghana Foreign Investment in Light of the Light of the New International Economic Order’, 2 *Third World Legal Studies* (1983) 1.

<sup>37</sup> Anti, *supra* note 22, at 114.

<sup>38</sup> Hamdani and Ruffing, *supra* note 13, at 93. The second appointment was of the economist Sidney Dell, who succeeded Klaus Sahlgren as executive director in 1982. See also Abrahamian, ‘A Man for All Nations: Sidney Dell, 1918–1990’, in S. Abrahamian *et al.*, *Poverty, Prosperity and the World Economy: Essays in Memory of Sidney Dell* (1995) 3, at 19. John Dunning was a member of the Eminent Persons Group and is known for his work at the United Nations (UN) on business and multinational corporations.

### 3 The UNCTC (1975–1992)

Originally called the Information and Research Centre on Transnational Corporations, the UNCTC was established in 1975 by Economic Council Resolution 1908 (LVII) under the guidance of the UNCmTC and in accordance with Article 101 of the UN Charter.<sup>39</sup> While the UNCmTC was composed of 48 state representatives, the UNCTC was to operate as an advisory centre and secretariat of the UNCmTC.<sup>40</sup> The immediate catalyst for the establishment of the UNCTC was the alleged involvement of the American multinational International Telephone and Telegraph Corporation and the USA in Chilean politics.<sup>41</sup> Although, as a result of the activities of international mining companies operating in South West Africa, IOs had focused on regulating multinationals since the 1950s, there was a new impetus for IOs in the 1970s.<sup>42</sup> UN organs and IOs,<sup>43</sup> including the UN Conference for Trade and Development (UNCTAD),<sup>44</sup> the International Labour Organization,<sup>45</sup> the United Nations Commission on International Trade Law<sup>46</sup> and the Organisation for Economic Co-operation and Development (OECD),<sup>47</sup> began to simultaneously address the political, economic and social activities of multinational corporations in expert reports and special sessions.

However, following President Salvador Allende of Chile's compelling speech at UNCTAD's third session in Santiago in April 1972, the UN Economic and Social Council established a Group of Eminent Persons to study the impact of multinational corporations on the development process and on international relations.<sup>48</sup> A fiery speech eight months later by Allende in New York to the UN General Assembly on the activities of multinational corporations in Third World countries attracted more

<sup>39</sup> Establishing an Intergovernmental Commission on Transnational Corporations and Terms of Reference of the Information and Research Centre on Transnational Corporations, GA Res. 1908 (LVII), 2 August 1974; GA Res. 1913 (LVII), 5 August 1974. The author has adopted this abbreviation to avoid confusion because the UNCTC is used interchangeably in literature to refer to both the centre and the commission.

<sup>40</sup> Rubin, 'Reflections Concerning the United Nations Commission on Transnational Corporations', 70 *American Journal of International Law (AJIL)* (1976) 73, at 74.

<sup>41</sup> D. Lustig, *Corporate Regulation in International Law: A History of Failure?* (2020), at 209.

<sup>42</sup> Question of Southwest Africa, GA Res. 1899 (XVIII), 11 November 1963.

<sup>43</sup> Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, GA Res. 35/63, 5 December 1980.

<sup>44</sup> The United Nations Conference on Restrictive Business Practices General Assembly, GA Res. 33/153, 20 December 1978.

<sup>45</sup> International Labour Organization (ILO) Conference, Resolution V Concerning the Social Problems Raised by Multinational Undertakings (1971); ILO, Tripartite Meeting of Experts on the Relationship between Multinational Enterprises and Social Policy (1972); ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization (1977).

<sup>46</sup> Report of the United Nations Commission on International Trade Law, GA Res. 2928 XXVn and 2929 XXVn, 28 November 1972.

<sup>47</sup> Organization for Economic Cooperation and Development, Guidelines for Multinational Enterprises, 15 *International Legal Materials* (1976) 9.

<sup>48</sup> The Impact of Multinational Corporations on the Development Process and on International Relations, GA Res. 1721 (LIII), 28 July 1972; 'Address Delivered by Mr. Salvador Allende Gossens, President of Chile at the Inaugural Ceremony on 13 April 1972', in *Proceedings of the United Nations Conference on Trade and Development*, 3rd Session, 13 April – 21 May 1973.



international chagrin. In its 1974 report, the 20-man Group of Eminent Persons recommended establishing the UNCMTC and the UNCTC.<sup>49</sup> This proposal for establishing a research and information centre to provide technical assistance to developing countries was endorsed by UN Secretary-General Kurt Josef Waldheim in his report to the UN General Assembly in which he recognized the need for 'serious analysis lest myths prove more appealing than facts and emotions stronger than reason'.<sup>50</sup>

Under its original terms of reference, the UNCTC was established to:

- i. provide necessary support to the Economic and Social Council and to the Commission on matters related to transnational corporations;
- ii. develop a comprehensive information system on the activities of transnational corporations by gathering information made available by governments and by analysing and disseminating all information to governments;
- iii. organize and coordinate at the request of governments, programs of technical co-operation on matters related to transnational corporations, through existing organs of the United Nations system, aimed at strengthening the capacity of host countries, in particular of developing countries, in their dealings with transnational corporations; and
- iv. conduct research on various political, legal, economic and social aspects relating to transnational corporations, including work which *might be useful for the elaboration of a code of conduct and specific arrangements*.<sup>51</sup>

Establishment of the UNCTC took place amidst UN-based movements by Third World countries for an NIEO in the 1970s and 1980s.<sup>52</sup> Following the Arab oil embargo of 1973, the Group of 77, made up of developing countries from Africa, the Middle East, Asia and Latin America, made specific demands through UN resolutions.<sup>53</sup> The resolution that established the UNCTC reaffirmed the NIEO resolutions. The 1974 Programme of Action on the Establishment of a New International Economic Order sought to create a new balance in economic relations between developing and developed countries built on principles of dignity and sovereign equality.<sup>54</sup> The key areas

<sup>49</sup> UN Department of Economic and Social Affairs, Report of the Secretary General: Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations, UN Doc. E/5500/Rev.1-ST/ESA/6, July 1974. The Economic and Social Council at its 53rd session adopted Res. 172, 28 July 1972. In this resolution, the Council requested the UN Secretary-General to appoint a group of eminent persons to study the role of multinational corporations and their impact on the process of development, especially that of developing countries, and also their implications for international relations and to formulate conclusions and recommendations for consideration by the Council.

<sup>50</sup> *Ibid.*, at 9.

<sup>51</sup> Terms of Reference, *supra* note 39 (emphasis added).

<sup>52</sup> Ghebali, 'The Politicisation of UN Specialised Agencies: A Preliminary Analysis', 14 *Millennium* (1985) 317, at 321; Horn, 'Normative Problems of a New International Economic Order', 16 *Journal of World Trade Law* (1982) 338.

<sup>53</sup> Cox, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature', 33 *International Organization* (1979) 257, at 258.

<sup>54</sup> UN General Assembly Declaration on the Establishment of a New International Economic Order, GA Res. 3201(S-VI), 1 May 1974.

of focus were problems of raw materials and commodities related to trade and development; the international monetary system and financing the development of developing countries; industrialization; transfer of technology; regulation and control of transnational corporations; economic rights and duties of states; and permanent sovereignty over natural resources. The first meeting of the UNCTC prioritized these issues for the UNCTC's first years of operation.<sup>55</sup> At its inception, there was almost no emphasis on protecting foreign investment, and more emphasis was placed on controlling the activities of multinational corporations using IOs.

The USA was strongly opposed to the NIEO and had begun to cut its monetary contributions to the UN in the 1980s.<sup>56</sup> While the USA was not strongly opposed to a UN code of conduct for transnational corporations at the UNCTC's inception, US representatives argued that establishing a research and information centre was a misplaced priority.<sup>57</sup> However, amidst the Cold War and as a result of decolonization, the USA, which had been instrumental in the establishment of international economic institutions following World War II, lost its 'majority' within the UN and became antagonistic to the UNCTC and a UN code of conduct. Even though the UNCTC was meant to be constituted by early 1975,<sup>58</sup> operations did not fully begin until 1977.<sup>59</sup> The UNCTC was an autonomous unit of the UN Secretariat.<sup>60</sup> It was a small 'subdivision' of roughly 33 professionals relying heavily on external consultants and experts.<sup>61</sup>

At its inception, Asante was chief advisor on legal matters and directly reported to the office of Sahlgren.<sup>62</sup> Recalling this appointment, Asante has stated that, even though he was offered a director-level position in 1977, he declined this role 'because as an expert, he wanted to immerse himself in his substantive work of purely advising on legal matters and wanted to avoid administrative work. In his view, administrative

<sup>55</sup> UN Commission on Transnational Corporations, Report on the First Session 17–28 March 1975, UN Doc. E/5655-E/C.10/6 (1975), at 15, para. 12.

<sup>56</sup> R. Olson, *US Foreign Policy and the New International Economic Order: Negotiating Global Problems, 1974–1981* (1981).

<sup>57</sup> Davidow and Chiles, 'The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices', 72 *AJIL* (1978) 247, at 254.

<sup>58</sup> United Nations Commission on Transnational Corporations 1931st Plenary Meeting, 5 December 1974.

<sup>59</sup> Rubin, *supra* note 40, at 5 ('[i]t has prepared an awesome agenda for the new Information and Research Center which has still to be funded or given a Director').

<sup>60</sup> See UN Department of Economic and Social Affairs, 'The Centre Would Be an Autonomous Body under the Aegis of the United Nations', Report of the Secretary General: Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations, UN Doc. E/5500/Rev.1-ST/ESA/6, July 1974, at 32, para. 17.

<sup>61</sup> Hamdani and Ruffing, 'Lessons from the UN Centre on Transnational Corporations for the Current Treaty Regime', in S. Deva and D. Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours* (2017) 27, at 29 ('[t]he mix of a secretariat, governments and independent experts continued the principle of "inclusiveness" and gave the exercise legitimacy as well as generating a positive climate. At the same time, the Centre's tripartite mix of normative, analytical and advisory activities grounded its support to the Commission on facts and policy experience, gaining the respect of delegates, professionals and academics'). It was originally envisaged that the centre would consist of the executive director and 15 professional staff.

<sup>62</sup> T. Sagafi-Nejad and J.H. Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (2008), at 22.

work could hamper his ambitions'.<sup>63</sup> By 1983, the UNCTC's functions were narrowed down more specifically to 'conduct research on political, legal, economic and social aspects relating to transnational corporations, including work on the elaboration of a code of conduct and specific international arrangements and agreements'.<sup>64</sup> The centre was also reorganized into two divisions: a policy analysis and research division and an advisory and information services division under the directorship of Asante.<sup>65</sup>

Between 1975 and 1992, the UNCTC carried out its mandate, resulting in an impressive collection of official reports and publications. These include comprehensive reports on bilateral investment treaties, foreign direct investment linkages in developing countries, environmental aspects of the activities of transnational corporations, economic and social effects of multinational enterprises in export processing and joint venture partnerships in developing countries. Although a former staff of the UNCTC described these reports as 'bloodless jargon', they had far-reaching influence on the domestic laws of developing states and international law.<sup>66</sup> Country reports were also published on national legislation and regulations relating to transnational corporations in specific jurisdictions, including the People's Republic of China and Saudi Arabia. Reports on economic sanctions and operations of transnational corporations in what was still Apartheid-governed South Africa were also published. Asante led teams that provided technical advice and training for developing countries.<sup>67</sup>

As chief legal adviser and director of advisory and information services at the UNCTC from 1983 onwards, Asante was directly involved in evaluating and negotiating transactions between states and transnational corporations. These included loan agreements with international and foreign banks, international procurement contracts, joint venture agreements, technical assistance agreements and mining and petroleum agreements. He 'was the leading in-house expert on matters related to investment policymaking'<sup>68</sup> and its most senior legal civil servant. As part of its technical cooperation programme, the UNCTC organized over 200 workshops and seminars in developing countries and economies in transition. These workshops aimed to enhance the negotiating capacities of developing countries in their dealings with transnational corporations.<sup>69</sup> Asante played a major role in the formulation of China's Investment Policy and its Joint Venture Policy, and in the drafting of petroleum and mining agreements in 1980 and 1981. For him, the success of the mission that advised China on

<sup>63</sup> Anti, *supra* note 22, at 14.

<sup>64</sup> UN Secretariat, Organization Manual: A Description of the Functions and Organization of the United Nations Centre on Transnational Corporations, UN Doc. ST/GB/Organization, Section T/Rev.2, 26 May 1983.

<sup>65</sup> *Ibid.*, at 3.

<sup>66</sup> Wälde, 'Book Reviews', 16 *Journal of Energy and Natural Resources Law* (1998) 227.

<sup>67</sup> UN Centre on Transnational Corporations, Compendium of Technical Assistance Projects, 1976–1989: United Nations Centre on Transnational Corporations, UN Doc. UNST/CTC (02)/C6 (1990).

<sup>68</sup> Sauvart, 'National FDI Policy Competition and the Changing International Investment Regime', in R.F. Oppong and W.K. Agyebeng (eds), *A Commitment to Law: Essays in Honour of Nana Dr. Samuel Kwadwo Boaten Asante* (2016) 136.

<sup>69</sup> Asante, 'The Perspectives of African Countries on International Commercial Arbitration', 6 *IJIL* (1993) 331, at 352.

the liberalization of its laws was a result of the UNCTC's strong technical and research team.<sup>70</sup>

Despite overwhelming support from developing countries, the UNCTC was abolished in 1992 after a phone call from Boutros Boutros-Ghali, which has been described as 'downsizing to please the largest shareholder of the UN'.<sup>71</sup> Following this move, the UNCTC's mandate was subsumed under the Transnational Corporations and Management Division (TCMD) of the UN Department of Economic and Social Development. In 1993, the TCMD was relocated from New York to the Geneva-based Secretariat of UNCTAD and renamed the Division on Transnational Corporations and Investment.<sup>72</sup> Barely one year after this transition, the UNCTC was abolished completely in 1994.<sup>73</sup> The events leading up to the UNCTC's demise in 1992 came as no surprise as, in 1986, the US State Department declared that it intended to limit its participation in the UNCTC's activities because the UNCTC had 'never given the Centre a clear mandate to include in its work the activities of state-owned enterprises from Communist countries and MNCs [multinational corporations] from developing countries – a violation of the important UN principle of universality'.<sup>74</sup> It also advised the US business community to 'restrict its participation in the Centre's work'.<sup>75</sup> Even though the USA clarified that this statement was aimed only at the UNCTC and did not affect its participation in the UNCTC or the negotiations for a UN code of conduct for transnational corporations, the UNCTC suffered a heavy blow.<sup>76</sup>

While the UNCTC's demise may be viewed as part of a broader reorganization within the UN aimed at addressing budgetary problems, there is evidence that the USA actively contributed to the abolition of the UNCTC. This is reflected in US Congress hearings and reports, including a 1987 publication by the American conservative think-tank Heritage Foundation which described the UNCTC as leading the UN attack on the USA and free enterprise.<sup>77</sup> The life of the UNCTC is a 'hard reminder that global institutions are not immune from the forces that govern any institution' and offers important lessons for understanding how IOs function.<sup>78</sup> It is an important case study of an 'international organization' that attempted to defuse the tensions between corporations and states during the agitation for an NIEO.<sup>79</sup> Most academic scholarship

<sup>70</sup> Anti, *supra* note 22, at 144.

<sup>71</sup> Activities of the Former United Nations Centre on Transnational Corporations and of Its Successor, the Transnational Corporations and Management Division of the Department of Economic and Social Development, GA Res. 1992/35, 27 August 1992.

<sup>72</sup> Compare with the Establishment of the United Nations Conference on Trade and Development as an organ of the UN General Assembly.

<sup>73</sup> Integration of the Commission on Transnational Corporations into the Institutional Machinery of the United Nations Conference on Trade and Development, GA Res. 49/130, 24 February 1995.

<sup>74</sup> Sagafi-Nejad and Dunning, *supra* note 62, at 119.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* See J. Geran, 'The Centre on Transnational Corporations: How the U.N. Injures Poor Nations', *Heritage Foundation*, 5 October 1987, available at [www.heritage.org/report/the-centre-transnational-corporations-how-the-un-injures-poor-nations](http://www.heritage.org/report/the-centre-transnational-corporations-how-the-un-injures-poor-nations).

<sup>77</sup> *Ibid.*

<sup>78</sup> Sagafi-Nejad and Dunning, *supra* note 62, at xxi.

<sup>79</sup> Hamdani and Ruffing, *supra* note 61, at 29.

has assessed the UNCTC on the basis of its demise and failure to arrive at a binding code.<sup>80</sup> While this may be in line with a functionalist approach that focuses on the success and failure of IOs,<sup>81</sup> it limits our understanding of institutions like the UNCTC. During its operating years, scholars believed that, even though a binding code would be difficult considering the divisions between capital-exporting and Third World countries, the UNCTC would outlive the UN code of conduct.<sup>82</sup> This statement was probably made because of what was considered to be the indispensable advisory services of the centre. In addition, the technical assistance of the UN's specialized agencies was considered the most important and constructive advance in international institutional law.<sup>83</sup> This narrative on the functions of the UNCTC is quite descriptive and may be dismissed for its mere summary of the mandate and operations of the UNCTC. However, it is necessary for understanding why the UNCTC was not a complete failure.

Asante retired from the UN in 1993, one year after his 1992 appointment as director of legal advisory services for development in the UN Department of Economic and Social Development. The next section uses Asante's publications as a prism for understanding why the UNCTC proved to be so controversial and why it symbolizes what is still considered a failed struggle between the Third World and the rest of the world for the transformation of international law through IOs.

## 4 Asante's Legal Scholarship: Dissemination and Confrontations

As the second section of this article shows, Asante's legal education and international career progressed at critical points in the history of international law and IO law. As a student and teacher of IO law and an IO civil servant during this period, his scholarship and career provide useful insights on the Third World and IO law. Most of Asante's publications before his UNCTC appointment were preoccupied with property, law and society and land law in Africa.<sup>84</sup> Asante belonged to small group of first-generation foreign-educated Africans who spent their early professional years writing on questions of state building in post-colonial Africa and less on matters of international law.<sup>85</sup> However, there was a marked difference in Asante's publications just before his

<sup>80</sup> Vagts, 'The UN Norms for Transnational Corporations', 16 *LJIL* (2003) 795, at 795; Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law', 37 *Columbia Human Rights Law Review* (2005) 287, at 294.

<sup>81</sup> Franck, 'The Success and Failure of International Organizations', 90 *ASIL Proceedings* (1996) 596.

<sup>82</sup> Primoff, 'International Regulation of Multinational Corporations and Business: The United Nations Takes Aim', 11 *Journal of International Law and Economics* (1977) 287, at 322.

<sup>83</sup> Friedmann, 'The United Nations and the Development of International Law', 25 *International Journal* (1970) 272, at 283.

<sup>84</sup> Asante, 'Interests in Land in the Customary Law of Ghana: A New Appraisal', 74 *Yale Law Journal* (1965) 848; Asante, 'Law and Society in Ghana', 1 *Wisconsin Law Review* (1966) 1113; Asante, 'Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana: A Comparative Study', 14 *ICLQ* (1965) 1144; S.K.B. Asante, *Property Law and Social Goals in Ghana, 1844-1966* (1975).

<sup>85</sup> Asante, 'Nation Building and Human Rights in Emergent African Nations', 2 *Cornell International Law Journal* (1969) 72.

1977 UNCTC appointment.<sup>86</sup> Even though Asante was well read in IO law, his publications between 1977 and 1992 had almost nothing to do with IO law. They focused primarily on the protection of foreign investment, commercial arbitration in Africa and the work of the UNCTC. In these publications, Asante argued that the mere acquisition of majority shareholding without transfer of managerial powers and technical expertise would continue to reinforce the global network of Western transnational corporations and the old international economic order.<sup>87</sup> One of his most influential articles published in the *International and Comparative Law Quarterly*, titled ‘Stability of Contractual Relations in the Transnational Investment Process’, was based on a 1979 seminar he gave at Oxford University on the legal aspects of the NIEO.<sup>88</sup>

Like most legal advisers of his era, a principal means for promoting the activities of the UNCTC was law periodicals and journals. Even though this came with the usual caveat that publications were not written in an official capacity, Asante’s writings during his UNCTC career provide some insight into the operations of the UNCTC from the perspective of a ‘legal insider’. Alluding to observable changes in his writing, Asante has this to say in a recent email exchange:

As an academic, you are aware of the maxim ‘publish or perish’. As an international civil servant, the maxim may be described as ‘publish and perish’ because you stand the risk of offending some sensibilities by publishing your views. Notwithstanding this, I continued to publish throughout my international career because I felt that I had a duty to ventilate the perspectives of developing countries on the international legal system and also a duty to help redress the inequities and disparities in the international system.<sup>89</sup>

This quotation shows the choices that scholars like Asante made on what to publish and the personal struggles they faced in reconciling their personal convictions with the importance of remaining ‘neutral’ in their roles within IOs. For Third World scholars who occupied these roles as the clear minority, appearing neutral was also closely tied to their survival and to the realization of their albeit idealistic visions for an NIEO.

Asante’s first major publication on the work of the UNCTC was a 1979 commentary in the *Journal of World Trade* on the UN and regulation of transnational corporations.<sup>90</sup> Unlike his two other articles published in the same year on foreign investment, this article was devoid of deep critical theoretical analysis and instead provided a descriptive overview of the 1978 draft UN code of conduct for transnational corporations by focusing on its substantive provisions. Subsequent academic publications by Asante in the next decade followed a similar tone.<sup>91</sup> His last major publication on the UNCTC

<sup>86</sup> *Ibid.*, at 78.

<sup>87</sup> Asante, ‘Restructuring Transnational Mineral Agreements’, 73 *AJIL* (1979) 335, at 352.

<sup>88</sup> Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’, 28 *ICLQ* (1979) 401, at 418.

<sup>89</sup> Email interview with S.K.B. Asante, 20 January 2022.

<sup>90</sup> Asante, ‘United Nations: International Regulation of Transnational Corporations’, 13 *Journal of World Trade* (1979) 55.

<sup>91</sup> Asante, ‘United Nations Efforts at International Regulation of Transnational Corporations’ in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980) 123; Asante, ‘The Code: The January 1986 Reconvened Special Session’, 21 *CTC Reporter* (1986) 14.



was a 1989 journal article in the World Bank's *ICSID Review*, which focused on the failed attempts by IOs to regulate the activities of multinational corporations, gave a summary of the updated draft code of conduct and reflected on the shift towards corporate social responsibility.<sup>92</sup> Unrelated to this publication but symbolic is the fact that the case *Asian Agricultural Products Ltd v Republic of Sri Lanka*, in which Asante was an arbitrator, was underway at ICSID and nearing completion. Reflecting changes in international economic relations, the UNCTC had also now shifted focus from the control of IOs to the promotion of foreign investment.

Even though Asante's publications remained neutral and descriptive, we get the impression in a few of his publications that he was appealing to different audiences and responding to the disenchantment towards the UNCTC that was emerging in the mid-1980s. For example, during the 1984 American Society of International Law (ASIL) meeting, Asante was on a panel session with Seymour J. Rubin, Ewell E. Murphy Jr, Detlev F. Vagts, K. Scott Gudgeon, Gerhard Wegen and Aron Broches, who in every sense represented American attitudes to the UNCTC and the NIEO.<sup>93</sup> During his remarks, Asante, who was now a director at the UNCTC, rejected a sharp dichotomy between the North and the South, arguing that the central issue that the UNCTC had been trying to negotiate was balancing the business interests of transnational corporations with legitimate developmental concerns of the host countries.<sup>94</sup> In a 1988 article, Asante described the 10-year-long negotiations at the UN towards a code of conduct for transnational corporations as a clash between traditional standards and modern formulations on issues such as nationalization and compensation.<sup>95</sup> For Asante, the UN's mandate was focused on true protection, which did not consist of 'devising ironclad legal instruments to impose restraints on host governments or remedies against host governments for violation of investors'.<sup>96</sup>

Asante's approach was a functionalist pragmatic approach shaped by his career experiences that focused on 'private' concepts of property and contracts for solving 'public international law' problems but was embedded in his recognition of Third World priorities.<sup>97</sup> He cautioned against juristic writing that suffered from excesses of formalism and failed to address economic and legal relations between host governments and transnational corporations.<sup>98</sup> Asante was the designated link between the Section on Business Law Committee V (Codes of Conduct for Transnational Corporations) of the ASIL and the UNCTC. At ASIL conferences, he urged participants to try to be

<sup>92</sup> Asante, 'The Concept of the Good Corporate Citizen in International Business', 4 *ICSID Review – Foreign Investment Law Journal* (1989) 1.

<sup>93</sup> Asante, 'Commentary', in R.J. Seymour (ed.), *International Investment Disputes: Avoidance and Settlement* (1985) 99.

<sup>94</sup> Rubin *et al.*, 'Avoidance and Settlement of International Investment Disputes', 78 *PAMASIL* (1984) 38, at 56.

<sup>95</sup> Asante, 'International Law and Foreign Investment: A Reappraisal', 37 *ICLQ* (1988) 588, at 610.

<sup>96</sup> Tesón *et al.*, 'Should Investment in the Third World Be Internationally Protected? What Role for the United Nations?', 79 *PAMASIL* (1985) 378, at 390.

<sup>97</sup> Asante, *supra* note 88, at 407.

<sup>98</sup> *Ibid.*

responsive to the concerns of all parties, transnational corporations and host countries.<sup>99</sup> He pointed out that the UN had many departments with activities working in the same area but that, in the 40th year of the UN system, introspection and reflection were essential for achieving more.<sup>100</sup> Recently, Asante has stated that '[m]y work as a legal advisor at the code of conduct negotiation was probably my most challenging period as a lawyer, because I was often called upon to give advice on highly sensitive and controversial issues on which various groups in the negotiating forum had sharply divergent views'.<sup>101</sup>

Asante's most vocal publication on the UNCTC was a short 1988 commentary, co-authored with Roland Brown who was the UNCTC's chief legal advisor, in the business section of the International Bar Association's *International Business Lawyer*. Prior to the UNCTC, Brown, an English lawyer, had served as Tanzania's first attorney general and a key actor in Julius Nyerere's nationalization program. Asante and Brown defended the work of the UNCTC, arguing that in carrying out its technical assistance program, the UNCTC was responding to a very specific mandate which was to 'strengthen the negotiating capacity of developing countries in their dealings with transnational corporations'.<sup>102</sup> Asante and Brown appeared to be defending the UNCTC even though its end was already inevitable. They stated empathetically that, by helping developing states, the UNCTC and its experts were neutral, stating that 'the Centre and its experts do not take positions of their own in exchanges with transnational corporations, or seek to act as mediators'.<sup>103</sup> Thus, even though the UNCTC assigned the highest priority to the formulation of a code of conduct,<sup>104</sup> Asante<sup>105</sup> and his colleagues had an 'even greater task',<sup>106</sup> which is captured perfectly in the following quotation:

Our resources are limited, but, nonetheless, we believe that the Centre has been able to make a distinct, if modest, contribution to creating a more stable and productive investment climate. What we are doing in this area is clearly within our mandate and we hope to have active support not only from the developing countries who are our clients, but also from the business community as a whole, including the professional advisers who service the requirements of transnational corporations.<sup>107</sup>

<sup>99</sup> Asante *supra* note 96, at 392.

<sup>100</sup> *Ibid.*, at 394.

<sup>101</sup> Email interview with S.K.B. Asante, February 2022.

<sup>102</sup> Asante and Brown, *supra* note 18, at 425.

<sup>103</sup> *Ibid.*, at 426.

<sup>104</sup> UN Centre on Transnational Corporations, *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, UN Doc. E/C.10/17, 20 July 1976.

<sup>105</sup> Asante, 'United Nations Efforts at International Regulation of Transnational Corporations', in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980) 123.

<sup>106</sup> See Miroux, 'UN and Business: The WIR Prequel', 20 *Academy of International Business Insights* (2020) 1 (noting that 'UNCTC, though, had another *raison d'être*, i.e. to further the understanding of transnational corporations and their "political, legal, economic and social effects on home and host countries and in international relations". The rationale was that a better clarification of these issues would help enhance the contribution of transnational corporations while "controlling and eliminating their negative effects"').

<sup>107</sup> Asante and Brown, *supra* note 18, at 425.

As noted in these 1988 comments on the activities of the UNCTC, even though there was no significant change in the mandate given to the UNCTC, there were changes in the relationship between the host countries and transnational corporations between 1976 and the 1990s.<sup>108</sup> The UNCTC's demise may have been the end of an era. However, to view Asante's legacy and the UNCTC only against this context limits our understanding of how IOs function 'legally' amidst strong economic and political forces.

A key theme that can be gleaned from focusing on Asante was how the UNCTC interacted with other IOs. Key in this respect are the interactions that took place with the World Bank. As mentioned above and in several reports of the UNCTC, we get the impression that the UNCTC sought to succeed where other IOs had failed. For example, during a 1985 ASIL meeting, Asante stated that the UNCTC was supposed to achieve the depoliticization of investment disputes in the UN.<sup>109</sup> This may be compared with what is now described as ICSID's achievement in depoliticizing investment disputes.<sup>110</sup> Importantly, Ibrahim Shihata, who is recognized as being responsible for significant reforms at ICSID, noted that during preparations for the World Bank's 1992 Foreign Investment Guidelines, based on the experience of the UNCTC, there was some reluctance to develop a binding code.<sup>111</sup> However, Shihata notes that, as work progressed with the guidelines, he visited the UNCTC on 10 March 1992 'and had a useful discussion with Peter Hansen and Samuel Asante who worked as a Director in UNCTC and had been reassigned as legal adviser to the newly established Economic Department of the United Nations'.<sup>112</sup> This exchange and consultations remind us that, while IOs are often conceptualized as unitary actors, in practice, 'they are sprawling organizations composed of sub-units with different identities, purposes, and organizational cultures'.<sup>113</sup> It also lends support to the argument that, while other IOs watched as bystanders during the NIEO, they were beneficiaries of the UNCTC's failures and accomplishments.

Ultimately, while developing countries embraced the advisory work of the UNCTC, as José Alvarez notes, its control over technical expertise and information and different value sets proved counterproductive to its perceived success during the NIEO era and linkages within IO regulation of multinational corporations.<sup>114</sup> For Thomas Wälde, the UNCTC was the centre of an NIEO battle between the OECD, the General

<sup>108</sup> *Ibid.*, at 425; see also Puig, 'Emergence and Dynamism in International Organizations: ICSID, Investor-state Arbitration and International Investment Law', 44 *Georgetown Journal of International Law* (2012) 531, at 531.

<sup>109</sup> Asante and Brown, *supra* note 18.

<sup>110</sup> Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA', 1 *ICSID Review – Foreign Investment Law Journal* (1986) 1.

<sup>111</sup> E.I. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (1993), at 44. Noting that the work reflected in the report 'differs from the task being undertaken since 1977 by the UN Centre on Transnational Corporations (UNCTC) in at least two respects'.

<sup>112</sup> *Ibid.*, at 45.

<sup>113</sup> Berge and John, 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws', 3 *Review of International Political Economy* (2021) 584, at 586.

<sup>114</sup> Alvarez, 'The WTO as Linkage Machine', 96 *AJIL* (2002) 146, at 157.

Agreement on Tariffs and Trade and the WTO and the World Bank for the domination of global economic law norm making.<sup>115</sup> Ultimately, while the UNCTC was an offspring of the NIEO, it was also a victim of the NIEO, with the WTO and World Bank emerging as key beneficiaries. While Asante's writings provide some insight into the activities of the UNCTC, periodical reports by the UNCTC as part of the UNCmTC provide broader context for understanding these issues. The main challenges that the UNCTC faced were budgetary issues, a general impression that the functions of the UNCTC overlapped with the functions of other existing IOs and opposition by some developed states. The next section of this article examines the place of Third World approaches within IO law and argues that the UNCTC and Asante's career during the NIEO show why Third World approaches to IO law are almost non-existent.

## 5 IO Law and TWAIL

While Asante's scholarship is well recognized in academic literature for its original contributions to TWAIL studies, no links have been made between these contributions and his IO career.<sup>116</sup> By examining Asante's scholarship and IO Third World studies during his UNCTC career, this section explores why Third World approaches to IO law never fully developed. It highlights the failures to reform IOs through the progressive development of the principles and norms of international law relating to the NIEO. This is important because there is some consensus that beyond the dominant approaches there is a new jurisprudence that acknowledges that IOs must be understood in their own context rather than as universal organizations.<sup>117</sup>

An initial question is how Third World scholars like Asante and scholars who identify with TWAIL have engaged with the law of IOs. While this inquiry may appear misplaced, as this section shows, addressing this question remains important in a discussion on the UNCTC. Although IO theories are well examined in other fields of study, like other areas of international law, IO law is under-theorized, and existing theoretical explanations rely heavily on borrowed theories.<sup>118</sup> Mainstream international scholars who look to the discipline's classical texts for new theories may be left disappointed.<sup>119</sup> This may be because theoretical approaches have centred on the legal functions and powers of IOs, which have been described as 'western entrenched'.<sup>120</sup> Our understanding of IOs has been enriched by theories of functionalism, constitutionalism and

<sup>115</sup> Wälde, *supra* note 66, at 227; General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

<sup>116</sup> B.Z. Tamanaha, *Bibliography on Law and Developing Countries* (1995).

<sup>117</sup> Klabbers, 'Beyond Functionalism-International Organizations Law 7'; J. d'Aspremont *et al.*, 'Towards a New Jurisprudence of International Organizations Law', in J. d'Aspremont *et al.*, *The Values of International Organizations* (2021) 212.

<sup>118</sup> Klabbers, 'Theorizing International Organizations', in A. Orford, F. Hoffmann and M. Clark (eds), *The Oxford Handbook of the Theory of International Law* (2016) 618, at 618.

<sup>119</sup> Schreuer, 'Review of Principles of the Institutional Law of International Organizations by C.F. Amerasinghe', 91 *AJIL* 759, at 760.

<sup>120</sup> Peters, 'Constitutional Theories of International Organisations: Beyond the West', 20 *Chinese Journal of International Law* (2021) 649.

global administrative law.<sup>121</sup> Third World approaches deal with old questions, but they also deal with what may appear as new legal challenges of IO law.

From its earliest beginnings, IO law has been dominated by European scholars who have set the pace for future directions of the discipline.<sup>122</sup> Over the years, while there has been an increasing interest in IOs, there has been minimal engagement by Third World lawyers with IO law.<sup>123</sup> Yet it is possible to identify three main typologies of TWAIL scholarship. The first generation of Third World scholars like Ram Prakash Anand began to write on IO law in the 1960s and 1970s.<sup>124</sup> Most of the scholarship that emerged adopted functional approaches to IO law focusing on themes such as the implied powers of IOs,<sup>125</sup> the functions of IOs,<sup>126</sup> the legal significance of UN resolutions<sup>127</sup> and local remedies.<sup>128</sup> A few studies also embraced Soviet approaches to IO law that supported the demands of developing countries for an NIEO.<sup>129</sup> Also notable is Raymond Ranjeva's book on regional IOs.<sup>130</sup>

In the late 1970s and 1980s, as the NIEO movement intensified within the UN and parallel to the UNCTC's establishment, a second typology of more Third World-centred approaches to IO law began to emerge, and Asante can be categorized in this field. The first comprehensive exploration of a Third World approach to the law of IOs was by Abi-Saab in his introductory chapter to a 1981 edited volume by the UN Educational, Scientific and Cultural Organization titled *The Concept and Evolution of International Organization*. The edited collection includes previously published contributions from leading IO scholars such as Rosalyn C. Higgins and Michel Virally and

<sup>121</sup> Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism', in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011) 4.

<sup>122</sup> Exceptions include Quoc Dinh, 'Les privilèges et immunités des organisations internationales d'après les jurisprudences nationales depuis 1945', 3 *Annuaire Français de Droit International Année* (1957) 262; Mahiou, 'L'Algérie et les organisations internationales', 28 *Annuaire Français de Droit International Année* (1982) 127.

<sup>123</sup> Özsu, 'Organizing Internationally: Georges Abi-Saab, the Congo Crisis and the Decolonization of the United Nations', 31 *EJIL* (2020) 601.

<sup>124</sup> N. Singh, *Termination of Membership of International Organisations* (1958).

<sup>125</sup> Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 44 *British Yearbook of International Law* (1970) 111; E. Osieke, *Constitutional Law and Practice in the International Labour Organisation* (1985).

<sup>126</sup> Anand, 'International Organizations and the Functioning of International Law', 24 *Indian Journal of International Law* (1984) 51.

<sup>127</sup> O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966).

<sup>128</sup> Cançado Trindade, 'Exhaustion of Local Remedies and the Law of International Organizations', 57 *International Law Review* (1979) 81.

<sup>129</sup> Osakwe, 'Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations', 65 *AJIL* (1971) 502; C. Osakwe, *The Participation of the Soviet Union in Universal International Organizations: A Political and Legal Analysis of Soviet Strategies and Aspirations Inside the ILO, UNESCO and WHO* (1972).

<sup>130</sup> Akindele, 'Regional Treaties and the UN Charter: A Study in Comparative Law of International Institutions', 14 *Malaya Law Review* (1972) 61; R. Ranjeva, *La Succession d'Organisations Internationales en Afrique* (1978).

a final original chapter by Bedjaoui.<sup>131</sup> In his introduction, Abi-Saab identifies different approaches to the study of IOs that encompass both legal and political aspects broadly divided into descriptive and analytical methods. Of key relevance is what he described as a macro-analysis elucidating that the changes in North-South relationships had led to changes in the membership, functioning, roles and importance of IOs.<sup>132</sup> He described the Western conception of IOs as a teleological and expansionist project that aligned with functionalist and integrationist theories.<sup>133</sup> He also stated that the Western group of states led by the USA had tried to stop the expansion of IO tasks and powers using the threat of withdrawal or non-participation.<sup>134</sup> As the previous section of this article has shown, the UNCTC is an important example of the role the USA has played in clamping down on IOs that it considers as inimical to its interests.

Bedjaoui's chapter titled 'A Third World View of International Organizations and Actions towards the New International Economic Order', which narrowed its focus on the NIEO, was partly inspired by his seminal 1979 monograph on the NIEO.<sup>135</sup> However, in this chapter, Bedjaoui was less optimistic of the role that IOs could play in realizing the NIEO. Although Bedjaoui did not refer to the UNCTC directly, his contributions cannot be separated from the organization, which remains the 'principal UN offspring of the NIEO'.<sup>136</sup> Bedjaoui argued that the resolutions of IOs could not contribute to the establishment of the NIEO since Western states had rejected these resolutions.<sup>137</sup> He recognized that the chances of an NIEO were dependent on radical changes, including revision of the UN Charter and the creation of specialized economic institutions.<sup>138</sup> By contrast, Asante wrote that independence of the new nations had proved substantially illusory in the economic sense and that membership in the UN and IOs had failed to secure access to the councils of international decision making for the world's economic affairs.<sup>139</sup>

Bedjaoui believed that changes in the voting systems and constitutions of IOs, the creation of a new equitable international organization for trade, the reform of UNCTAD and the creation of new forms of directly operational international bodies would lead to an NIEO. Ultimately, he believed that IO law had a 'special sensitivity' to the demands of the NIEO and that IOs were the nucleus for transforming general

<sup>131</sup> Abi-Saab, 'The Concept of International Organization', in G. Abi-Saab, *The Concept of International Organization* (1981), reprinted in M.A. Boisard, E.M. Chossudovsky and J. Lemoine (eds), *Multilateral Diplomacy* (1998) 5.

<sup>132</sup> *Ibid.*, at 5.

<sup>133</sup> *Ibid.*, at 11.

<sup>134</sup> *Ibid.*, at 12.

<sup>135</sup> M. Bedjaoui, 'A Third World View of International Organizations: Action towards a New international Economic Order', in G. Abi-Saab, *The Concept of International Organization* (1981) 206.

<sup>136</sup> T. Wälde, 'A Requiem for the "New International Economic Order": The Rise and Fall of Paradigms in International Economic Law', in N.M. Al-Nauimi and R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law* (1995) 131.

<sup>137</sup> M. Bedjaoui, *Towards a New International Economic Order* (1979), at 178.

<sup>138</sup> *Ibid.*, at 200.

<sup>139</sup> Asante, 'International Transactions and National Development Goals', 10 *Ghana Law Review* (1978) 4, at 4.



international law.<sup>140</sup> It is noteworthy that, in writing on the NIEO, Asante stated that, 'while politicians and diplomats from the Third World inveighed against the inequities of the prevailing international economic order with the flamboyance that captures headlines, professional men such as lawyers, should focus on the more prosaic but equally vital aspects which should unravel the full technical implications of concepts'.<sup>141</sup> This was a direct acknowledgement of the importance Asante attached to moving beyond the rhetoric of NIEO speeches to realizing the legal aspects of the NIEO through control of multinational corporations.

Asante's approach to IO law bore some similarities to the views held by Abi-Saab and Bedjaoui but only to the extent that they all believed in the importance of IOs in addressing Third World economic problems. Collectively, even though they wrote very little on IO law, considering the spheres of their influence and direct access to critical decision-making forums at the UN, their scholarship stands out as being the most influential on the international law concerns of developing states during the NIEO era that the UNCTC had projected.<sup>142</sup> However, unlike Bedjaoui, Asante did not give too much attention to the institutional law of IOs, such as equal voting powers and the legal effects of resolutions. Rather, his approach, which was embedded within his job responsibilities, focused solely on the advisory role of the UNCTC *vis-à-vis* transactions between multinational corporations and developing countries.

The views of first-generation Third World scholars were shaped by their foreign education, close interactions with the political class and first-hand observation of political contestations at the UN. While IO 'Third World' civil servants like Shihata were more pragmatic in approach and equally sympathetic to Third World concerns, at the other end of the spectrum was Amerasinghe who remains the most prominent 'Third World' IO scholar. Unlike Asante, Amerasinghe did not actively engage with what may be considered 'Third World problems in IO law'. Amerasinghe, who is known to have rejected an 'imperialistic hypothesis', may be described as being indifferent to Third World approaches and concerns with IOs. In a 1975 book chapter that was meant to represent a Third World contribution on nationalization, Amerasinghe described the 1974 Economic Charter as 'extreme and hardened positions'.<sup>143</sup> This description of the NIEO and, by a far stretch, the UNCTC, which was very different from the views adopted by scholars like Bedjaoui, Asante and Abi-Saab, was echoed by many international law scholars, including a former legal officer of the UNCTC.<sup>144</sup>

In addition, in his review of the Group of Eminent Person's report that recommended the establishment of the UNCTC, Amerasinghe's main concern was that, by de-emphasizing the role of international dispute settlement, the report did a disservice

<sup>140</sup> Bedjaoui, *supra* note 135, at 257.

<sup>141</sup> *Ibid.*, at 337.

<sup>142</sup> T.O. Elias, *The International Court of Justice and Some Contemporary Problems: Essays on International Law* (1983), at 201.

<sup>143</sup> Amerasinghe, 'Quantum of Compensation for Nationalized Property: The Third World Perspectives', in R.B. Lillich (ed.), *The Valuation of Nationalized Property in International Law* (1975) 91, at 130.

<sup>144</sup> Wälde, *supra* note 66, at 227.

to the cause of an international regime.<sup>145</sup> Thus, it is clear that, while Bedjaoui, Asante and Abi-Saab sought to promote Third World approaches within IOs, Amerasinghe chose to distance himself completely from the NIEO. It is however important to clarify that the choices made by scholars to focus on specific issues that are not tied to their geographical origins do not undermine the authenticity of their scholarship. In practice, it is assumed that lawyers are not employed on the basis of their ideological beliefs but, rather, on the strength of their skills and qualifications, which ensures that IOs carry out their functions. However, this simplistic view does not undermine the ideological leanings of scholars and what may be perceived as their activism within IOs. For example, a more critical account by a prominent former UNCTC legal officer used strong adjectives, describing the UNCTC as a hive of ‘junior, left leaning and starry-eyed Third-World legal academic sympathizers’ and ‘radical crusaders who were often drop-outs from the hard competition of the corporate and legal world’ and who pursued criticism of transnational corporations to generate budgets, staff, travel, conferences, patronage and promotion with the active support of Scandinavian states.<sup>146</sup> The most useful conclusion that emerges from comparing Asante and his contemporaries like Amerasinghe is that it may provide some clarity on why TWAIL approaches to IO law have remained under-explored within mainstream IO law.

Soon after the publication of *The Concept of International Organization* and after Asante’s 1979 seminar at Oxford on the legal aspects of the NIEO,<sup>147</sup> Bedjaoui, Asante, Abi-Saab and Shihata were appointed by the UN General Assembly on the basis of the UN Charter as members of a panel of experts to write a report titled *Progressive Development of the Principles and Norms of International Law Relating to the NIEO Concerning the Economic Relations among States, International Organizations, and Other Entities of Public International Law, and the Activities of Transnational Corporations* under the aegis of the UN Institute for Training and Research (UNITAR).<sup>148</sup> The UNCTC was one of the IOs invited to contribute to this report, which was expected to form the basis for future UN negotiations. The principles built on the aspiration language of the NIEO resolutions, but, for the first time, they placed strong emphasis on the role of states and international (economic organizations) in realizing the international law principles of the NIEO.<sup>149</sup> The principles on participatory equality that attracted the most controversy echoed work already done by Bedjaoui and focused on the equal participation of

<sup>145</sup> Amerasinghe, ‘The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation’, 9 *Vanderbilt Journal of Transnational Law* (1976) 793.

<sup>146</sup> Wälde, *supra* note 66, at 227.

<sup>147</sup> K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980). Two of the 19 chapters published in this book are Asante’s publications.

<sup>148</sup> UN Secretary General, Report on the Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, UN Doc. A/38/366, 29 September 1983.

<sup>149</sup> Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order: Report of the Secretary-General ‘Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order’, 54 *Rivista Di Studi Politici Internazionali* (1987) 313; J. Makarczyk, *Principles of a New International Economic Order: A Study of International Law in the Making* (1988), at 126.

developing countries in international economic organizations through the abolition of weighted voting.<sup>150</sup>

Abi-Saab who chaired the panel has over the years expressed regret that the 1984 report was not followed because the political moment for the NIEO had passed.<sup>151</sup> Unlike Shihata, Bedjaoui and Abi-Saab, who moved on to other areas of international law as their careers within what may be described as more successful IO law projects in the World Bank and WTO progressed, Asante's international civil servant career had already peaked with the UNCTC's demise in 1992. The non-realization of the progressive development of the principles and norms of international law relating to the NIEO marked the end of Bedjaoui's vision for transforming the NIEO through IOs. TWAIL did not fully emerge until the 1990s when the NIEO was already fading into oblivion and when the UNCTC's structure had collapsed. However, scholars like Asante, Taslim Olawale Elias, Anand, Bedjaoui and Abi-Saab had already laid the foundation for the emergence of TWAIL. This plays out in a 1987 edited book of journal articles representing Third World attitudes towards international law, which includes a section on IOs (and Asante's publication), which set the ball rolling for the emergence of a vocal TWAIL movement in the 1990s and 2000s.<sup>152</sup>

Yet the most visible TWAIL perspectives on IO law do not appear until much later in publications by B.S. Chimni and Antony Anghie, who are the key founders of the TWAIL movement and representative of a third typology of IO law. Although the TWAIL movement does not project one single view on international law, front-runners like Chimni reject realist theories that posit that IOs mirror international politics. Instead, Chimni has argued that IOs possess autonomy that is conferred in favour of the capitalist class.<sup>153</sup> Chimni has also called for the decolonization of IO history and rejected the absence of Third World priorities in IO texts that neglect the Third World in IOs history.<sup>154</sup> This is evident in the total neglect of the UNCTC from IO texts. Chimni has also criticized Western intellectual foundations of reform of IOs.<sup>155</sup> His identification of the Third World approach to the history of IOs, which bears much influence on TWAIL scholarship, is a sharp contrast to the first generation of Third World scholarship to which Asante belongs.

Anghie and Chimni categorize Asante as belonging to TWAIL I scholarship produced by the first generation of post-colonial international lawyers that 'placed immense faith in the

<sup>150</sup> UN Institute for Training and Research, Report on the Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, UN Doc. A/39/504/Add.1, 23 October 1984, at 19, para. 18.

<sup>151</sup> Abi-Saab, 'Reflections on International Legal Theory and Practice: A Conversation with Georges Abi-Saab', in J.L. Dunoff and M.A. Pollack (eds), *International Legal Theory: Foundations and Frontiers* (2022) 327, at 338.

<sup>152</sup> E.E. Snyder and S. Sathirathai (eds), *Third World Attitudes toward International Law: An Introduction* (1987), at 161.

<sup>153</sup> Chimni, 'International Financial Institutions and International Law: A Third World Perspective', in D.D. Bradlow and D.B. Hunter (eds), *International Financial Institutions and International Law* (2010) 31, at 34.

<sup>154</sup> *Ibid.*

<sup>155</sup> Chimni, 'International Organizations: 1945–Present', in J.K. Cogan, I. Hurd and I. Johnstone (eds), *The Oxford Handbook of International Organizations* (2016) 113, at 125.

UN to bring about the changes necessary to usher in a just world order'.<sup>156</sup> This statement bears some truth. Even though Asante was a Third World scholar, he chose to deal with North-South problems as a 'function of economic and political realism',<sup>157</sup> adopting a rational approach to the problems of development.<sup>158</sup> Asante favoured 'common sense and equity over formal doctrine', which also incorporated theoretical dimensions.<sup>159</sup> Without any doubt, Asante's writings were influenced by his policy-oriented education and experiences as a World Bank counsel and as attorney general in Ghana. He viewed interactions between governments and transnational corporations as a fact of international business, arguing that for this reason the UN code of conduct was 'an essential prerequisite to the establishment of a viable system of international economic co-operation'.<sup>160</sup>

Many scholars, including TWAIL scholars, consider the UNCTC a failure because it failed to achieve a code of conduct for transnational corporations and the aspirations of the NIEO. For example, Chimni has argued that the invasion of the UN system by the private corporate actor has been underway since the 1970s.<sup>161</sup> For him, privatization of the UN system has reduced the possibility of UN forums being at the centre of collective action by Third World states to constrain giant private actors. His main illustration for this argument is what he describes as an abandonment of a code of conduct, the shutting down of the UNCTC, the repositioning of UNCTAD and the marginalization of development issues in the UN system.<sup>162</sup> Although this is a fair description of the UNCTC examined in section 3 above, it conforms with the ideal that IOs are created by states for altruistic reasons. However, to understand the UNCTC in a broader scope, we must also expand how we understand the theory and practice of IOs. Rather than just focus on the code of conduct, we can also focus on what has been described as the UNCTC's most distinctive contribution: the advisory services in which Asante played a crucial role.<sup>163</sup>

Although Asante was influenced by his American education and exposure to American ideas of transnational law and realism, he approached his work within the UNCTC to a certain extent from a unique perspective that matched with his expertise in questions of domestic property and contract law and his career at the World Bank and in Ghana. Of course, the irony is that a realist approach to IO law is more closely associated with US approaches to IO law. Asked directly in a recent email if he considered himself a functionalist, Asante's firm response was no.<sup>164</sup> While this response

<sup>156</sup> Anghie and Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict', 36 *Studies in Transnational Legal Policy* (2004) 185, at 188.

<sup>157</sup> Asante, *supra* note 88, at 408.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> Asante, *supra* note 95, at 628.

<sup>161</sup> Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1, at 14.

<sup>162</sup> *Ibid.*, at 15.

<sup>163</sup> Dunning, *supra* note 12, at 178; J. Lemoine, *The International Civil Servant: An Endangered Species* (1995), at 54.

<sup>164</sup> Compare with Klabber's argument that almost all international organizations lawyers have been functionalists. Klabbers, *supra* note 6, at 10.

appears at variance with the argument that individuals working in IOs embrace functionalism, it underscores the fact that associating IO civil servants with specific IO law theories is not a box-ticking exercise.<sup>165</sup> A focus on property rights rather than on what Asante called 'rhetoric', which had characterized the demand for restructuring the world economic order, was central to the work of the UNCTC.<sup>166</sup> During recent email exchanges, Asante has emphasized that

I must however stress that, at both institutions, my work was project oriented, dealing with live development projects and actual negotiations of international business transactions and the structuring of foreign investment regimes, which involved the national or domestic laws of the countries concerned and such international legal principles as were applicable. So, while I acknowledge that my knowledge of international law and the law of international institutions was helpful, equally critical was an appreciation of the relevant aspects of the domestic laws of the countries with which we had dealings.<sup>167</sup>

Even though Asante was sympathetic to the unique needs of developing countries, he also recognized the legitimate financial and business interests of transnational corporations.<sup>168</sup> These ideas were central to Asante's role in the broadening of the UNCTC's scope of legal technical assistance in joint ventures, foreign investment, banking, privatization and petroleum and mining agreements in the former Soviet Union and other Eastern and Central European countries.<sup>169</sup> On the surface, it may appear difficult to reconcile the views of Asante and other first-generation scholars with post-1990 critical scholarship on IO law. Until recently, mainstream IO law texts have focused on the new voting rights of developing countries within the UN. At independence, it was believed that IOs like the UN would be beneficial for realizing the aspirations of newly independent states.<sup>170</sup> However, more recently, critical accounts of IOs by Chimni and Anghie have shaped and dominated most of the discourse on Third World perspectives.<sup>171</sup> Unlike first-generation scholars like Asante who were occupied with the NIEO, contemporary critical scholars have shifted focus to the place of the Third World in specific IOs and international disciplines, especially international economic law and human rights. IOs are still central to these debates, but the institutional law of these IOs has been replaced by a critical focus on the substantive rules developed by these IOs.

## 6 Conclusion

This article has provided an alternative view of IO law by centring an account of the UNCTC around Asante's career. As the foregoing discussion has shown, at the

<sup>165</sup> N. White, *The Law of International Organisations* (2016), at 4.

<sup>166</sup> Asante, *supra* note 87, at 336.

<sup>167</sup> Email interview with S.K.B. Asante, 20 January 2022.

<sup>168</sup> Asante, *supra* note 87, at 371.

<sup>169</sup> Asante, *supra* note 7, at 198.

<sup>170</sup> Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', 8 *Howard Law Journal* (1962) 95, at 104.

<sup>171</sup> B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), at 292.

heart of Asante's career was an approach that was not embedded in a strict functional theory of IO law. Unlike more prominent IO lawyers, his career and approaches were influenced by a realist approach to the transnational problems of multinational corporations in developing countries. He did not write much about IO law as a field of international law. Like most first-generation Third World international lawyers, he was deeply concerned about the international problems faced by developing countries during the NIEO era.

The present world in which IOs operate is very different from the heydays of the UNCTC. The NIEO era of the 1970s and 1980s was a period when change seemed plausible. The UNCTC is an exemplifier of this era. The abiding belief of first-generation Third World scholars in the powers of IOs to transform the world has been replaced by more critical approaches. At the heart of these criticisms remains the belief that IOs are functional entities, set up to perform specific tasks for the greater good of humankind.<sup>172</sup> The plausibility or necessity of Third World approaches is far from urgent. While TWAIL criticism of IOs is very visible, critical studies of IO law are almost non-existent. This is perhaps because, rather than promote the importance of a TWAIL agenda, traditional IO law instead exposes the limits of TWAIL approaches. For first-generation Third World scholars like Asante, the nostalgia of missed political movements remains etched in memory and long-forgotten reports like the 1984 UNITAR analytical study *Progressive Development of the Principles and Norms of International Law Relating to the NIEO*. For future generations, IOs and IO law remain a necessity. The NIEO continues to reappear on the UN's agenda, but the focus on IO law of the 1980s has completely vanished.<sup>173</sup>

Regional IOs have proliferated, but they have not replaced the importance of universal IOs like the World Bank and the UN. They have not led to radical changes in IO law. However, there are ongoing efforts to reinvigorate IO law as a branch of public international law. The main challenge is how to make IO law more inclusive and more visible. Broad methodological lessons emerge from engaging with Asante's career in two of the world's most important IOs. Within the context of the UNCTC, functionalism will nudge us towards examining the UN resolution that established the UNCTC and focus more on the UNCTMTC. However, it has also provided a context for understanding the place of Third World approaches in IO law. This is consistent with a recognition that, beyond the functional approach, historical and sociological approaches to IO law are equally essential,<sup>174</sup> which is also parallel to shifts towards the accountability of IOs.<sup>175</sup>

While the success of the UNCTC was hinged upon the success of the NIEO, its failures allowed UNCTAD to reclaim its position as the Third World's IO and paved the way for the acceptance of advisory services by IOs and for new international law disciplines like international investment law and world trade law. This

<sup>172</sup> Klabbers, *supra* note 6, at 11.

<sup>173</sup> Towards a New International Economic Order. GA Res. A/RES/77/174, 14 December 2022.

<sup>174</sup> Klabbers, 'Beyond Functionalism: International Organizations Law in Context', in J. Klabbers, *The Cambridge Companion to International Organizations Law* (2022) 7, at 17.

<sup>175</sup> S. Besson, *Reconstructing the International Institutional Order* (2021).



publication has shown that the failures of the UNCTC and the NIEO are a major reason why Third World approaches to IO law are almost non-existent. It also ensured the continued dominance of what Abi-Saab and Higgins once described as Western approaches to IO law. Even though the UNCTC may be described as a forgotten moment in the institutional life of international law,<sup>176</sup> the activities of the UNCTC continue to bear fruit around the world. Today, China has embraced the liberalization of its economy, is an active participant in international economic organizations and exports foreign capital mainly through state-owned enterprises. Many of the principles that were considered controversial in the code of conduct on transnational corporations have found their way into international investment treaties and into the national laws and contracts signed between states and foreign investors. These include the rights of states to regulate, respect for human rights and protection of the environment. Advisory reports that began under the UNCTC have become flagship projects of UNCTAD and are a source of 'law' for many states. Almost 50 years after the seeds for the UNCTC were planted, the UN is still trying to hold multinational corporations accountable for their conduct, but it now uses the language of 'business and human rights'.<sup>177</sup> Parallel to this, the World Bank through its ICSID Convention has become one of the most important international economic organizations.<sup>178</sup>

As Asante's intellectual history and career shows, IOs can take up a life of their own and are often driven by the imaginations of legal advisers who work quietly behind the scenes.<sup>179</sup> After two unsuccessful attempts to get elected to the International Court of Justice in 1991 and 1993, Asante's international civil service career came to an end. For 90-year-old Samuel Kwadwo Boaten Asante, who is now addressed in public life by his Chieftaincy Stool title as Nana Susubribi Krobea Asante, Omanhene of Asante Asokore Traditional Area, '[t]he validity of [his] position has been vindicated by the various attempts to resurrect the technical assistance programme of UNCTC in various forms after the triumph of conservative forces in the late 1990s'.<sup>180</sup>

<sup>176</sup> Compare with Kelsall, *supra* note 11, at 463.

<sup>177</sup> C.D. Wallace, *Foreign Direct Investment in the 1990s: A New Climate in the Third World* (1990), at 3; K. Weilert, 'Taming the Untamable? Transnational Corporations in United Nations Law and Practice', in *Max Planck Yearbook of United Nations Law* (2010) 445, at 463.

<sup>178</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159.

<sup>179</sup> Asante, 'From an African Village to the Global Village and Back: Instructive Profiles in Development from My International and National Experience', 12 May 2018; Asante, 'Lessons from a Failed International Criminal Campaign in the Distant Past' (2021); Asante, 'My Experience in the Management of Natural Resources (2021) (all on file with the author as received from S.K.B. Asante through email correspondence).

<sup>180</sup> Email interview with S.K.B. Asante, 20 January 2022.