

Civil Society and Democratic Governance: Accountability in Transnational Governance Networks¹⁾

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It is widely accepted that the global governance system suffers from democratic deficits (Scholte 2004). Recent debates tend to focus on whether it is possible and desirable to remedy this situation, and if yes, how? At one extreme it is suggested that the time has come for the beginnings of a world government in the embryonic form of a directly elected global assembly (Falk and Strauss 2001). Others have proposed versions of cosmopolitan democracy (McGrew 2000, Held 2000), building for instance on regional parliaments, and yet others have suggested more pragmatic approaches (Cunningham 2002) or limited efforts to enhance the legitimacy and democratic accountability of such arrangements (Scholte 2004, Keohane 2006). One issue considered in the last context is the actual and potential role of civil society organizations (CSOs) in furthering such accountability, accountability to constituents being one aspect of democratic quality.

This is the intellectual context for the present study. It derives from a collaborative research project that seeks to find out “to what extent and in which ways the engagement of civil society organizations with global governance agencies have furthered the accountability of such agencies” (Scholte 2006). My contribution to the project focuses on the OECD.²⁾

The Organisation for Economic Co-operation and Development³⁾

The OECD covers practically all policy areas except security and defense and it works with these issues in a variety of ways. Its governing body is the *Council* where each member state is represented and decisions are taken by consensus. A distinct feature is the system of specialized *committees* where representatives from national administrations meet to discuss and review policy in particular policy areas. There are ca. 35 committees, and in addition there is a large number of working groups and expert groups. The permanent *secretariat* in Paris with a staff of ca 2300 (2004) international civil servants is also important. Furthermore the organization has since its creation involved civil society organizations in its work, giving business and labour, represented by BIAC (Business and Industry Advisory Committee) and TUAC (Trade Union Advisory Committee) a formal status. Finally, since 1990 the OECD has developed cooperative relationships with some 70 non-member countries, including significant developing and emerging economies such as Brazil, Russia, and China as well as many least developed countries.

This is a flexible organization that can do governance activities ranging from analytical work over soft regulation to hard regulation through binding international agreements. It can do so with a very variable organizational geometry, from low level exchange of information between national administrative agencies and the OECD secretariat, to high level, politically charged negotiations.

This organizational architecture is best described as a *trans-governmental governance network* (Slaughter 2000, Ougaard 2004) or a *series* of networks organized around the formal organization in Paris, each network comprising civil

servants and experts from member states and the OECD's permanent staff, experts and politicians, and in various ways CSO representatives. Therefore the "governance agency" examined in this paper is the formal organization itself plus the OECD-centered trans-governmental networks, for short *the OECD Network*.

The Mai Affair⁴⁾

The MAI affair (1995-1999) was a failed attempt to negotiate a highly ambitious multilateral agreement on investment liberalization. It had to be ambitious because to be worthwhile it should lead to a significant improvement in the already liberal investment climate among OECD members. It also should have to potential to gradually expand its membership to non-OECD member countries. One reason the OECD was chosen as the venue was that it was considered difficult, to say the least, to get meaningful investment liberalization through the WTO process, while it should be possible to negotiate a far-reaching agreement in the OECD forum, due to the much higher degree of like-mindedness in liberalization matters among its membership.

This belief turned out to be wrong. Gradually it transpired that the remaining obstacles to full investment liberalization were considered rather important in member countries. Therefore the eventual resulting agreement was likely to be filled with national exceptions and escape clauses, and therefore without much benefit from a business perspective. Thus the perceived potential benefits of completing the process declined considerably as negotiations went forward. At the same time the political costs grew dramatically.

Formal negotiations had begun in September 1995 and in January 1997 the first draft agreement had been produced. In February 1997 an NGO, *The Council of Canadians*, published a version of the text on the internet

(Devereaux et.al. p 161), leading to a rapidly snowballing global anti-MAI movement. In the words of Devereaux and co-authors,

The proposed MAI sparked fury around the world, becoming in the words of a European MAI negotiator, “the focal point for fears about globalization.” Indeed, according to some observers, the MAI protests marked the beginning of the international anti-globalization movement. <..> The MAI negotiations were targeted by hundreds of grassroots environmental, consumer, and development organizations and condemned by critics ranging from labor union leaders to movie actresses, all voicing concern about the harmful impacts of global economic integration.” <.> More than 600 organizations in nearly 70 countries expressed disapproval of the talks (Devereaux et.al. p. 140).

Thus, with the prospects of a strongly liberalizing agreement receding, and the costs of continuing negotiations going up, the strategic calculations of key actors changed. Main sections of the business community lost interest in the MAI, the US government lost interest, France lost interest and, as the first country, in effect withdrew from the process in October 1999, leading to the final demise of MAI in December of that year.

The central question in an analytical post-mortem of the MAI is the cause of death: Was the global mobilization of NGOs and civil society protests the decisive dragon-slayer, or was the chief culprit the inherent difficulties, disagreements and conflicts of interests among participating governments? Not surprisingly, the first explanation is popular in the NGO world, but both Henderson and Devereaux et.al. come out in favor of the second view. They do not deny the contribution of civil society protests to the result, but they see it more as yet another push to an already badly tilting wagon – and not the most decisive push.

In my assessment it is more probable than not that the MAI process would have broken down also in the absence of the global anti-MAI movement. The incompatibility between what was sought and what was possible in light of deeply entrenched pockets of investment protectionism, also in highly liberal political economies, was simply too overwhelming. At the same time, even from the outset there was not a very strong demand for the MAI in the business community (Devereaux et.al. pp151-153), and among the supporters of the MAI the basic rationale for the project was not entirely clear (Henderson p 33-47).

In contrast, had the MAI had a perceived strategic importance for major sections of international business and support from major states comparable to for instance the successful TRIPS agreement concluded in the WTO context in 1994, it is not inconceivable that it could have gone through in spite of NGO protests.

If this assessment holds, the central analytical question in the post mortem becomes the cause of conception rather than the cause of death. With hindsight it seems clear that the problems would have been fairly easy to foresee if more thorough preparations had been made. So why did major countries and a key international institution walk so ill-prepared into this debacle.

I suggest the combination of two reasons, both more or less directly implied by the analyses by Henderson and Devereaux et.al. One is that after the completion of the Uruguay Round that was considered a major success for economic liberalization and for US trade policy, a kind of liberalization euphoria caught sections of the policy-making establishment. Believing in a powerful historical momentum in favor of further liberalizations, they actively sought a new cause to promote. The other reason was that the permanent staff at OECD was concerned about the future of the organization and sought ways to heighten its relevance and visibility (Devereaux et.al. p 152). As one internal critique of

the process said: “the bureaucracies were proposing an agreement that the private sector in most countries were not necessarily calling for... The whole initiative could be described as a solution in search of a problem” (Devereaux et.al. p. 153).

So here is an irony: the MAI agreement was not really important for the protagonists of liberal globalization and it probably would have failed anyway, but it greatly stimulated the growth of a vigorous transnational NGO community that in multiple ways monitors and seeks to influence global governance arrangements.

This means that the MAI affair itself is not really a good case of global governance institutions being brought to accountability by CSOs. It was a unique event in a specific moment of history, where neo-liberal triumphalism was at its peak and policy-makers got over-ambitious and careless, making the process an unusually easy target for protesters. But in a larger perspective the affair clearly was an important stimulator in the NGO world, in the OECD itself, and in other international organizations, of the process that brought accountability much higher on the agenda. In that sense, the CSO involvement in the MAI affair contributed to make this particular conjuncture a turning point in the history of global governance, the magnitude of which it is too early to tell.

CSO Engagement with the OECD in general

From its inception, the OECD has systematically involved CSOs in its work through BIAC and TUAC. These are independent organizations but they are officially recognized and through them a large number of business and labor organizations, national and international, can and do interact with and give advice to committees and secretariat.

At the turn of the century, – inspired by the MAI affair and the 1999 Seattle WTO Ministerial meeting (OECD 2006A p3)–, a marked up-grading took place. In 1999–2000, the Organization reassessed its relations with civil society and concluded among other things that “openness to civil society is important in the light of the contributions civil society organizations (CSOs) can make to the OECD’s work; openness can help to improve understanding by CSOs and the public of the opportunities and challenges of global economic and social change” (ibid).

In the following years the committees expanded and intensified their relations to civil society so that in 2006, “consultations with CSOs are now a regular and systematic part of most OECD committees’ work” (OECD 2006 A + annexes). An inventory of contacts lists more than a hundred different topics on which CSOs have been consulted at least once and in many cases on a regular basis. It names more than two hundred different NGOs that have been involved, and several times it refers more broadly to, for instance, “Umbrella NGO organizations in all DAC member countries” (OECD 2006 B). Thus it is safe to say that OECD has an extensive and intensive engagement with a very broad range of CSOs and that few significant constituencies seem to be left out.

However, given the nature of the organization, much variation across issues and policy areas is to be expected. In each area there can be up to five factors in what you could call *the accountability equation*: 1) the OECD bodies and instruments in question, 2) the constituents of this regime, 3) civil society organizations which may or may not be direct representatives of the constituents, 4) the addressee of accountability claims which may or may not be the directly implicated part of the OECD network, and 5) the degree to which 4) is accountable to 2). With this in mind, let us look at some selected issues.

The Model Tax Convention

With the rise of FDI and other trans-border economic activities questions of double taxation and tax evasion have become more pressing, the standard remedy being a bilateral tax treaty between two states. Since a growing number of states need to develop such treaties with each other standardization is desirable and to this end the OECD has developed the *Model Tax Convention* as a model for bilateral treaties.

The Model Convention is in almost constant development as changing business practices create new taxation challenges and opportunities, calling for additions and revisions to the Model Convention. In this work the OECD's Centre for Tax Policy and Administration (CTP) cooperates closely with BIAC and ICC (The International Chamber of Commerce), so closely that they can be described as the CTP's "customers" (interview). Often issues are brought to the CTP by BIAC when the constituents find the Model Convention insufficient, and analytical work done to develop the Convention can be partly funded by business.

Thus, if the main constituents are transnational companies concerned with avoiding double taxation, there is little doubt that the involvement of BIAC, ICC, and other business associations contributes significantly to a high degree of accountability. These CSOs are involved in shaping the convention and can initiate changes and developments when they find it required. Accountability towards this specific constituency is close to a defining feature of this particular body within the OECD.

However, if a broader view of the constituency for OECD's work on tax issues is taken, the picture needs modification. Arguable an equally if not more important constituency is made up of national tax administrations concerned with fair and effective taxation to fund public services, and thereby indirectly

but importantly, all citizens concerned with public welfare issues.

Efforts have been initiated in the OECD to fight “harmful tax practices”, i.e. reigning in off-shore tax havens that thrive on the facilitation of tax evasion, but they have not yet gone very far. Presumably BIAC is not very pro-active in this regard, and concerned civil society organizations such as *Tax Justice Network* and Oxfam are “in the background” and do not have a direct relationship with OECD in this context (interview). The 2006 inventory lists only one non-business group, TUAC, as being involved in tax issues, and its involvement seems to be rather weak and with little impact (OECD 2006 b p 24-25, interviews). In early 2007, however, TUAC began to show a stronger interest (interviews), being concerned with the negative impact economic globalization may have on states’ ability to tax transnational corporations effectively (interview). In March 2007 TUAC brought the issue of the taxation of hedge funds on the agenda, resulting in some public controversy (interviews). This may be the beginning of stronger CSO involvement in this aspect of OECD’s work on taxation, but so far there has not been much CSO activity that could enhance accountability in this area.

Anti-bribery

OECD’s *Anti-Bribery Convention* entered into force in 1999 (OECD 2003). Accepting the basic premise of the Convention that corruption “raises serious moral and political concerns, undermines good governance and development, and distorts international competitive conditions” (OECD 2003 p 7-8), I assume that anti-corruption efforts have a large constituency, consisting of the majority of businesses and the general public in most countries whether members of the OECD or not.

The convention is a binding instrument, requiring adhering governments to

“implement a comprehensive set of legal, regulatory and policy measures to prevent, detect, prosecute and sanction bribery of foreign officials” (OECD 2006 c). It relies for implementation on a monitoring process, where, in *Phase 1*, it is ascertained whether the legal texts in the country meet the standards of the Convention, and in *Phase 2* “the structures put in place to enforce the laws and rules implementing the convention” are evaluated (OECD 2003 pp 11-12).

Thus, the addressees of accountability claims are twofold: On one hand the OECD and its Secretariat (are the Convention and its supporting instruments good enough? Is the monitoring process conducted rigorously and effectively?), and on the other hand the participating governments (are they effectively implementing the Convention?)

CSO involvement in the development and implementation of the Convention has been extensive, with BIAC, ICC, TUAC, and in particular Transparency International playing important roles. CSOs’ efforts “helped generate the needed political will to criminalise the bribery of foreign public officials through efficient multilateral action” (OECD 2003 p 10-11). They also called attention to issues that in consequence were brought into the Convention and related instruments, for example the problems of solicitation of bribes and protecting “whistle-blowers” (OECD 2003, interview).

Concerning implementation, it is explicit policy to seek civil society participation and the efforts of the OECD and CSOs are seen as mutually reinforcing (interview; OECD 2003). National chapters of TI in particular have in several cases played a role in shaping national legislation, and in contributing to monitoring activities, calling attention to weaknesses in national implementation (OECD 2003, p 14-15; interview). Through such mechanisms CSOs can complain to the OECD about lack of government activity in any particular area, and in turn the OECD can “recommend” to the government that it “raises

awareness” on the issue at hand (interview).

Overall, CSO participation has helped create strong accountability measures, the OECD has close links to relevant CSOs and is open and responsive to their suggestions, and CSOs are strongly involved. But most importantly there is a strong partnership between OECD and CSOs for keeping national governments accountable. In relation to these addressees for accountability claims, CSOs have helped create rather strong accountability mechanisms, and ongoing CSO involvement continues to play an important and possibly indispensable role in making governments answerable for their efforts. The relationship is one of partnership in implementation.

It should be noted, however, that this partnership probably is preconditioned by the nature of the issue and the constituency. It is difficult to oppose anti-bribery in principle. In the underlying constellation of interests there is little conflict and controversy; business, labour and large segments of civil society all agree that corruption should be fought.

Investment

In 2000 the OECD revised the *OECD Guidelines for Multinational Enterprise* and adopted a *Decision of the Council on National Contact Points*. The revision was far-reaching with a view to “reinforce the core elements-economic, social and environmental-of the sustainable development agenda” (OECD 2000 p 2, also OECD 1999). The system of National Contact Points is an important part of the implementation mechanism for the guidelines and it was strengthened considerably by the decision.

An important factor in bringing these changes about was the NGO mobilization in the MAI and Seattle episodes. So was the growing strength of the sustainable development agenda to which NGO activity also had contributed.

Furthermore, through the 1990s there had been a marked surge in the drive for corporate social responsibility, also in many ways propelled by NGO activity (Ougaard 2004). Thus even if much of this CSO activity did not directly engage the OECD it contributed both to the fact that the guidelines were revised and to the direction of change. But there was also direct engagement; the guidelines were “developed in constructive dialogue with the business community, labour representatives and non-governmental organisations” (OECD 2000 p 2-3) and CSO engagement contributed to the consideration and partial inclusion of the views of a broader set of constituents. This is an instance of heightened accountability on behalf of the OECD network towards those constituents, and by implication perhaps a modest dilution of its accountability towards the business community.

The CSO impact is not limited to this case. Another example is the open online consultation process that was used in the development of the *Policy Framework on Investment*. Here the organization issued an open call for “the public’s views through an online consultation on the draft text” (OECD 2006 d), and some views from CSOs found their way into the final document.

In this process, the OECD recognized a challenge of distinguishing between serious CSOs and organizations whose views were seen as impossible to accommodate and indeed take seriously (interview). This points to an important dilemma that could be relevant in any accountability equation, namely whether and on which criteria global governance agencies can restrict and delimit the range of CSOs that are given voice in policy formation and access to accountability measures.

Among those considered serious was *OECD Watch* that groups together NGOs that share the “vision about the need for corporate accountability and sustainable investment” (OECD Watch 2007). This CSO has been acknowledged

by the OECD as “a partner in implementing the guidelines” and OECD has been open to input from the organisation in various matters (ibid).

This amounts to establishing and giving access (although without formalized influence) to a *political arena* that allows a broader array of constituents to get involved in the policy-making process. But there has also been an important development on the implementation side with the strengthening of the system of National Contact Points.

Somewhat simplified, the key point is a stipulation that “specific instances” can be brought for a NCP by business, employees, NGOs and the public (OECD 2001 46). This amounts to a right for all concerned parties to obtain an authoritative statement from a national NCP whether any given company practise violates the guidelines. There are no further sanctions involved. It is a concrete, institutionalized accountability measure, but hardly a strict one. It relies solely on moral and persuasive force, but this can be of some strength and the system is an example of enhanced accountability. And it is being used. Both OECD Watch and TUAC have reported some successes but also weaknesses in the ca 100 cases that so far has been brought to NCPs (OECD Watch 2007 B, TUAC 2006: 33).

6.4. Environment

In this area the constituencies have cross-cutting, partly overlapping and partly conflicting interests. Businesses are much concerned with cost and competition consequences of regulation; labor is concerned with hazards in the work-place and employment and wage consequences, and cutting across socio-economic and other dividing lines there is a general human interest in environmental sustainability which environmental NGOs seek to represent politically.

The OECD's work in the environmental area is multifaceted. It relates to specialized technical issues such as "good laboratory practices," to regulatory issues such as "harmonization of regulatory oversight in biotechnology" (OECD 2007), and to long-term guidelines as expressed in the 2006 Strategic Vision to "work towards ensuring global economic growth that is environmentally sustainable" (OECD 2006 e).

Although implementation of these policies is the responsibility of member governments, the work of the OECD network is a relevant addressee for accountability claims because of the growing importance for business and governments alike that environmental and safety standards are internationally harmonized.

CSOs have been involved in this work in many years. BIAC and TUAC have had access to the work of the Environment Policy Committee, and in some of the more technical standard-setting issues there most likely has been a high degree of accountability towards the business constituency, but also, via national governments, to the broader environmental constituency.

But more recently the involvement of CSOs has broadened significantly. This has been facilitated by an important development in the NGO world, namely the creation of the umbrella organization *European Environmental Bureau* (EEB). This organization, headquartered in Brussels, has 143 member organizations from 31 countries (EEB 2007).

The EEB coordinates NGO interaction with the OECD in environmental matters (interview) and the relationship between the OECD and EEB has been developed to a point where the Environmental Committee is one of the OECD bodies most open to NGO engagement, if not *the* most open. One significant evolution is that EEB in practice has been elevated to a status comparable to the one previously held only by BIUAC and TUAC. Another significant development

is the high level of access occasionally granted EEB which at some occasions has participated at meetings at the ministerial level.

In environmental issues, the OECD network constitutes a structured political arena, where different constituents, including now the environmental NGOs can articulate and advocate their positions. Decision-making power, however, resides with the formal governmental part of the network. Still, this is a venue both for criticizing existing policies and for suggesting revisions and new initiatives.

But CSOs can also use the various venues for criticizing countries for weak or lacking implementation of internationally agreed policies. A potentially effective channel in this regard is the country review process, which is an important part of OECD' s work in the area and one that the Committee seeks to strengthen (OECD 2006 e). The OECD actively involves NGOs in this process, and this has enhanced the ability of environmental NGOs to hold national governments accountable for their sustainability performance. The situation is not far from the “partnership in implementation” pattern found in the anti-bribery area.

It seems that a precondition for this has been the creation of the coordinating umbrella group EEB. This coordinating role, one must surmise, involves an element of selectivity because the agendas and priorities of environmental NGOs are not always mutually compatible – as was the case also for OECD Watch in the investment area .

Finally, it should also be noted that in some of the specialized and technical areas (harmonization of chemical safety standards for instance), it is possible that we would find accountability equations similar to the “service provider – customer” relationship found in the taxation area.

Conclusions

Civil society organizations engage with the OECD network in different ways and the accountability equation accordingly differs between policy areas and issues. The cases examined suggest that the following stylized modes of CSO-governance agency interaction can be identified.

- 1) The mobilization-activism pattern, evident in the MAI affair, where widespread demonstrations, protests, petitions and so on, on behalf of a broad and heterogeneous constituency, contributed to a change in policy. This pattern, however, appeared in a specific historical situation and is not likely to be repeated often.
- 2) The “service provider – customer” relationship where accountability to a specific constituency is close to being constitutive of the government agency in question. The network around the ongoing development of the Model Tax Convention is close to this picture.
- 3) The “partners in implementation” relationship, illustrated by the OECD network on anti-bribery, and to some extent by the NCP system in relation to the Guidelines for Multinational Enterprises and CSO involvement in the country review process in the environmental area.
- 4) The “policy process input” relationship where the governance agency creates structured, more or less formalized arenas and channels that allow CSOs to present information and advocate policies and criticize existing policies and their implementation. Such venues can, in other words, be used by CSOs to hold the OECD network accountable to its constituencies. This is found in most policy areas to varying degrees.

A fifth pattern deserves mentioning, although it is not considered here. It is

found in the development area, where member countries to a quite large extent channel development assistance through NGOs. Thus when the OECD produces guidelines and best practices in the development area, there is an “instrument of implementation” relationship between the governance agency and the NGO – a situation where the issue is holding the NGO accountable.

What have been the key developments in the beginning of the Twenty-first century.

The OECD has opened up to a much broader range of constituents, in particular in the form of the institutionalized incorporation of Transparency International, the European Environmental Bureau and OECD Watch in the network. A partnership in implementation relationship has evolved with some CSOs. Open on-line consultations that give access to virtually all interested CSOs have been established as a recognized procedure and are being used.

These institutional developments have the potential for enhancing accountability, although this must be seen in relation to the rather different accountability equations in separate issue areas. The potentially strongest new accountability measure seems to be the strengthening of the National Contact Points in the investment area and the involvement of CSOs in the environmental country reviews.

Finally, how has CSO engagement contributed to this development and to enhancing accountability? The short answer is positively. Specifically there seems to be three lessons.

First, the protest movement against the MAI and the events in Seattle in 1999 contributed to the inclusion of a broader range of CSOs. However, this pattern is not likely to be repeated often.

Secondly, the impact of CSO engagement in the ordinary activities of the network seems to depend very much on the quality of input to policy making

and implementation monitoring processes. Statements of ideological, moral or political principles have little impact, whereas facts-based analysis and detailed knowledge of issues and situations “on the ground” are appreciated and used in the network. The general impression is that many CSOs can and do live up to this standard.

Thirdly, an important development has been the creation of coordinating umbrella CSOs, specifically EEB and OECD-Watch. Undoubtedly this has enhanced the voice of the NGO community in the OECD network, while also making life easier for the OECD Secretariat. It also implies that the umbrella organizations must accept a filtering role, making distinctions between serious and not serious, responsible and irresponsible, realistic and unrealistic policy positions. Thus enhanced accountability comes at the cost of co-optation, accepting the basic premises on which the governing agency works.

Notes

- 1) This paper is adapted from my contribution to a research project on Civil society and accountable global governance directed by Jan Aart Scholte. Contact the author concerning the full paper.
- 2) In addition to written sources the paper is based on a series of interviews at OECD in March 2007.
- 3) For more on the OECD see Ougaard 2006 b and Ougaard 2004.
- 4) I borrowed this title from Henderson’s 1999 analysis. The following account is based on this study and on Devereaux et.al. 2006. The latter is newer, more detailed, and based on more extensive research. But basically the two studies arrive at similar conclusions on the issues that are relevant for this paper.

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