

UN Vision Project on Global Public Policy Networks

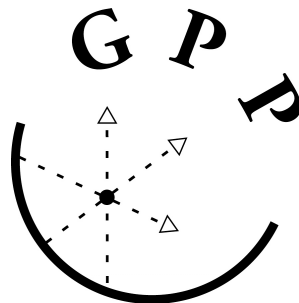
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THE FAILURE OF THE MULTILATERAL AGREEMENT ON INVESTMENT (MAI) AND THE ABSENCE OF A GLOBAL PUBLIC POLICY NETWORK

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Case Study for the UN Vision Project on Global Public Policy Networks



I. INTRODUCTION	3
Problem description, background and agenda setting for the MAI	3
The MAI: characteristics and institutional setting	5
II. THE MAI NEGOTIATIONS	8
The Actors at the Negotiation Table	9
The OECD Member States	9
The Business Community	9
The Labour Movement	10
The Actors not present at the negotiation table: NGOs and the evolution of an opposition movement to the MAI	11
The birth of a movement against the MAI	11
The launch of the opposition campaign	12
Structure and processes, and working methods in the network	13
The Non-Interaction between negotiators and opposition network	15
III. CONCLUSIONS AND LESSONS TO BE LEARNED: THE ABSENCE OF A GLOBAL PUBLIC POLICY NETWORK AS A MISSED OPPORTUNITY FOR THE MAI	17
BIBLIOGRAPHY	21
RELEVANT INTERVIEWS	28

I. INTRODUCTION

In 1995 the OECD Member States started to negotiate a multilateral treaty to "govern" international investment flows. Participants considered the undertaking relatively non-controversial, a mainly technical codification of existing rules and practices. The initial deadline for the treaty was set for as early as Spring 1997, indicating the initial high level of consensus. However, three years later the negotiations ended unsuccessfully. The MAI is a classical example of confrontation instead of co-operation among the potential partners of a global public policy network.

In this paper I will analyse how the absence of a collaborative network can be explained and, most importantly, how this absence affected the negotiations. In order to place the negotiations in context, I will start with an overview of the background against which the MAI developed: the growth of DFI (Direct Foreign Investment), previous attempts to develop a regime for investment, and the agenda setting for the MAI. Subsequently, I will sketch the main characteristics of the MAI and its institutional context, the OECD (Organisation for Economic Co-operation and Development), including the influence of the organisational structure and culture of the OECD upon the MAI negotiations, and the absence of a global public policy network. In the third chapter of this paper, I will analyse the positions and interactions of the different actors. Finally, I will draw conclusions and identify lessons to be learned with regard to how the absence of an integrated policy network affected the negotiations and, in view of the policy cycle of global public policy networks, if and how the failure of the MAI could have been avoided.

Problem description, background and agenda setting for the MAI

Direct Foreign Investment (DFI) has been subject to substantial growth over the last decades. The amount of DFI grew faster than the world economy and faster than the volume of international trade (EG, ECOSOC1996, OECD 1999). In contrast to the tight regime governing the area of international trade, there is no comparable set of international rules for DFI. Rather a mix of regional arrangements, bilateral treaties and limited multilateral instruments "govern" the area of investment.

Until the 1970s a degree of mistrust towards DFI was predominant in most countries. Governments, particularly in the newly independent developing states but also in the industrialised world, feared that foreign control over the exploitation of their economical resources and the operation of key industries would deprive them of economic development and political independence (Fatouros 1996: 48). For the last decade, however, there has been a radical and persuasive policy shift in favour of investment liberalisation (Ostry 1998: introduction). DFI is increasingly seen as a precondition for economic growth and the transfer of technical know-how. The resulting competition for DFI among investment recipient countries made it possible for DFI exporting countries to impose investment conditions. The lack of transparency in investment rules and the barriers to investment inhibited optimal investment flows.

After the failure to insert investment in the GATT regime in the aftermath of the Second World War, a second - and ultimately unsuccessful - attempt to develop a multilateral agreement on investment took place in the Uruguay Round.¹ Developing states continued to strongly resist an investment treaty in the newly created WTO (1995). Nevertheless, the US and, in the course of the Uruguay Round, the EU as well as the other industrialised states become convinced of the idea. Investment was back on the international agenda.² In view of the opposition of the developing world in the WTO, the US proposed the move the negotiations towards the OECD where a strong agreement, a "high standard model" (OECD 1996) for a Multilateral Agreement on Investment (MAI) was to be developed.

1 At the beginning of the 1980s the US started to lobby for a new round of multilateral negotiations, extending the traditional GATT-agenda with new issues like intellectual property, trade in services and investment (Drake and Nicolaidis 1992): the Uruguay Round. In the aftermath of WWII, the to-be-establishment International Trade Organisation, whose agenda dealt with international investment (see Havana Charter of 1949), failed over the disagreement between developing countries and the industrialised world. In the long and difficult negotiations of the Uruguay Round, only the trade related investment measures (TRIMs) could be agreed upon. Compared to services or intellectual property, investment was not a top priority for the US and the EU was initially insecure about the competitiveness of its DFI position (Ostry 1998).

2 Despite the opposition, the issue of investment was placed on the agenda of the WTO Ministerial meeting in Singapore in December 1996. By that time, proponents of a multilateral investment agreement had changed their "proposal" into a "study process" on the relation between trade and investment (Khor 1996). The establishment of a working group on investment was to be a compromise solution.

The MAI: characteristics and institutional setting

The basic idea behind the MAI was that DFI is an engine for economic growth, and adversely, "growth in DFI has been underpinned by widespread liberalisation" (CIME and CMIT, OECD investment Committees, 1996: 10). The MAI treaty thus had to "set clear, consistent and transparent rules on liberalisation and investor protection, with dispute settlement, thereby underpinning the continued removal of barriers to market access and encouraging economic growth" (ibid.: p 9).

This is also what the negotiation proposal of 1995 was aimed at: in short the proposal adopted a "top-down" approach, implying that the only exceptions to the general rules were those explicitly listed at the time of entering into the agreement. It had a very broad definition of investment, extensive rules on investment protection and expropriation (including compensation for expected profits), and a dispute settlement system (including an investor to state provision). Its main features were the national treatment provision, meaning equal treatment of domestic and foreign firms, and "standstill" and "rollback" requirements of existing restrictions to DFI. It also included the deregulation of performance requirements and the repatriation of profits. Signing the treaty implied an obligation to remain a member for a period of at least five years, and the commitments of the treaty were valid for another 15 years after potentially retreating. Any country willing to undertake the obligations could sign the treaty once it would be in vigour.

The OECD, which was the organisational setting in which the negotiations took place, had gathered some previous experience in the field of negotiation (e.g. Bribery Convention, OECD Codes of Liberalisation of Capital Movement and of Current Invisible Operations, Declaration and Decisions on International Investment and Multinational Enterprises), but it did not have an extensive negotiation tradition. Its general mandate is one of a think tank and a promoter of economic prosperity through market driven flows of international trade, investment and capital. Within the OECD, the Committees responsible for the liberalisation of investment and services are the "Committee on International Investment and Multilateral Enterprises" (CIME), which consists of policy makers representing the Member countries and the "Committee on Capital Movements and Invisible Transactions" (CMIT), which consists of independent experts sent by the member states. These committees took care of the preparatory work. For the MAI negotiations, a special Negotiation Group, comprised of

diplomats from all OECD countries, was set up³ and chaired by the Dutch diplomat Frans Engering. The detailed work was done in a number of Draft and Working groups. Engering was supported by the OECD Secretariat and by a Bureau, with two vice-presidents (one American and one Japanese).

In order to explain the confrontation policy which developed in stead of co-operative networking among state and non-state actors, it is important to shortly introduce the existing OECD structural consultation procedures. Since its foundation, the OECD was embedded in the tri-partite consultation structure of state, employee and employer representatives at the global level – which at that time was novel and progressive. When desired or required the Member States consulted the representation of the business community, BIAC (Business Advisory Committee) on the one hand, and the representation of the unions, TUAC (Trade Union Advisory Committee) on the other hand. Even though the internal networks to their respective constituencies did not always operate very smoothly (see below), through these structures, the business actors and the labour movement had an official stance in the negotiations.

However, the OECD structure as it operated did not keep track of important developments in the structure of modern societies in which NGOs (Non-governmental organisations) played an increasingly important role, providing expertise, mobilising public opinion, politicising topics and confronting governmental and business actors with public accountability. Contrary to many negotiations in the area of the environment or human rights, the tradition of NGO involvement in the field of economic negotiations is more limited. The OECD Trade and Environmental Committees regularly consult with NGOs. However, the MAI Negotiation Group did not develop a conscious policy towards the NGOs. The Negotiation Group consisted of investment experts, who had no experience in dealing with political issues and the involvement of larger publics. Notably, the MAI was not considered a political issue in the first place. Consequently, the NGOs were not consistently integrated in the MAI negotiations. Many NGOs did not know about the negotiations until an NGO campaign against the MAI was launched by a group of initiators. The exclusion of the NGOs had important consequences - for the MAI negotiations and, beyond the MAI, for the

3 One of the main reasons for the set up of a negotiation group independent from the OECD was to avoid the need to negotiate with the OECD Committees (on trade, taxes, environment) (Huner 1998)

potential of developing integrated global public policy networks in the area of trade and investment.

II. THE MAI NEGOTIATIONS

At its yearly meeting in 1991, the OECD Council of Ministers ordered a study on the feasibility of a multilateral framework on investment.⁴ Three years later, in 1994, upon its approval of the study, the Council asked the OECD to prepare the basis for the negotiation of a multilateral agreement of investment, the MAI. The OECD Council of Ministers approved the mandate for the negotiations without much controversy in the spring of 1995. In May 1995, the 29 Member States of the OECD started with the negotiations for a Multilateral Agreement on Investment, the MAI. Indicating the general atmosphere of consensus, the negotiations were expected to be finished by May 1997. However, in 1997, the negotiations had to be extended for one year. In April 1998, at the yearly meeting of the OECD Council, negotiations were suspended for six months, in order to "consult with civil society" (Ministerial Declaration 1998) and "take stock of the national situation" (ibid.). In October 1998, before negotiations could be resumed, France officially pulled out of the negotiations. In spite of some declarations e.g. by the US, stating that the negotiations would continue, many countries appeared to withdraw their support for the MAI. During the Fall of 1998 negotiations faded away. Why? How was the absence of a global public policy network relevant to the failure of the MAI?

In the subsequent chapter, I will briefly touch upon the different actors involved. The initial phase of the negotiations involved the governments of the OECD, the business actors and the trade unions, working – to a more or lesser degree – together (see above). From 1997 onwards, another group of actors, not invited to the negotiation table, became involved: the NGOs. They mounted a network of their own, involving parts of the labour movement and, over time, some political actors (the green and socialist fractions of some OECD Member States and European institutions). Rather than integrating into a public policy network, the NGO network confronted the OECD Member States and the business actors with the aim of

4 Already in 1988, the OECD had initiated negotiations to turn existing non-binding investment agreements into binding ones. Officially, those negotiations were discontinued because of the US refusal to give Canada an exemption on the national treatment on culture. The reason behind appears to have been the growing ambition of some negotiation partners (particularly the US) to launch negotiations on more comprehensive agreement on liberalising investment flows (Blanya, Doherty, Hoedeman, Ma'anit, Wesselius 1998) or as the European Round Table of Industrialists (ERT) put it: to "lock in the process of liberalisation" (ERT, European Industry: A partner for the Developing World. Foreign Direct Investment as a Tool for Economic Development and Co-operation – Suggestions for Future Improvement, 1993, p 35).

obstructing the negotiations. As such there was a clear division line between insiders and outsiders, between the actors included, directly or indirectly, in the at the negotiation round and those opposing the negotiations.

The Actors at the Negotiation Table

The OECD Member States

The OECD Member States started negotiating in 1995. As mentioned above, the Negotiation Group conducting the negotiations consisted largely of investment experts, who considered the negotiations to be a technical undertaking. They were a very coherent group, used to taking for granted the concepts, like investor to state dispute settlement, that they consider logical and essential parts of an investment discipline (see Huner 1998). To a large extent the negotiations took place in a political vacuum. The experience of many of the diplomats of the permanent representations to the OECD was that the Member States' Ministers of Finance, gathering once a year in Paris, did not read the thick and complex drafts they received (interviews).

There were significant differences in the negotiation positions of different Member States. But there was a general consensus on the benefits of an investment liberalisation treaty. The US had been pushing for the treaty, and in the European Council of Ministers the negotiation mandate was adopted by consensus. Negotiators and politicians alike were taken by surprise by the NGOs opposition to the MAI.

The Business Community

The Business Community, in particular the major corporate players, played a crucial role in the agenda setting and the preparatory phase for a multilateral agreement on investment: at national levels but also via their permanent representation at the OECD, the BIAC. Its involvement was visible in various ways. In the words of UNICE: "Ministerial decisions (KT: at the OECD Ministerial of May 1995: based on OECD report, see above) and UNICE's preliminary comments on trade and investment...were entirely consistent" (UNICE May 1996). Notably, the Court of Arbitration of the International Chamber of Commerce is mentioned as one the main mechanisms for dispute settlement. However, the first priority of

the major business actor was the creation of a global regime for investment at the WTO (World Trade Organisation), involving those booming economies where investment was still hazardous.

In spite of the close involvement of business actors in the set up of the MAI, the double-edge strategy of the business sector to develop the MAI as a stepping stone for a global investment regime was never fully implemented. In particular, when the negotiations were challenged by civil society (see later), some OECD Member States complained about a clear and open lack of support from the business community (Dymond 1999: 49). BIAC stated that it was difficult to gather the support of the business community for an agreement that appeared to be in constant flux (interviews). The internal channels of communication within the business community and among state and business actors did not seem to allow as much as necessary for rapid and flexible responses or an open dialogue. The involvement of the business sector was often limited to the largest and most specialised corporate actors.

The animosity between the business sector and the NGOs was very strong. The business actors involved tried to use their influence to keep the treaty rigid and free of the (binding) references to labour and environmental standards asked by the MAI opposition movements. They argued that such references would cause interpretation problems under the dispute settlement system and thus reduce investors' confidence in the treaty, whereas this confidence was needed to boost investment – and economic growth. Other arguments included the problem of Non-OECD Members, which could join the MAI after the negotiations and would be reluctant to sign a treaty setting high environmental and labour standards. There never was an attempt to conduct a constructive dialogue among both the non-state actors involved in the MAI.

The Labour Movement

The international labour movement was also informed about the MAI from the beginning via TUAC, the Trade Union Advisory Committee to the OECD - although it was frustrated by the lack of openness and the infrequency of the information flows from the negotiation table. Initially, TUAC had problems to mobilising its constituent member unions. In fact, the unions only got really involved after the NGOs politicised the MAI. Once mobilised, the unions were often more radical than their representatives at the OECD. TUAC did not oppose an investment agreement as such. Rather, it argued, lobbied and, later on, partly joined the NGO anti-MAI campaign, pressuring for what it called a balanced approach.

It was TUAC's goal to get labour on the agenda as an integral part of investment. Initially a little hesitant and careful, but during the negotiations increasingly vigorous, TUAC reinforced its demands and started to frame the negotiations as an opportunity to reinforce and strengthen labour standards instead of as a threat to those very standards. Rather than opposing the treaty, TUAC thus focused on reforming the treaty text. Over the course of the negotiations, governments seemed to be increasingly positive towards the TUAC demands, which included the association of the Guidelines for MNCs in a non-binding way, a preambular reference stating the commitment of governments towards ILO labour standards, and a clause on not-lowering-standards to attract investment.

The Actors not present at the negotiation table: NGOs and the evolution of an opposition movement to the MAI

The birth of a movement against the MAI

The NGO involvement in the negotiations of the MAI started when a draft text was leaked in Canada in February 1997 (Reuters EU Briefing 17 February 1998, see below), which was immediately widely spread through a network of NGOs, outraged about the content of the MAI and the fact that it had not been subject to any public debate.

There was a gap between the reporting of officials who say that there was nothing secret about the negotiations, and the angry reactions of the coalition of NGOs and consumer organisations which became actively involved in the process from that moment onwards. What NGOs called the "secrecy" of the negotiations remains a major argument in the NGO-State confrontation.

Negotiators, State- and OECD- officials say that the MAI was announced publicly and that the relevant constituencies were consulted, but that simply no public interest existed in the subject. They say they thought about the negotiations as a technical and relatively non-controversial undertaking (interviews). The MAI, according to them, mainly codified the status quo in the about approximately sixteen hundred existing Bilateral Investment Treaties (BITs). The NGOs, on the other hand, claim they had been deliberately kept outside of the process in order not to disturb the establishment of "the corporate rule treaty", as many NGOs called the MAI.

In response to the sudden publicity for the draft negotiation text in February 1997, the OECD, in a "reaction of panic" (interview), put the draft on their official Web Site, excluding the national exceptions⁵, which distorted the state of the negotiations and led to the NGOs feeling confirmed about their negative views on the issue (interviews). The publication came too late and was too limited. It only reinforced the escalation of the campaign.

Contrary to what most NGOs believed, the NGO community was not completely unaware of the MAI negotiations before 1997.⁶ However, there was no public consultation or wide spread information about the MAI, and the NGOs were not involved in the process. The choice of the OECD as an organisation far away from the spot lights and without a negotiation tradition did not contribute to a debate on the planned negotiations. Until 1997, the MAI negotiations almost took place in a political vacuum, as if "they were part of a conspiracy against democracy and civil society", according to the interpretation of many NGOs (Interviews). Negotiators were largely mostly like-minded financial experts used to working on highly complicated issues far away from direct public scrutiny. Many of them had not seriously considered involving the NGOs in a systematic way.

The launch of the opposition campaign

The real NGO campaign did not start until the beginning of 1997. It is interesting to discover that the start of the opposition against the MAI can be traced back to a couple of individuals, and that they remained the leading figures in its further development. By the end of 1996, Martin Khor, Director of the Third World Network based in Malaysia, obtained a document prepared for the OECD Ministerial meeting of May 1995 as well as for future WTO negotiations by the European Commission (Commission of the European Communities 1995: A level Playing Field for Direct Investment World Wide, March 1, Brussels). From the document, Mr. Khor understood that multilateral investment negotiations, which his organisation as part of a large coalition opposed at the WTO, might be ongoing at the OECD. He informed some NGO colleagues, among whom was Tony Clarke, Director of the Polaris

⁵Given the top-down approach of the MAI proposal (see chapter 5), only the provisions explicitly mentioned by the adhering countries at the moment of adherence were exempted from the general rules towards liberalisation of DFI. These exceptions were confidential.

⁶ There was previous communication between some NGOs and the OECD Secretariat and the MAI was mentioned at a public event in Geneva.

Institute in Canada. Tony Clarke managed to get a copy of the MAI draft. After turning the "text into a readable document and adding an analysis and interpretation" (interview with Tony Clarke, Brussels, April 28), he posted it to an international email distribution list about globalisation called "le Forum international sur la globalisation" in February 1997.

In the United States, the NGO Public Citizen Global Watch put the draft on its web page. Lori Walach, a graduate of Harvard Law School, became one of the strongest leading organisers of the international campaign against the MAI. Building on the credibility of her status as a lawyer, she transformed the legal OECD documents into accessible wording, often "ready for use" in the subsequent NGO campaigns. Her role as provider of information combined with her role as provider of explanation gave her a power position in the campaign. She would launch the campaign under the name of the "Dracula Strategy" implying that simply exposing the MAI project to the light would be sufficient to kill it (George). NGOs showed that they were well interconnected. In no time, the document was distributed and action was taken in different parts of the world. The campaign against the MAI was born.

Structure and processes, and working methods in the network

The NGO network had no secretariat or formal dimensions. During the NGO campaign, some of the bigger and most active NGOs, like Public Citizen's Global Trade Watch, functioned as clearing houses, providing information, bringing persons into contact with each other, and organising joint action. Power structures were mainly horizontal. Access to information and to the negotiators, credibility and the capacity to mobilise constituencies were among the most important sources of power. Whereas the largest and most active NGOs often took the lead, they were followed because of their persuasiveness, not because of a certain hierarchy. From the initial meetings to prepare for OECD consultations or to organise protest campaigns the core of the network emerged. This core consisted largely of activist who had known each other. Often they were among the initiators of the opposition campaign. The larger network took shape mainly in the form of email distribution lists, ranging sometimes from local to national levels and often from capital to capital. No doubt the internet played a crucial role in the anti-MAI campaign. In part, existing networks like the NAFTA opposition movement, were revitalised. The network also grew fast, to include, in the end, (mainly green) members of the national and European Parliaments, TUAC and the Unions. It was fairly transparent and very open to new members. The gender distribution reflected the NGO employment policy

and seemed to be reasonably equal. For obvious reasons, there was less involvement of the South. Nevertheless, some very active NGOs had their basis in the South (e.g. Martin Khor and the Third World Network).

As previously mentioned, many NGOs called their "plot" to kill the MAI the "Dracula strategy": stopping the negotiations by simply bringing public attention to a treaty proposal that cannot stand up against the light. Not having direct bargaining leverage at their disposal, the NGOs tried to use the power of arguments and symbols (see Dracula) to reach their goals. However, contrary to TUAC, the NGOs talked primarily to the citizens of their countries, in order to convince them and multiply their concerns, and then turned to politicians. This does not mean that NGOs did not talk to the negotiators directly. But their strategy was more one of confrontation than one of collaboration (see below).

Generally speaking, NGOs used a threefold strategy. At the same time, they

- mobilised citizens on a local level, providing information and arguments and framing the issue, convincing them of the need to do something;
- co-ordinated their activities internationally (summits, e-mail, repeating of wordings...);
- they pressured governments their respective governments.
- More specifically, different instruments were directed towards different actors:
- Towards citizens:
 - making citizens aware
 - providing citizens with information, spreading "interpreted facts" and arguments
 - making suggestion to citizens in terms of directly pressuring decision makers.
- Towards the decision makers:
 - making them aware (many NGOs called this educating the politicians, since many of the decision makers never heard about the MAI before).
 - providing them with information, spreading "interpreted facts" and arguments

- making suggestions in terms of what they can contribute
- and also: trying to get information from them, one-to-one conversations.

Among each other:

- using existing networks and building new ones
- spreading information, "interpreted facts" and arguments (steady email contact among a tight network of people informally leading the NGO movement, including Lori Wallach (Citizen Watch), Tony Clarke (Polaris Institute), Charles Arden-Clarke (WWF), Olivier Hoedeman (CEO)...and towards large networks consisting of email distribution lists and discussion groups, like anti-MAI friends, etc.).
- developing common strategies and position papers
- gathering for global strategy meetings and issue common press releases
- organising highly visible events and symbolic actions

The NGOs were not always united, but they were mostly pulling the same strings and they generally seemed to maintain a spirit of communality and of common purpose.

The Non-Interaction between negotiators and opposition network

The way the interaction between the Negotiation Group took shape did not leave much room for co-operation of debate. However, there was an evolution in the attitude of many NGOs towards the OECD and national representatives: during the first meetings there was more openness and trust than afterwards, when consultations were held more frequently. It is remarkable that the decrease in trust and openness seemed to be adversely related to the willingness of negotiators to consider some of the claims and suggestions brought forward by the NGOs.

Whereas the NGOs tried to access the negotiation process, the Negotiation Group was initially very reluctant to meet with the NGO community. A direct confrontation was pushed ahead. By the early autumn of 1997 it became clear that some form of direct dialogue between NGO's and the negotiators was inevitable (Huner 1998). Thus, a first large scale official meeting with NGO's was called on 27 October 1997. Many negotiators agreed on the

usefulness of the meeting and concluded that most of the NGO concerns deserved serious attention, and they eventually got it. But by that time it was too late to co-operate.

Mistrust prevailed on the side of the NGO community. Many of the NGOs were wondering if they should accept the invitations for consultation and trust building in order to discuss with negotiators and OECD officials. They questioned the openness of the "other side" to listen to their concerns and to take them seriously. In general, they were afraid of being used by the OECD to restore its credibility and legitimise decisions. After all, in their view, the organisation had not been showing any sign of openness before it was forced by public pressure to do so. Of the bifurcated strategy to challenge the negotiators or to fight the MAI, most NGOs at the crossroad had chosen the later path.

This spiral of non-cooperation culminated when the NGOs eventually simply turned down the OECD invitations for consultations. On December 2 1998, about one year after the first official meeting, a seminar for business, labour and other representatives of civil society was organised by the OECD. Reflecting the attitude of many NGOs towards the OECD, a message was spread in the NGO network, stating that the OECD seminar is destined to split the NGO movement. Most NGOs decided not to go, only two went (WWF and Oxfam). Susan George, Director of the Dutch NGO Transnational Institute and Ecoropa, a French NGOs very active on the MAI, took the initiative to write a letter to OECD under-Secretary-General Ms. Shelton, and circulated it for signatures to other NGOs. She explained that it was too late for consultation: "the OECD has been in constant contact with the spokespersons of transnational corporations since the inception of the MAI process, whereas labour was not regularly or officially informed by the OECD Secretariat and 'other representatives of civil society', including parliamentarians were kept totally in the dark and obliged literally to force their way into the discussion more than two years after negotiations had begun". Most NGOs and negotiators were no longer on speaking terms.

At the same time, at least for some actors on both sides of the spectrum, there seems to be the publicly undebated question whether the MAI does not represent a missed opportunity to find common ground.

III. CONCLUSIONS AND LESSONS TO BE LEARNED: THE ABSENCE OF A GLOBAL PUBLIC POLICY NETWORK AS A MISSED OPPORTUNITY FOR THE MAI

The process of globalisation has increased the need for international governance to resolve transboundary problems and challenges. In the absence of accountable global political structures, international organisations and, more specifically, international negotiations, are often the forums for transboundary decision-making. This process, paralleled with increasing public awareness of global problems and a growing public demand for political information, makes negotiations behind closed doors increasingly controversial. At the same time, new ways of networking and instant information exchange make it also more and more difficult to conduct negotiations away from the public. The old structure involving employment and employee organisations proved overtaken by reality. As William A. Dymond, the Canadian leading negotiator for the MAI, argues, the demand for transparency in international negotiations has reached new heights. The internet, according to Dymond, has accelerated the arrival of civil society in the negotiation room, ending the days when negotiations were the province of expert officials (Dymond 1999: 50). Kobrin concludes in his analysis of the MAI: "The days of negotiating treaties behind closed doors are over. Future negotiations will require a balance between public involvement and the need for effective global governance" (Kobrin 1999).

However, the political tendency towards economic liberalisation, which is closely intertwined with the process of globalisation, has also been subject to public anxiety and opposition. Public involvement will require a certain degree of openness from all sides involved in order to enable a constructive dialogue. International organisations as forums for negotiations could create and foster a climate of transparency and openness, in which negotiators have to explain and defend their arguments and are exposed to the arguments of other actors. Following Jan Huner, assistant to the Dutch chair, "The main problem with the MAI is that its negotiators did not expect to have to sell it politically. Most of the MAI-negotiators are (were) investment specialists not used to viewing from a political perspective the concepts that they consider logical and essential parts of an investment discipline.... They were thus wholly unprepared to defend these concepts vis-à-vis opponents that were distorting them to portray the MAI as a threat" (Huner 1998).

After the first meeting between negotiators and NGOs, many negotiators were positively surprised about the usefulness of the meeting and some of the points made by the NGOs (see above). Provided a structured relationship between the actor-groups, negotiators could have learned from the start about different perspectives and concerns, as well as about the contributions NGOs could make. Similarly, NGOs could have understood that some of their fears and some of the intentions they attributed to the negotiators were exaggerated or plainly wrong. Resuming dialogue after the negotiators felt pressured by the intense opposition proved much more difficult than it would have been from the beginning.

The fact that NGOs were not structurally informed, consulted or involved in the MAI negotiation process was at the basis of the misperceptions and the mistrust that led them into a campaign to "kill the MAI". The animosity between the three potential partners of a global public policy network divided them in two camps and turned the MAI into a politically non-feasible project. The opposition campaign by the NGOs features prominently in the growing body of literature on the reasons for the MAI failure (e.g. Kobrin 1999, Huner 1998, Dymond 1999, Henerson 1999).⁷

The exclusion of NGOs and their reactions not only damaged the negotiations and discredited the MAI in the eyes of the larger public and many political actors, it also constitutes a missed opportunity to make use of the expertise and experience of the NGOs. Moreover, excluding civil society by excluding NGOs implied a missed opportunity to democratise global governance. For the NGOs, the evolution of the MAI seemed to lead towards promising opportunities in process terms as well as in content terms: there was a clear evolution towards involving the NGOs and many of the OECD member states were considering to insert environmental and labour concerns for the first time into an investment treaty. Corporate actors and NGOs did not even attempt to communicate or explore the potential for mutual gain opportunities.

In sum, the MAI negotiations shed light on the political risks involved in the conduct of major international negotiations in the absence of a respective public policy network. Their

⁷ The lack of NGO involvement or the absence of a global public policy network is obviously not the only reason for the failure of the MAI. Other issues like the lack of added value, the lack of political back up, an over-ambitious agenda or diverging views among the member states are often considered as well. However, with observers and analysts alike the non-involvement of civil society features high among the reasons for the MAI failure.

evolution shows how the exclusion of one group of actors led to misperception, mistrust and animosity, ending in a negative dynamic of opposition and a spiral of non-cooperation which severely damaged the potential for international governance in that area. The MAI episode has thus raised the acute question of how international negotiations are best conducted and of how a policy to create and foster global public policy networks could be designed. In terms of concrete models for co-operation, existing forms of positive interaction, ranging from shadow conferences or the occasional invitation of NGOs and corporate actors at the negotiation table, to e.g. NGOs taking the lead in e.g. the land mine campaign, can be taken as examples.⁸ Obviously, the field of negotiation and the type of the aspired agreement play a decisive role when designing potential models for cooperation.

In none of those models, all differences among the political actors, the business actors and the NGOs could be overcome just by communication and involvement. However, communication and interaction can be geared towards different goals, such as building trust, fostering mutual understanding, hence paving the way for a better chance to develop compromises while avoiding the negative dynamics of the MAI negotiations. Clearly, the MAI shows how important it is to create channels of contact and information exchange

⁸ The shape the involvement of NGOs should take is disputed. On the one hand, they lack the representivity and the public accountability of states. On the other hand, NGOs can democratise the negotiation process by opening up the doors of formerly closed negotiations, and by channelling a plurality of views towards the negotiations. Some actors, analysts and practitioners alike, are not comfortable with an increasingly important role for civil society. Henderson, instance challenges the NGO claim to speak "for the people" and argues against the right for NGOs to take part in international negotiations, which should be reserved to elected governments (Henderson 1999). Obviously, the matter proposed here is not to bring them to the negotiation table on the same footing as states, but rather to involve them in a network-like structure of exchange of information, views and advice.

among the different actors from the beginning of the negotiations in order to avoid suspicions of secrecy and disrespect.

BIBLIOGRAPHY

- BIAC 1995: The OECD Multilateral Agreement: BIAC Views on Specific Elements of an eventual Agreement.
- BIAC 1996: The Multilateral Agreement on investment and the OECD Guidelines/Environment, Labour and consumer matters, BIAC position paper, Contributed of the meeting of the Negotiation Group on 18 – 20 December, DAF/MAI/RD(96)54, p 1, confidential.
- BIAC 1998: Business group urges MAI negotiators to continue, 19 November.
- Blanya, Belen; Doherty, Ann; Hoedeman, Olivier; Ma'anit; Adam; Wesselius, Erik 1998: February, MAIGALOMAIA!, Citizens and the Environment Sacrificed to Corporate Investment Agenda, A Briefing by Corporate Europe Observatory.
- Botsch, Andreas 1996: The MAI: Investment Liberalisation and Labour Standards. A Trade Union Perspective, Assistant to the General Secretary, TUAC.
- Brewer, Thomas, L. 1996: International investment dispute settlement mechanisms: agreements, institutions and issues, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.
- Canadian Labour Congress 1997: Submission to the House of Commons Sub Committee on International Trade, Trade Disputes, and Investment Regarding the MAI, November 6.
- Chakravarthi Raghavan, 1996: Third World Network Features, 1404/96.
- CIME and CMIT Committee 1996: A Multilateral Agreement on Investment, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.
- Commission of the European Communities 1995: A level Playing Field for Direct Investment World Wide, March 1, Brussels
- Deal, Timothy, E. 1997: Why We Need the MAI, Washington Times, Senior Vice President of the USCIB, 25 December
- DeAnne, Ju,lius 1991: Foreign Direct Investment: The Neglected Twin of Trade, Occasional Paper Series No.33, Group of Thirty, Washington DC.

- Drake and Nicolaïdis 1992: Ideas, interest, and institutionalisation: "trade in services" and the Uruguay Round, In: International Organization.
- Dymond, William, A. 1999: The MAI: A Sad and Melancholy Tale, in Hampson, Rudner, Hart (eds.), Canada among Nations, Oxford University Press, pp 25-53.
- EC Services 1998: MAI. Dialogue with ETUC, 21 September.
- ERT 1993: European Industry: A partner for the Developing World. Foreign Direct Investment as a Tool for Economic Development and Co-operation – Suggestions for Future Improvement.
- ERT 1993: Survey on Improvement in Conditions for Investment in the Developing World.
- ERT 1996: Investment in the Developing World: New Openings and Challenges for European Industry, December.
- ERT 1997: European Industry and the Developing World – For a Global Framework of Mutual Interest and Trust, June.
- European Commission 1996: The Global Challenge of International Trade, 14 February, Com(96)53.
- European Round Table 1993: European Industry: A partner for the developing world. Foreign Direct Investment as a Tool for Economic Development and Cooperation – Suggestions for Future Improvement.
- Europese Gemeenschappen, Economisch en sociaal Comité 1996: Rapporteur: de heer CAL, advies van het Economisch en Sociaal Comité over Wereldwijde uniforme regels voor directe investeringen, EXT/137, "Directe Investerings", Brussel, 28 februari, document number: CES 260/96 P/GK/JV/wv/cg.
- Fatouros A. A. 1996: Towards an international agreement on foreign direct investment?, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.
- Friends of the Earth 1998: OECD Environmental Ministers urged to intervene in MAI negotiations, Press release, 2 April.
- Friends of the Earth International 1998: Friends of the Earth calls for halt to damaging investment treaty, 16 February.
- Friends of the Earth International 1998: Press Release, 23 March.

- Friends of the Earth International 1998:, Friends of the Earth calls for halt to damaging investment treaty, 16 February.
- Friends of the Earth International et al (Public Citizen, Sierra Club)1998: International Coalition Launches Campaign Against the MIA – A New Stealth Investment Agreement, Press Release, Press Conference, Washington, February 12.
- George, Susan 1998: Seminar on issues relevant to multilateral agreement on investment, December 2 1998, November 17.
- Henderson, David 1999: The MAI Affair: A story and its Lessons, The Pelham Papers, number five, Melbourne Business School.
- Hoedeman Olivier 1998: MAI negotiations go underground and what to do about it, notes, April 29the MAI strategy session, Paris.
- Huner, Jan 1998, Environmental Regulation and International Investment Agreements: Lessons from the MAI, introduction, seminar Trade, Investment and the Environment, RIIA, Chatham House, 29-30 October
- Jones, Roy 1998: The EOCED MAI. Key Concepts and the Trade Union Response. Discussion Paper, Senior Policy Advisor, January, TUAC 1997: Meeting of TUAC Delegation with Bureau Members and Other Government Representatives to the MAI Negotiation Group, Summary Report, October 28.
- Jones, Roy 1998: The EOCED MAI. Key Concepts and the Trade Union Response. Discussion Paper, Senior Policy Advisor, January.
- Keidanren and UNICE 1996: statement at the WTO Ministerial Conference, Singapore, 13 December.
- Key, Sydney, J. 1998: Financial Services in the Uruguay Round and the WTO, Occasional Papers No. 54, Group of Thirty, Washington DC.
- Kobrin, Stephen, J. 1999: The MAI and the Clash of Globalizations, Foreign Policy online, Fall, <http://www.foreignpolicy.com/articles/ART3.htm>
- Kraus, Jürgen 1998: Play Fair Europe, Neues von der Kampagne: in: Komitee Widerstand gegen das MAI 1998: Infobrief, July.
- Ley, Robert 1996: Multilateral rules to promote the liberalisation of investment regimes, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

Lori Wallach, Public Citizen's Global Trade Watch 1998: Die OECD und Regierungen starten eine MAI Charme Offensive. Die PR-Kampagne zur Akzeptanzförderung des MAI.

Martin Khor 1996: Third World Network Features, 546/96

Newton, Alastair 1996: The MAI in a global perspective, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

NGO list 1997: NGO Press Release, 28 October.

NGO list 1998: NGO MAI response post Ministerial. To our Countries' Prime Ministers, Presidents and Parliaments, June.

NGO-list 1998: Call to reject any proposal for moving the MIA or and investment agreement to the WTO, 18-29 May.

NGO-list 1998: NGO MAI response Post Ministerial, June, draft.

OECD 1994: The OECD Guidelines for Multinational Enterprises, Paris.

OECD 1998: "Open Markets Matter: the Benefits of Trade & Investment Liberalisation, April 8

OECD MAI working group A 1996: Existing liberalisation, report, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

OECD MAI working group B 1996: New issues, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

OECD MAI working group C 1996: Investment protection, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

OECD MAI working group D 1996: Dispute settlement, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

OECD MAI working group E 1996: Non-Member countries and institutional issues, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

OECD 1999: Financial Market Studies, July

Ostry, Sylvia 1998: A new Regime for Foreign Direct Investment, Group of Thirty, Washington DC.

Over 600 International Organisations opposing the MAI 1998: Joint NGO statement, drafted 27 October 1997, updated 11 February 1998.

Public Citizen Global Trade Watch 1998: MAI Negotiation Continues at Bilateral Level, email to email distribution list, MAI Listserv., July 20.

Public Citizen Global Trade Watch, Our Future under the MAI

Public Citizen's Global Trade Watch, The "MAI-Free Zone" City/Council Resolution...and how to get one passed

Reuters 1998: EU Briefing 17 February.

Robertson 1996: , David, The OECD investment mandate of 1995: Catching up with the Market, In: OECD 1996: OECD Documents, Towards Multilateral Investment Rules, Paris.

Robertson, David 1996: The OECD investment mandate of 1995: Catching up with the market, In: OECD 1996: OECD Documents, Towards Multilateral Investment Rules.

Sforza, Roderick; Vallianators, Mark: Friends of the Earth, Briefing Paper, Ethyl Corporation v. Government of Canada: Chemical Firm Uses Trade Pact to Contest Environmental Law.

Shihata, I.F.I. 1993: Legal Treatment of Foreign Investment. "The World Bank Guidelines", Martinus Nijhoff, Dordrecht.

Sir Leon Brittan 1996: 13 December, The Outcome of Singapore, Statement, IP/96/1172.

Smith Alister 1996: The development of a Multilateral Agreement on Investment at the OECD: A preview, In: OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

Taylor Chantell, Public Cititzen 1998: MAI update, April 10th.

TUAC 1995: Foreign Direct Investment and Globalisation: OECD Policy Developments and the TUAC response, Workshop organised by ETUI/HBS/ILO-CEET, the American Trade Union Confederation, Lake Balaton Hungary, 6-7 September.

TUAC 1996, Report, 18-20 December.

TUAC 1996: Item 5 of the Provisional Agenda, Labour Standards and Globalisation, OECD MAI and the Guidelines for MNCs, Plenary Session, 97, 21-22 November, Paris

TUAC 1996: The MAI and the Guidelines for MNCs, Briefing Note.

TUAC 1997: MAI Negotiation Group Meeting. Points of Interest to TUAC Affiliates, 29-30 October (confidential).

TUAC 1997: Meeting of TUAC Delegation with Bureau Members and Other Government Representatives to the MAI Negotiation Group, Summery Report, 28 October.

TUAC 1997: NGO Informal Consultation with the OECD MAI Negotiation Group and Related Meetings, Summery Report, Paris, 26-28 October.

TUAC 1997: OECD informal consultations on the MAI, Summary Note by TUAC on the discussion, Paris, December 2.

TUAC 1997: THE MAI: Key Issues for Trade Unions, TUAC Briefing Note for Affiliates, September.

TUAC 1997: The MAI: Labour and Other Issues, Briefing Note, July.

TUAC 1997: The MAI: The Treatment of Labour Issues, Briefing Note for Affiliates, February.

TUAC 1997: The multilateral Agreement on Investment: Key Issues for Trade Unions, TUAC Briefing Note for Affiliates, September.

TUAC 1997; Plenary Session, Report, May 15-16.

TUAC 1998: Binding Labour Clause in the MAI. Definitions and implementation mechanisms, Non-Paper, January.

TUAC 1998: Ministerial Statement on the MAI, TUAC Note, 28 April.

TUAC 1998: OECD MAI High-Level Meeting of Government Officials, Paris, 16-17 February.

TUAC 1998: THE OECD MAI, TUAC Briefing Note, 20 October, p 1-2, subtitle: Outcome of the 20 October Consultation on the MAI.

UNCTAD 1997: Press Release, 8 December.

UNICE 1995: Preliminary comments on trade and investment, 8 March.

UNICE 1995: UNICE Position on Trade and Investment for the WTO Ministerial Conference of December 1996, 28 May 1996UNICE, preliminary comments on trade and investment, 8 March.

UNICE 1996: UNICE Position on Proposed Terms of Reference for a Working Group on Trade and Investment to be set up by WTO Ministers meeting in Singapore in December 1996, 11 October.

UNICE 1996: UNICE Position on Trade and Investment for the WTO Ministerial Conference of December 1996, 28 May.

UNICE 1996: UNICE Position on Trade and Investment for the WTO Ministerial Conference of December 1996, 28 May 1996 UNICE, UNICE Position on Trade and Investment for the WTO Ministerial Conference of December 1996, 28 May.

UNICE 1998: UNICE Position on Trade and Investment for the WTO Ministerial Conference of December 1996, 28 May 1996 UNICE, Forthcoming WTO Multilateral Negotiations. Preliminary UNICE Objectives, 16 July.

UNICE 1998: UNICE urges new efforts towards a satisfactory conclusion of the OECD negotiations on the Multilateral Agreement on Investment (MAI), press release, 23 March.

UNICE 1998: UNICE urges new efforts towards a satisfactory conclusion on the OECD negotiations on the MAI, press release, 23 March 1998

Unity & Trust Society Representative 1998: in: WEED, German NGO, Informationsbrief Weltwirtschaft &Entwickeling, nr. 1/98.

USCIB 1995: press release, 24 May.

USCIB 1995: USCIB press release, 24 May 1995.

Witherell, William, H. 1996: Towards an international set of rules for investment, In: : OECD, OECD Documents, Towards Multilateral Investment Rules, Paris.

World Business Organisation 1998: Press Release, January 16.

WWF 1997: the OECD MAI, briefing, March.

WWF 1998: From Liberalisation to Sustainable Development: a critique of the OECD Paper, "Open Markets Matter: the Benefits of Trade & Investment Liberalisation, April 8, June.

WWF-International at all. 1996: letter to Mr. Johnston, May 7.

USCIB web site 1999: <http://www.imex.com/uscib>

RELEVANT INTERVIEWS

Chassagne, Olivier, European Commission, DG 1, Directorate G, February 9, Brussels.

Grauls, Jan, Director General, Bureau of Economic Relations, Ministry of Foreign Affairs, Belgium, February 10, 1999, Brussels.

Griffeths, Nickolas, Permanent Representation of the United Kingdom to the OECD, February 11, 1999, Paris.

Karl, Joachim, expert, OECD, former German Delegate in the Negotiation Group on the MAI, February 12, 1999, Paris.

Küppers, Gaby, Assistant to MEP Kreissl-Dörfler, Wolfgang, April 29, 1999, Brussels.

Schmidt, Pierre, Ambassador, Permanent Representation of Belgium to the OECD, February 12, 1999, Paris.

Lee, Robert, Head of Division, Division of International Investment, July 1999, Paris

Ferrand, Olivier, Treasury Department, European Affairs Division, July 1999, Paris

Rochlll, Martin, Friends of the Earth, February 9, 1999, Brussels.

Wandell, Alexandra, Friends of the Earth, February 9, 1999, Brussels.

Clarke, Tony, Polaris Institute, April 17, 1999, Brussels.

George Sussan, Ecoropa, April 27, 1999, Brussels.

Wallach, Lori, Public Citizen Global Trade Watch, April 27, 1999, Brussels.

Jones, Roy, Trade Union Advisory Committee to the OECD, April 28, 1999, Brussels.

Khor Martin, Third World Network, April 28, 1999, Brussels.

Kreissl-Dörfler, Wolfgang, MEP (Germany, Greens), April 28, 1999, Brussels.

Vander Stichele Myriam, Transnational Institute, April 28, 1999, Brussels

Wesselius, Erik, Corporate European Observatory, April 30, 1999, Brussels.

Tash, April, BIAC (Business Advisory Committee) manager, July 1999, Paris.