Multilateral Agreement on Investment

No safe passage

The OECD's proposals for a Multilateral Agreement on Investment spells danger for fisheries

In 1995, negotiations were concluded in New York on the UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Representatives of 139 states had been involved in the process, which resulted from the increasingly crisis-ridden state of many of the world's fisheries. The Agreement was an attempt to develop a management regime which would halt and, it was hoped (somewhat optimistically); reverse the dual trends of increasing fishing capacity and effort, on the one hand, and decreasing resources, on the other.

Articles in the Agreement dealt with:

- the precautionary approach to fisheries management;
- the duties of flag states and port states in ensuring compliance with management measures;
- the need for states to co-operate in matters of compliance; and
- the special requirements of developing states and the need for co-operation with them.

A particularly important aspect of the last point was the acceptance of the need to "avoid adverse impacts on, and ensure access to, fisheries by subsistence, small-scale and artisanal fishworkers" (Article 24.2(b)), as well as an agreement to "assist developing states to enable them to participate in high-seas fisheries for [straddling and highly migratory] stocks, including facilitating access to such fisheries" (Article 25.1(b)).

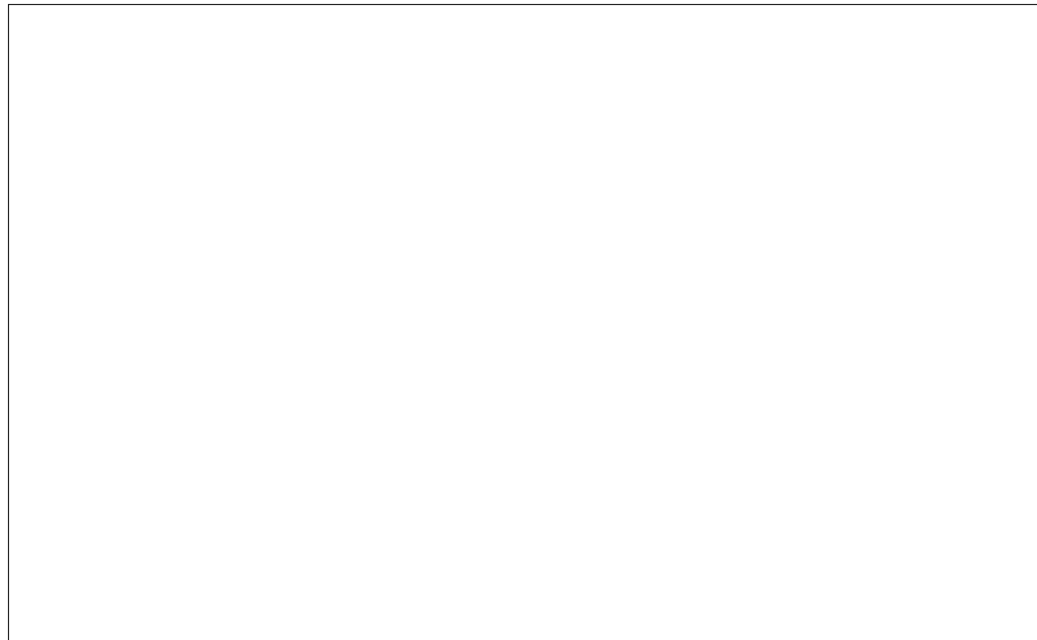
At about the same time as dignitaries from so many countries were solemnly putting their signatures to the UN Agreement in December 1995, other representatives of many of these same states were meeting for another series of negotiations. These, however, were being held in secret and by an 'invitation only' group, namely the members of the Organization for Economic Co-operation and Development (OECD) and a few hangers-on.

This select group began to hammer out a new international economic pact, known as the Multilateral Agreement on Investment (MAI), intended to promote greater legal security and protection for investment as well as to ease the movement of capital (both money and production facilities) across borders by limiting the power of governments to restrict and regulate foreign investment. In the words of the Preamble of the current draft text of the MAI, "agreement on the treatment to be accorded to investors and their investments will contribute to the efficient utilization of economic resources, the creation of employment opportunities and the improvement of living standards."

These noble words belie the true intention of the MAI, though, which is to force countries to grant extraordinary rights to multinational corporations, enabling them to move money and property freely across borders, virtually without let or hindrance. The effect would be to completely undermine the beneficial results of the UN Agreement mentioned above, as well as many other recent international agreements which concern the environment, labour standards and social policy.

International investment

By all accounts, the MAI, as it stands, would fundamentally alter the climate for international investment by preventing



governments from providing more favourable conditions for their citizens and domestic companies than for other investors.

Among the major provisions are the following:

- Countries would be required to treat foreign investors no less favourably than domestic ones. For instance, they could not maintain economic assistance programmes that benefit only domestic companies or place restrictions on what foreign companies own.

- Limits would be placed upon performance requirements, which are laws that require investors to meet certain conditions (minimum levels of domestic employment, requirements to purchase goods in that country or to hire a given level of local personnel, restrictions on exports, etc.).

While countries would be allowed to lodge reservations, specifying that particular articles of the MAI would not apply to certain industries, such as fishing, it is not clear whether they would eventually have to be phased out, whether they could be modified to reflect evolving situations or whether new reservations could be added later, as new industries or technologies develop. New reservations, however, could not be lodged by existing signatories once the Agreement enters into force.

Perhaps the most audacious aspect of the MAI is that private investors and corporations would be allowed to sue national governments in an international tribunal, rather than in that country's domestic courts, though governments would not be able to sue the investors before the same international tribunal. Multinational corporations would essentially be given rights denied to national governments.

Initially limited to the OECD countries, others would be invited to sign the MAI but only after the negotiations had been concluded. If the programme envisaged in the MAI is carried through to its conclusion, the implications for fisheries are profound. Yet, there has been no broad public debate on the matter, as there was for the FAO Code of Conduct for Responsible Fisheries or the UN Agreement, or even the GATT negotiations. The fishing industry in the OECD countries has not been consulted.

No public participation

This lack of public participation is made more serious by the unusually long time frame of the Agreement. If a country wishes to withdraw from the MAI once it has entered into force, it must wait five years before giving notice to that effect. The provisions of the Agreement will, nonetheless, continue to apply for a period of 15 more years-Much can happen

in 20 years-recall how the fishing industry has changed since EEZs came into widespread existence in 1977.

A few examples of the possible implications of the MAI for fisheries should show the dangers. One of the most contentious aspects of fisheries management is the allocation of the total allowable catch (TAC). Most countries give preferential access to their domestic fishermen, only allowing others in for those species which are not fully utilized. Would the MAI allow such favouritism? If all foreign investors are to be treated at least as favourably as domestic companies, would it be possible for, say, a Canadian company to establish a subsidiary in a small island state in the Pacific and thus gain access to the rich tuna stocks there?

Governments and regional management organizations usually set the TAC based upon some variant of Maximum Sustainable Yield as a target. There are many other possible targets, though, based upon other biological or even economic criteria. If, as a conservation measure, a country wishes to maintain fish stocks at somewhat greater abundance, would it be at liberty to do so? If quotas must be reduced to allow stocks to grow, would a country be obliged to reduce access for all sectors of the fleets to the same extent?

Many countries have developed extensive programmes of subsidies to support certain parts of the fisheries sector, including unemployment and reconversion schemes, shipbuilding and modernization support, fuel subsidies and others. Could some of these programmes be deemed to be preferential treatment under the MAT and thus banned? Could multinational corporations, such as Pescanova, establish a subsidiary in another country and demand equal access to these programmes?

The lodging by the European Union (EU) and several of its member states, of reservations to the MAI with respect to access to fish stocks, is eloquent testimony that these concerns are not mere conjecture.

International agreements

Curiously, nowhere does the MAI make any mention of any other international agreement, treaty or convention relating to fisheries, such as the UN Convention on the Law of the Sea, the UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks or any of the regional management bodies. In fact, among all the international bodies, only the International Monetary Fund (IMF) is mentioned as providing "obligations", which can not be altered by the MAI. A Preambular paragraph mentions Agenda 21 and the Rio Declaration on Environment and Development, but some delegations object to making any reference of this nature.

Once the MAI has been finalized by the 29 OECD member states and a few others, it would be open for accession by other states. It is not clear under what conditions the acceding states could join and to what extent they could lodge their own reservations. Accession would have to be approved by those countries which already belong, so they would have an opportunity to put pressure on new members to keep their reservations to a minimum.

The negotiations for the MAI have not concluded, but in March, the European Parliament became the first democratic institution in the world to comment on the draft text. By an overwhelming majority, the Members rejected the philosophy of the MAI as it currently exists: they called upon the member states of the EU' to "not accept the MAI as it stands".

It now appears certain that the MAI will not be finalized and ready for signature before 1999: the United States and the EU have some significant disagreements to work out. It is even possible that the MAI will be stillborn, at least as a creation of the OECD.

However, it is clear that the ideas which it contains shall, indeed, see the light of day in one form or another, as they form a pervasive trend throughout major international financial instruments. For example, there are reports that the IMF may require similar types of concessions from countries which wish to receive financial aid.

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