
Intellectual Property Rights

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The inclusion of intellectual property rights (IPR) in the Morocco-US Free Trade Agreement (FTA) was the decision of the United States, the most active advocate of the necessity of “integrating IPR” in multilateral and bilateral trade agendas. Since 2002, the US Congress has required that trade agreements include levels of IPR protection similar to those in force in the United States.¹ The Morocco-US FTA is no exception and includes many IPR provisions that exceed the level of protection in Morocco before the FTA.

According to some analysts, the IPR provisions of the Morocco-US FTA meet the criteria of “TRIPS+” (Trade-Related Aspects of Intellectual Property Rights Plus), which applies to countries that are capable of locally producing generics and that are responsive to US arguments and pressure (Morin 2006).

On the Moroccan side, the integration of IPR was at first seen as an obligation and then understood in terms of opportunities and risks. Moroccan officials developed a new discourse on IPR based on the necessity and benefits of aligning domestic laws with international standards and of curtailing “informal (or shadow) industries.”

The first section below briefly outlines Morocco’s pre-FTA IPR provisions, which fully complied with the WTO TRIPS agreement, and then presents the primary provisions of the Morocco-US FTA related to trademarks, patents, and copyrights.

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1. Trade Act of 2002, Section 2102(4)(i)(II).

Next is a detailed review of the provisions on medical patents and data protection, comparing TRIPS, which reflects Moroccan law before the FTA, and articles of the Morocco-US FTA related to the following points: protection of new applications, protection for confidential data submitted to regulatory authorities, duration of protection, reduction of exceptions, use of required permits, the international exhaustion clause, and limitation of revocations.

The third section focuses on the intentions behind the Morocco-US FTA, with an assessment of the initial impacts of the agreement, specifically the fiscal effects as well as the impact on innovation and on the health and agricultural industries. The chapter concludes with a consideration of Morocco's ability to enforce the new rules and recommendations for expanding the Moroccan agenda in the fields of investment and technology transfer.

TRIPS Agreement and IPR Provisions in the Morocco-US FTA

The WTO TRIPS agreement came into force in January 1995, with provisions concerning patents, copyright, trademarks, industrial designs, layout designs for integrated circuits, trade secrets, and geographical indications. When the agreement was signed, IPR laws in Morocco were relatively weak compared to the laws of developed countries. But the laws of developed countries were considered exceptional since East Asian countries had successfully grown and developed their scientific and technical capabilities in the context of weak IPR regimes.

The Morocco-US FTA followed a series of US bilateral agreements that included strong intellectual property commitments above and beyond those of the TRIPS Agreement. For the United States, the Morocco-US FTA promotes strong intellectual property protections similar to those of the US system. For Morocco, the FTA represents a significant departure from previous intellectual property law.² Important features of the Morocco-US FTA are the short length of the transition periods in comparison with other FTAs (for example, those with Chile and with the countries of Central America in CAFTA), and the application of the principle of national treatment with no restrictions (unlike the Chile-US FTA and CAFTA, which include restrictions for sound recordings) (IFAC 2004, 11).

Adherence to Other International Agreements

During the FTA negotiations, the United States and Morocco agreed that Morocco would sign on to important international agreements on intel-

2. Ibid.

lectual property to which the United States had already acceded. Morocco therefore became a member of the International Convention for the Protection of New Varieties of Plants (UPOV Convention, 1991) in October 2006 and ratified the Trademark Law Treaty (1994) on April 6, 2009. The Kingdom has not, however, become a contracting party to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedures (1980).

In addition, as of the effective date of the FTA, the two parties agreed to ratify the international treaties of the World Intellectual Property Organization (WIPO) on copyrights—the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyrights Treaty (WCT)—and to make efforts to adhere to both the Patent Law Treaty (2000) and the Hague Agreement Concerning the International Registration of Industrial Designs (1999). Morocco is only a contracting party to the Hague Agreement. The United States has ratified all of these except the Hague Agreement.

Trademarks

The Morocco-US FTA stands apart from other US FTAs because it expands the scope of trademark protection. Article 15.2(1) specifies that “Neither Party may require, as a condition of registration, that signs be visually perceptible, nor may a Party deny registration of a trademark solely on the ground that the sign of which it is composed is a sound or a scent.”

Article 15.2(6) extends protection for “well-known” trademarks,³ whether registered or not; however, protection is more restrictive than that of the Chile FTA, which gives the right to the holders of well-known trademarks to prohibit or nullify the registration of “similar” trademarks.

The Moroccan registration system, which was based on a simple examination of trademark applications, has been reformed in response to Morocco’s commitments under the FTA. The agreement sets out a mechanism for objections that allows holders of previously registered trademarks to dispute trademark applications within two months of the application’s publication. The agreement also establishes an electronic application system.

For internet-related aspects, the agreement requires that Morocco implement a legal framework to govern domain names and the limited liability of internet service providers (ISPs).

For geographic indications, the agreement specifies registration procedures and includes a series of provisions to avoid confusion with regis-

3. Article 15.2(6), footnote 4, narrowly defines the term: “In determining whether a trademark is well known, the reputation of the trademark need not extend beyond the sector of the public that normally deals with the relevant goods or services.”

tered trademarks.⁴ It also calls for the creation of a single national registry for geographic indications to catalogue protected designations of origin and geographic indications. These two elements do not represent a deviation from Moroccan law; they were already included in the 1997 Moroccan law on industrial property (Law 17-97) and were enhanced in 2005 by Law 31-05, in compliance with TRIPS provisions (Part II, Section 3, Article 22).⁵

Patents

The Morocco-US FTA provisions on patents are based largely on Morocco's commitments to the WTO under TRIPS. The implications of the additional commitments of the "TRIPS+" framework are analyzed below.

Copyrights

For copyrights and related rights, the Morocco-US FTA calls for an increase in the level of protection against piracy, based on legislation in developed countries, and compliance with the most recent international treaties on the subject, especially the WCT and the WPPT.

Among the significant provisions in the effort to raise Moroccan standards to US standards is a measure from the US Copyright Act⁶ that entitles the holder of a copyright to prevent parallel importation of its products produced outside Morocco (IFAC 2004, 11).

In addition, customs services will play an important role in suspending the free circulation on Moroccan territory of counterfeit products and pirated merchandise, which infringe on rights protected in Morocco, especially concerning trademarks, copyrights, and related rights.

FTA Provisions Related to Medical Products

Intellectual property negotiations for the Morocco-US FTA sought to make Moroccan national legislation comply both with multilateral agreements

4. The parties stated that both of the following reasons constitute a motive for refusing protection or recognition of a geographic indication: (1) The geographic indication is likely to be confused with a trademark that is the object of a good faith application or registration because of its similarity with the given trademark; (2) The geographic indication may be confused with an existing trademark for which the rights have been acquired by good faith use within the party's territory, because of its similarity with the given trademark.

5. See Nafissa Belcaid, "Cadre juridique de la protection des indications géographiques au Maroc," presented at the Interregional Seminar on Geographic Indications, Ankara, Turkey, April 3-4, 2008, www.tpe.gov.tr (accessed on June 13, 2009).

6. Title 17 of the United States Code, Section 602.

and with higher standards (i.e., TRIPS+). As Carlos Correa explains, “These new free trade agreements, negotiated outside the World Trade Organization, require even higher levels of intellectual property protection for medicines than those mandated by the TRIPS Agreement, and in some cases go beyond what is required in the developed countries that are promoting them” (Correa 2006, 399).

The following sections present the areas in which the Morocco-US FTA changes patent and data protections from their levels under Moroccan law prior to the FTA.

In June 2001 the TRIPS Council examined Moroccan legislation in the area of intellectual property, including Law 17-97 on industrial property protection and Law 2-00 on copyrights and related rights. This examination revealed that all Moroccan legislation was in compliance with the provisions of the TRIPS Agreement. Morocco has since met all of its obligations under Article 63.2 of the TRIPS Agreement relating to transparency by notifying all the texts it presented to the TRIPS Council during the 2001 examination

Protection of New Applications

The Morocco-US FTA provisions for the patent protection of new applications for existing products exceed those of Moroccan law before the FTA.

TRIPS/Moroccan law prior to the FTA	Morocco-US FTA
WTO members have the freedom to determine if a new use of a known product is patentable. Article 27(3)(b) provides more precision regarding the patenting of new uses for medical purposes: “Members may also exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals.”	FTA Article 15.9(2) specifies that the patentability of new uses of known product includes those “for the treatment of humans and animals.”
Morocco did not provide patent protection for new uses of existing products prior to the FTA.	Morocco now provides patent protection for new uses of existing products, including “new uses of a known product for the treatment of humans and animals.”

Protection of Data Submitted to Regulatory Authorities

For approval to commercialize a new drug, companies have to conduct certain tests to assess the safety and efficacy of products and submit the re-

sults to the relevant authority. Some legal experts argue that these data are a valuable investment that warrants protection from disclosure to other potential applicants. Other analysts argue that it is appropriate to facilitate the entry of generic drugs by allowing secondary entrants to use data submitted by first applicants.

TRIPS/Moroccan law prior to the FTA	Morocco-US FTA
Morocco’s data protection laws generally provided that data, the generation of which involves considerable effort, should be protected against unfair commercial use and disclosure, consistent with TRIPS.	The FTA specifically provides five years of data protection for all test data submitted to regulatory authorities for marketing approval. The authorities are obligated to inform the holders of third-party applications for similar products (Article 15.10).

The TRIPS wording leaves considerable room for interpretation: “In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use” (Article 39-3).

The FTA five-year provision has been one of the most controversial in previous US FTA negotiations, especially with Guatemala.

Patent Term Extensions for Delays Caused by Regulatory Approval Processes

Moroccans believe that the FTA provisions in this area have no impact on Morocco because the Ministry of Health has a policy of speed and transparency in processing marketing authorizations.

TRIPS/Moroccan law prior to the FTA	Morocco-US FTA
The effective duration of protection may be shorter than the nominal duration because of delays in administrative procedures, especially marketing authorizations and delays for examining applications.	The agreements allows for compensation of delays: the patent duration is extended in case of delays in granting the marketing authorization for requests by holders.

Reduction in the Scope of Exceptions

The Morocco-US FTA duplicates TRIPS Article 30 provisions related to exceptions but adds, as in other US FTAs, a provision that can restrict its use.

TRIPS/Moroccan law prior to the FTA	Morocco-US FTA
<p>Article 30: “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”</p>	<p>The scope of this article is limited by Article 15.9(6): “if a Party permits a third person to use the subject matter of a subsisting patent to generate information necessary to support an application for marketing approval of a pharmaceutical product, that Party shall provide that any product produced under such authority shall not be made, used, or sold in its territory other than for purposes related to generating information to meet requirements for approval to market the product, and if the Party permits exportation, the Party shall provide that the product shall only be exported outside its territory for purposes of meeting marketing approval requirements of that Party.”</p>

Additional Conditions for the Use of Compulsory Licenses

A compulsory license is an authorization for the use of a government-granted patent to a third party without the right holder’s consent. No additional conditions are set out in the Morocco-US FTA.

Exhaustion of Intellectual Property Rights

The Morocco-US FTA prohibits parallel importation of patent products, a significant departure from Morocco’s law before the FTA.

TRIPS/Moroccan law prior to the FTA	Morocco-US FTA
<p>Article 6: “For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”</p>	<p>Article 15.9(4). “Each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory.”</p>

Limitations on Revocations

Comparison of the two agreements shows that the discretion allowed by TRIPS was reduced to align the FTA provision with US law.

TRIPS/Moroccan law prior to the FTA	Morocco-US FTA
Article 32: "An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available."	Article 15.9(5): "Each Party shall provide that a patent may be revoked only on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud, misrepresentation, or inequitable conduct may be the basis for revoking a patent or holding a patent unenforceable."

Health-Related Provisions in Other US FTAs

Figure 7.1 shows a comparison of US FTAs with respect to their health-related provisions that go beyond TRIPS. It confirms that the Morocco-US FTA is "state-of-the-art" in this domain, behind only Australia in the number of extra protections.

Intentions and Impacts

At this stage of the implementation of the Morocco-US FTA, reactions to the IPR provisions are more influenced by theories and ideologies than by measurable effects.

The usual intention of bilateral FTAs is a balance between what the United States offers (i.e., access to its large market) and what the less developed country offers (access to services markets and improved regulations governing foreign investment, trade, and intellectual property rights).

In a 2005 report, the World Bank argued that "stronger IPR embedded in the TRIPS-Plus agreements have not been shown to accelerate technological flows to low-income countries—though it may do so for middle-income countries" (World Bank 2005, 2).⁷ But it also noted that "because free trade areas that result in larger markets do attract additional investment flows, it may be that in combination with large, preferential trade areas, enhanced investor protections and IPR do have a positive impact."

The US intention is to use FTAs as an instrument for updating and

7. The World Bank classifies Morocco as a lower-middle-income country, based on per capita income. However, Morocco's social and development indicators are those of a low-income country.

Figure 7.1 Comparison between US FTAs on the inclusion of TRIPS+ health-related provisions

Provision	Jordan 2000	Singapore 2003	Chile 2003	CAFTA 2003	Australia 2004	Bahrain 2004	Morocco 2004
Protection of new applications					X	X	X
Undisclosed data		X	X	X	X	X	X
Duration of protection	X	X	X	X	X	X	X
Reduction of exceptions	X	X	X	X	X	X	X
Required permits	X	X			X		
International exhaustion					X		X
Limitation of revocations	X	X	X	X	X	X	X

TRIPS = Trade-Related Aspects of Intellectual Property Rights

CAFTA = Central American Free Trade Agreement

Source: Morin (2006).

upgrading intellectual property protection. According to the IPR Advisory Council, the Morocco-US FTA is the agreement that best satisfies US IPR goals: It accommodates all the objectives laid out in the Trade Act of 2002, and its US negotiators satisfied US industries, creators, and innovators. In passing, the Council praised the Moroccan negotiators for their “foresight” and their long-term vision for the interests of their country (IFAC 2004, 2).

Moroccan reactions have been mixed. Supporters of the agreement highlight the country’s newly liberalized and competitive trade environment, where companies can no longer compete on the basis of importing “mature” technologies from developed countries and producing them behind tariff barriers.⁸ It is true that Morocco needs access to the sophisticated technologies necessary to compete in today’s global economy, especially since innovation will play a critical role in Morocco’s Plan Emergence, which aims to boost the competitiveness of seven Moroccan industries, three of which are explicitly dependent on advanced technology.⁹ In essence, the supporters argue that the immediate costs of stronger IPR will be transitory and offset by increases in foreign direct investment (FDI) and technology transfer.

The following sections discuss the economic impact of IPR measures, in particular their fiscal effects and their impacts on innovation, the health care sector, and agriculture.

8. Mohammed Loulichki, Communication du Royaume du Maroc sur les nouveaux textes adoptés dans le domaine de la propriété intellectuelle, remarks prepared for the ordinary session of the Council for TRIPS, June 5, 2007, www.mission-maroc.ch (accessed on June 13, 2009).

9. The seven industries are offshoring, autos, aeronautics, electronics, food processing, fisheries, and textiles.

Initial Impacts of Legal Conformity with the Morocco-US FTA

As mentioned above, the council of the TRIPS Agreement established in June 2001 that the Moroccan legal framework complied with the provisions of the multilateral agreement, after an examination of Law 17-97 on industrial property and Law 2-00 on copyrights. In order to comply with the Morocco-US FTA, the Kingdom adopted new legal initiatives in 2006.¹⁰ Concerning copyrights, Law 34-05 amended and completed the 2000 law (Law 2-00 on copyright and related rights) by introducing provisions to adopt international definitions and to improve and extend rights in terms of duration, protection, and presumptions. Concerning intellectual property, Law 31-05 amended and completed the 1997 law (Law 17-97 on the protection of industrial property rights) by introducing provisions related to trademarks, the creation of a national register for geographical indications, and border protection.

Morocco made this reform for the following reasons:

- to align national legislation with new international rules so as to appropriately respond to the technological changes of the information society;
- to preserve intellectual property rights while strengthening protection for rights holders and consumers against acts of counterfeiting and piracy; and
- to meet its commitments under the free trade agreements with its trading partners.

The Office Marocain de la Propriété Industrielle et Commerciale (OMPIC) reports that local as well as foreign companies are using these reforms and measures.¹¹ Figure 7.2 shows that both foreign and domestic patent applications increased from 2007 to 2008. US companies accounted for the largest share of foreign applications—98 of 447 in the first half of 2008—followed by French and Swiss companies.

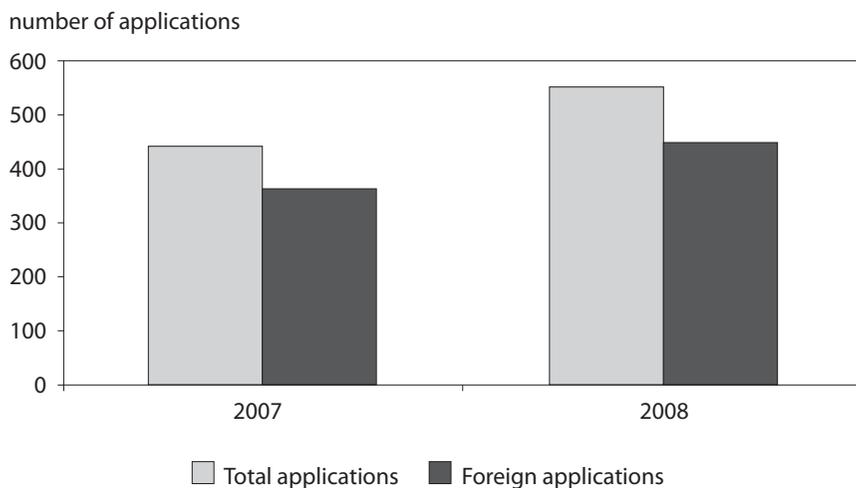
Figure 7.3 shows post-FTA trends in trademark applications. Those of foreign companies increased from 726 to 857 from 2007 to 2008. Again, US companies are leaders in this field, with 6 percent of the total. While foreign companies have been increasingly active, they still represent only 22 percent of the total number of trademark applications in Morocco. Over a quarter of trademark applications by foreign companies are from US companies (6 percent of total applications).

OMPIC reports further indicate the use of protection measures estab-

10. Loulichki, Communication du Royaume du Maroc sur les nouveaux textes adoptés dans le domaine de la propriété intellectuelle.

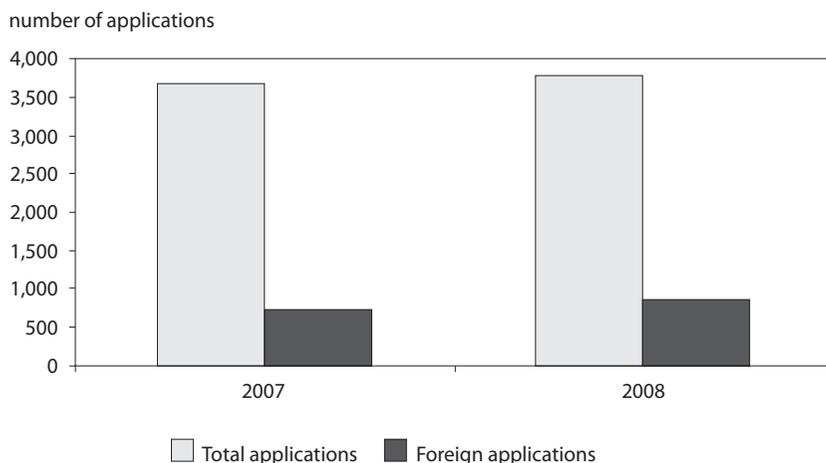
11. OMPIC, L'Activité des Dépôts de Titres de la Propriété Industrielle: 1^{er} Semestre 2008, www.ompic.org.ma/resources (accessed on June 13, 2009).

Figure 7.2 Patent applications in Morocco, 2007–08



Source: Office Marocain de la Propriété Industrielle et Commerciale, www.ompic.org.ma.

Figure 7.3 Trademark applications in Morocco, 2007–08



Source: Office Marocain de la Propriété Industrielle et Commerciale, www.ompic.org.ma.

lished by the new law on industrial property as patent opposition applications increased by 90 percent in 2007, reaching 558 cases, and demands for importation restrictions reached 150 cases in 2007.

Fiscal Effects

Supporters of the IPR provisions of the FTA cite the benefits of Moroccan legal reforms to comply with TRIPS and TRIPS+, the strengthening of the role of OMPIC, and the work of the Association Marocaine de Lutte contre le Piratage (AMLPI) and the Association Marocaine des Droits d'Auteurs (AMDA). For example, Article 34.05 raises the penalties for copyright violations from a trivial fine of 500 Moroccan dirhams and a one-month prison sentence to a fine of 50,000 Moroccan dirhams and a prison sentence of up to four years. Once complete, these reforms will allow the Kingdom to appreciably expand its tax base and reduce the financial losses associated with piracy.

Effects on Innovation

According to the Moroccan Ministry of Communications, changes in intellectual property regulations have led to changes in the perception of copyright and related rights. Creativity is now perceived as having an important economic value and as a vector of development. With this perception came the realization that failure to protect these rights could hinder national and foreign investment.

Implantation of Isofoton in Morocco, a global innovative leader in the solar cell industry with eight subsidiaries around the world, is a good example of the impact of IPR protection to attract FDI. The company's director of research and development (R&D) recognizes that even if North Africa is a "strategic market" for the company, its investment decisions are highly conditioned by the IPR regime, since all of their inventions have to be protected by patents.¹²

Effects on Healthcare

The main short-term issue in health care is the influence of FTA restrictions on prices and access to medications. Several nongovernmental organizations (NGOs) have expressed strong opinions on this subject. Other associations have argued that the agreement's provisions will reduce the array of instruments for combating tobacco addiction.

To address these concerns, the Morocco-US FTA includes a side letter clarifying that the agreement's intellectual property chapters do not affect the ability of governments to "take necessary measures to protect public health by promoting medicines for all...." In other words, government actions to protect public health can be justified under the Morocco-US FTA. The United States Trade Representative office clarified that "if...a drug

12. World Intellectual Property Organization, "Edition Spéciale Journée Mondiale de la Propriété Intellectuelle," *WIPO Magazine* 2, April 2009.

is produced under a compulsory license, and it is necessary to approve that drug to protect public health...the data protection provision in the FTA would not stand in the way.”¹³ Notwithstanding the potential flexibilities provided by this side letter, it raises several questions, notably how broadly the parties to the Morocco-US FTA will define the “protection of public health” or what interpretation an arbitration panel might apply. Uncertainty in this respect may become a barrier to appropriate use of the flexibilities and may open the door to restrictive interpretations by vested interests.

Effects on Agriculture

The Morocco-US FTA coincides with a need of major exporters and producers in Morocco for access to technology, more market access, and competitiveness in niche sectors. Flows of improved genetic material are likely to increase as the licensing and royalty arrangements under stronger IPR rules become more widespread. Stronger IPR protection may therefore benefit commercial farmers, but it could be an impediment to middle- and low-income farmers by restricting their seed saving and exchange. There are also concerns among domestic seed companies that wish to protect their own plant varieties or that are under pressure from foreign breeders to improve legal protection before they can get access to foreign breeding lines and varieties. In several countries, agricultural researchers have been advocating the protection of new varieties.

Some producer associations believe that the impact on agricultural chemical products, such as pesticides, will be more restrictive than on medications because of the extended protection for data on agricultural chemical products (10 years). These associations fear the impact on prices for US inputs. Some peasants have expressed concerns that the new IPR rules could force them to pay royalties for the seeds they use, even if these seeds are produced naturally in their fields (although there is no evidence that these concerns have materialized).

Constraints, Opportunities, and Recommendations

The agreement’s implementation is subject to major constraints in Morocco. The informal sector, including piracy and contraband, is very important in some Moroccan regions, and the higher penalties on IPR violations will affect those regions in particular where a significant portion of the population makes a living from counterfeiting. In addition, although the IPR provisions offer opportunities for the development of new drugs and agricultural technologies that will benefit Morocco, some concerns remain

13. “Text: Veroneau Letter to Levin on Morocco FTA,” *Inside US Trade*, July 23, 2004.

about the FTA's definition of "protecting public health" and its impact on agricultural chemical products. The use of new information and communication technologies, especially digital techniques and more widespread access to the internet, could raise still other issues in the IPR area.

The problems require management methods that allow public access to knowledge and ensure the protection and defense of intellectual property. Moreover, the Moroccan legal system presents unique institutional constraints. As Morocco succeeds in increasing the efficiency of its legal system, questions about its independence continue to emerge.¹⁴ All these constraints were taken into account by the parties involved in negotiating the agreement. But the design and implementation of an actual agenda of reforms in this area seem to be more complicated than anticipated.

On the other hand, international evidence is inconclusive about the responsiveness of FDI to intellectual property regimes. Although surveys of foreign investors typically register concerns about IPR, they are often of secondary priority (Lee and Mansfield 1996). As a consequence, many authors conclude that countries (especially low-income countries) should focus on their overall investment climate to attract high-technology investment rather than fine-tuning their IPR. Unfortunately, there are no data to indicate whether Morocco's IPR commitments under the Morocco-US FTA have resulted in greater inward FDI.

An assessment of benefits and costs suggests that it may be naïve to focus on IPR as a principal means of attracting FDI and facilitating technology transfer. The Morocco-US FTA provides a framework for further liberalizing the Kingdom's economy and trade, and IPR is only one component of a larger reform effort. A wider agenda is needed that includes better targeting of support policies in agro-industry, health care, and the services sectors. Government policies should go beyond implementation of Morocco-US FTA commitments and encourage technology transfer by promoting more effective cooperation, strengthen scientific and technological capabilities, and raise funding levels for public research on public needs. The reform agenda should also include an effective "exit strategy" for those who earn their living in informal industries that may be regulated out of existence. A comprehensive reform program will help Morocco see concrete benefits from the IPR commitments it made in the Morocco-US FTA.

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14. Decisions by commercial courts on disputes between national and foreign partners have raised these questions.

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