

Trade-related intellectual property rights, access to medicines and human rights – Morocco

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Summary

1. Morocco has undertaken bold steps to improve access to treatment, including the recent introduction of a mandatory health insurance scheme. Although Morocco's HIV/AIDS prevalence rate is still quite low with 0.1% in the adult population and 0.15% in pregnant women, over 15,000 people are living with HIV/AIDS and require treatment.¹ Moreover, tuberculosis is a grave threat to public health in Morocco, with over 16,500 cases of pulmonary tuberculosis a year.² For the poorest and most vulnerable groups, the high cost of medicines remains a barrier to treatment, especially in rural areas.

2. Morocco, as a State party to the International Covenant on Economic, Social and Cultural Rights has an obligation to take measures to respect, protect and fulfil the right to the highest attainable standard of health under article 12, as interpreted by the Committee on Economic, Social and Cultural Rights General Comment No. 14(2000).³ Inherent in the right to health is the obligation to ensure access to affordable medicines for all without discrimination, in order to prevent, treat and control diseases.

3. Morocco's policies on access to medicines and the realization of human rights are threatened by strict trade-related intellectual property (IP) rules in trade agreements. Of particular concern is the United States – Morocco Free Trade Agreement (FTA) that was signed in March 2004 and came into force on 1 January 2006. The FTA raised a lot of concern since the start of the negotiations, especially from Moroccan⁴ and international access to medicines advocates.⁵ These groups spearheaded campaigns urging the Moroccan government to ensure that the final text of the FTA did not include IP rules that would harm Morocco's ability to ensure access to affordable medicines for all, in accordance with its obligations under the right to health.

4. Despite these efforts, the final text of the FTA includes IP rules that go beyond the standard of protection required by the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Most importantly, the FTA text dismantles the flexibilities reaffirmed by the WTO Doha Declaration on TRIPS and Public Health such as compulsory licensing or parallel importation, and introduces rules that curtail Morocco's ability to take measures to reduce the cost of medicines.

3D would like to thank the Fédération internationale des droits de l'homme for their support in the translation of this report.

¹ WHO, UNICEF, UNAIDS, *Morocco, Epidemiological Fact Sheet on HIV/AIDS and STDs*, Update 2004.

² WHO, EMRO Country Profiles, Morocco, 2004, www.emro.who.int/morocco/

³ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The right to the highest attainable standard of health*, E/C.12/2000/4, 11 August 2000.

⁴ Association Marocaine de Lutte Contre le Sida (ALCS), *Mémoire de la société civile contre les restrictions de l'accès aux génériques dans l'Accord de Libre Echange*, January 2004.

⁵ Médecins Sans Frontières – Maroc, *Les Dangers des dispositions sur la propriété intellectuelle dans l'Accord de libre-échange entre Maroc/Etats-Unis pour l'accès aux médicaments essentiels au Maroc*, January 2004.

5. Therefore, it is important that the government of Morocco commission an independent human rights impact assessment of the effect of trade-related IP rules on the cost of medicines and the enjoyment of human rights in Morocco. Moreover, it is crucial that the government revise its IP legislation in the light of the results of this impact assessment, in order to ensure that IP rules are consistent with development and human rights commitments.

6. 3D -> Trade - Human Rights - Equitable Economy (3D) is a not-for-profit organization based in Geneva, Switzerland, working to ensure that trade rules are developed and applied in ways that promote an equitable economy. We believe that human rights mechanisms such as the Committee on Economic, Social and Cultural Rights can help attain this objective by reminding States that compliance with international trade rules cannot justify non-compliance with human rights obligations.

7. This submission to the Committee on Economic, Social and Cultural Rights outlines 3D's main concerns relating to the impact of trade-related IP rules on access to affordable medicines and the enjoyment of human rights in Morocco. These concerns support the Committee on Economic, Social and Cultural Rights' questions on the right to health submitted to the government of Morocco in June 2005.⁶

8. The final page of this submission sets out some specific issues we suggest that members of the Committee on Economic, Social and Cultural Rights might raise with the government of Morocco.

I. Access to affordable medicines in Morocco

9. Before 2000, Morocco did not have any patent legislation on pharmaceuticals. This enabled the Moroccan pharmaceutical industry to flourish and develop into the second biggest pharmaceutical industry in Africa, after South Africa. In 2000, the Moroccan pharmaceutical industry was able to cover 72.2% of national needs and sell generic medicines at 10 to 80% of the cost of the equivalent brand-name products.⁷

10. In 2002, the budget of the Moroccan Ministry of Health represented approximately 4.6% of GDP, general government expenditure as a percentage of total health expenditure was 32.8% and private sector expenditure on health was 67.2%.⁸ Of this private expenditure, private household out-of-pocket payments accounted for 74% of total payments.⁹ According to Moroccan civil society groups, private household expenses on medicines in 2004 were equivalent to 17 US dollars (approximately 14 euros) per person, with only 15% of the population covered by a health insurance reimbursing the cost of medicines¹⁰

11. In 2005 the Moroccan government introduced its plan for mandatory health insurance coverage for the most economically vulnerable groups and is planning to extend coverage to 10 million people by 2008. However, such a plan will only be feasible if the government retains sufficient policy space to pass measures capable of reducing the cost of medicines. Since the adoption and implementation of the US –Morocco FTA, this policy space appears to have been jeopardised.

⁶ CESCR, *List of Issues: Morocco*, E/C.12/Q/MAR/2, 30 June 2005.

⁷ ALCS, note 4 above.

⁸ WHO, *National Expenditure on Health – Morocco*, 2002, www.who.int/nha/country/MAR.xls

⁹ Ibid.

¹⁰ Dr. Rhaouti Mohammed Laghdaf, Président de l'Ordre des pharmaciens du Nord, *Impact sur le secteur de la santé de l'Accord de libre-échange Maroc-USA*, March 2004.

II. The impact of intellectual property rules on access to medicines and the right to health in Morocco

A. The TRIPS Agreement and access to medicines

12. Trade-related IP rules can affect access to affordable medicines. Of greatest concern are patents, which grant exclusive rights over the manufacture, use or sale of an invention. Patent rights can keep prices of drugs artificially high if no measures are put in place to reduce them. Morocco, as a member of the WTO, was obliged to comply with the WTO TRIPS Agreement passed implementing legislation in 2000.¹¹

13. In order to reduce the adverse impacts of patent rules on prices, the TRIPS Agreement allows countries to use certain key flexibilities, such as the granting of compulsory licenses in order to make cheaper generic versions of patented medicines or the parallel importation of patented medicines that are sold more cheaply in other countries. A country's ability to freely interpret and use these flexibilities was reaffirmed by the WTO Doha Declaration on TRIPS and Public Health of 2001.¹² The Doha Declaration expressly states that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, access to medicines for all."

14. Another mechanism adopted by the WTO Member States is the WTO General Council Decision of 30 August 2003. This is a temporary waiver to the TRIPS Agreement that allows WTO Member States to export the majority of medicines made under compulsory licence to countries that cannot make pharmaceuticals themselves.¹³ The WTO General Council incorporated the mechanism into a permanent amendment to the TRIPS Agreement on 6 December 2005.¹⁴ Until final ratification of this amendment by 1 December 2007, WTO Members can still make use of the 30 August 2003 Decision as it stands. This mechanism is criticised by access to medicines advocates due to its complexity and cumbersome nature.¹⁵

15. It is important to encourage the government of Morocco to revise its IP legislation in order to make use of all the flexibilities reaffirmed by the Doha Declaration on TRIPS and Public Health to reduce the cost of medicines and comply with its obligations under the right to health. Morocco should also undertake a human rights impact assessment of the use of the 30 August 2003 Decision to see if it is sufficiently adequate to reduce the cost of medicines and respect human rights. If this is not the case, Morocco should be encouraged to ask the WTO TRIPS Council to review the mechanism.

B. TRIPS-plus conditions in trade agreements

16. Morocco concluded a Free Trade Agreement (FTA) with the United States in March 2004, after two years of opaque negotiations. Despite a sixth-month delay, the agreement came into effect on 1 January 2006. As feared by Moroccan civil society groups and international access to

¹¹ Morocco, *Law No.17-97 Concerning Protection of Industrial Property*, Dahir No.1-00-91, 9 Kaada 1420, 15 February 2000.

¹² WTO, *the Doha Ministerial Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, 14 November 2001.

¹³ WTO, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, Decision of the General Council of 30 August 2003, WT/L/540, 1 September 2003.

¹⁴ See WTO, *Implementation of Paragraph 11 of General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on TRIPS and Public Health, Proposal of a Decision on an Amendment to the TRIPS Agreement*, IP/C/41, 6 December 2005.

¹⁵ *Joint Statement by NGOs on TRIPS and Public Health, WTO Members should reject bad deal on medicines*, 3 December 2005, <http://www.cptech.org/ip/wto/p6/ngos12032005.html>

medicines advocates, the IP chapter of the FTA contains a number strict IP rules that undermine the WTO Doha Declaration on TRIPS and Public Health. These rules, termed TRIPS-plus rules, risk harming the realization of the right to health in Morocco:

- **Extension of the patent term:** patent owners are protected beyond the twenty year monopoly period under the TRIPS Agreement if there is a delay in the grant of a patent or in the granting of marketing authorization.
- **Limitations on parallel imports of patented drugs:** the provision of an exclusive right to the patent owner to contractually prohibit parallel importation goes against the spirit of the Doha Declaration.
- **Data exclusivity:** patent owners are given an extra five years exclusivity over test data and a further three years exclusivity for “new clinical information” even if a drug is not patented in Morocco. This would prevent generic manufacturers from obtaining the data needed to make generic versions of new medicines.
- **Marketing authorization restrictions:** authorization to market a drug in Morocco is only given during the patent period if the patent owner gives his consent. This is a de facto prohibition on compulsory licensing or government use licenses contrary to the spirit of the Doha Declaration.

17. In the face of strong criticism from national and international civil society, the US and Morocco tried to resolve public health concerns by exchanging side-letters reaffirming that the obligations under the IP chapter “do not affect the ability of either Party to take necessary measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria and other epidemics as well as circumstances of extreme urgency and national emergency.”¹⁶ Moreover, the letters also state the parties’ commitment to the WTO 30 August 2003 Decision and implementation of a final TRIPS Amendment. However, these side-letters are not incorporated into the FTA and therefore do not override the strict IP provisions in the agreement that undermine access to medicines for the poor.¹⁷

18. In view of these concerns, it is important to encourage the government of Morocco to undertake an independent human rights impact assessment of the effect of trade-related IP rules on access to affordable medicines and the realization of the right to health in Morocco. Furthermore, it is crucial that the results of such an impact assessment be used as a basis for revision of IP legislation that is inconsistent with development and human rights commitments.

III. Trade decision-making procedures: limited access to information and participation

19. A further issue of concern is the lack of transparency and access to information regarding trade decision-making. The US-Morocco FTA was strongly criticized by interested civil society groups in Morocco and internationally¹⁸ for being secretive and opaque. Although the government of Morocco organized meetings providing information to interested parties once the agreement was signed, this cannot substitute access to information and public participation in decision-making before the conclusion of a trade agreement.

20. It is therefore important to remind Morocco that trade negotiations should be open and transparent in order to ensure that the trade rules negotiated do not adversely impact on human rights, including children’s rights. Indeed, Morocco should be reminded that this would be a

¹⁶ Exchange of letters between Robert B. Zoellick, US Trade Representative and Taïb Fasi Fihri, Minister Delegate for Foreign Affairs and Cooperation, Morocco, 15 June 2004.

¹⁷ Robert Weissman, Essential Action, *Comments on the Intellectual Property Chapter of the US – Morocco Free Trade Agreement and the Impact on Access to Medicines*, 8 April 2004.

¹⁸ Human Rights Watch, *Access to Essential Medicines in US-Morocco Trade Agreement, Letter to United States Trade Representative Robert B. Zoellick*, 18 February 2004.

violation of the obligation to ensure freedom to seek, receive, and impart information on matters affecting health according to article 12 CRC, as interpreted by General Comment No. 14 (2000), as well as general human rights principles of accountability, access to information, and public participation.

Conclusion

21. Morocco has taken measures to ensure access to affordable medicines. However, these measures risk being dismantled by the implementation of the US-Morocco FTA. It is therefore imperative that Morocco undertakes a human rights impact assessment of the effects of trade-related IP rules on access to affordable medicines and revise IP legislation that is inconsistent with development and human rights commitments. Furthermore, it is important that the government of Morocco ensure access to information and public participation in trade decision-making before making any commitments in trade agreements that could undermine human rights.

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Morocco: issues of concern regarding trade-related intellectual property rights, access to medicines and human rights

Right to the highest attainable standard of health (article 12 CESCR, as interpreted by General Comment No. 14(2000))

Question: Has the government of Morocco assessed the possible impacts on the right to health, of the strict intellectual property rules proposed in the US-Morocco Free Trade Agreement?

Recommendation: The government of Morocco should undertake an independent human rights impact assessment of the effect of trade-related intellectual property rules on access to medicines and the enjoyment of the right to health. The results of this assessment should be used as a basis for the revision of intellectual property legislation that is inconsistent with the right to health.

Information accessibility (article 12 ICESCR, as interpreted by General Comment No. 14(2000))

Question: Has the government of Morocco taken measures to ensure access to information on the impact of trade-related intellectual property rights on health, and public participation in Free Trade Agreements?

Recommendation: the government of Morocco should ensure access to information and public participation in trade decision-making, including Free Trade Agreements, that risk affecting the enjoyment of human rights such as the right to health.

Technical assistance (article 2(1) ICESCR, as interpreted by General Comment No. 3(1990) and article 23 ICESCR)

Question: Has the government of Morocco requested human rights technical assistance in order to ensure that trade-related intellectual property rights, especially rules in Free Trade Agreements, do not undermine State obligations under the right to health?

Recommendation: The government of Morocco should seek human rights technical assistance from the Office of the High Commissioner for Human Rights (OHCHR), to ensure that trade-related intellectual property rights are negotiated and implemented in a manner consistent with development commitments and human rights obligations, including obligations under the ICESCR.