ADDITIONAL VIEWS on H.R. 4842
United States-Morroco Free Trade Agreement Implementation Act

I. Labor

Had this agreement contained a fully enforceable provision requiring both countries to implement and enforce the five basic International Labor Organization labor standards (rights to associate and bargain collectively, prohibitions on forced labor, discrimination, and child labor), then it would have sailed through both chambers of Congress easily and without delay. Instead, the agreement includes simply an obligation for each country to enforce its own domestic law, regardless of what that law happens to say.

It is ironic that, as the U.S. aggressively pursues provisions on intellectual property rights and other areas reflecting U.S. law – which is among the most stringent in the world on those often contentious issues – that USTR will not seek provisions on labor reflecting even the basic norms that have been endorsed by virtually every country in the world.

The "enforce domestic law" standard continues to be the wrong one. And, when a country's labor laws do not meet the basic international standards, then this approach will be unacceptable.

Unfortunately, the Bush Administration continues to negotiate trade agreements including the "enforce your own law" standard, and we are forced to take an up-or-down vote on what the Bush Administration has negotiated.

While the Bush Administration has shown an ideological rigidity, pursuing the same model regardless of the realities in each country with which it negotiates, it does not make sense for us to take the same cookie-cutter approach. We need to look at the facts on the ground in each country to examine how the provisions in each agreement will operate in practice and to ensure that the trade agreement will not force U.S. workers, farmers and businesses to compete with firms whose competitive advantage is the suppression of labor.

As a result, we were left with the difficult task of closely scrutinizing Morocco's labor laws to see how they match up against the basic ILO standards, and of examining Morocco's commitment to respect the basic rights of its workers. This scrutiny was made more complex by the fact that Morocco just adopted major reforms in July 2003, which went into effect only in June of this year.

We note the following facts:

- There is an active union movement in Morocco, with five major national union federations. Additionally, there is a tradition in Morocco of sector-level collective bargaining.

- These aspects of Morocco's labor situation are attributable in part to the fact that

Morocco inherited a socialist-leaning labor law and industrial structure from France. They are also attributable in part to the fact that Morocco's unions played an important role in Morocco's independence movement.

- Prior to July 2003, Moroccan law had notable deficiencies in its law relative to the five basic ILO standards.

- In 2003, Morocco undertook a major "social dialogue" involving the Government of Morocco, representatives from the business community, and representatives from the major Moroccan union federations.

- This "social dialogue" resulted in the adoption of major labor law reforms in July 2003, which reflected a common agreement of and were endorsed by all three groups – government, business and labor. The law came into effect in June 2004.

- There was also a "tripartite agreement" in July 2003, which included a commitment for additional reforms related to the right to strike (also following the government-business-labor structure of the "social dialogue").

- The July 2003 reforms constitute a major, not cosmetic, change in Morocco's laws. Many of the reforms were aimed specifically at correcting previously-existing inconsistencies between Morocco's labor laws and the basic ILO standards. Morocco received support from the ILO in crafting these reforms.

- Among numerous other reforms, Morocco made anti-union and other forms of discrimination illegal; provided strong penalties against such conduct; created a legal obligation to engage in collective bargaining; prohibited interference in union activities; eliminated a rule requiring mandatory arbitration that had limited the ability to strike; disciplined the use of temporary contracts, which had previously been used to evade worker rights; and prohibited retaliation by employers against workers engaged in legitimate strikes.

- Morocco's labor ministry and judicial system have played a fairly active and generally constructive role in resolving labor disputes in Morocco.

- Morocco has worked with the ILO on various issues (particularly child labor) for several years now, and has expressed a willingness to work with the ILO on implementation and enforcement of its new labor laws.

- Morocco's independent union movement has come out in support of the FTA.

In the past, Morocco has been criticized for using criminal sanctions (under Article 288 of its Penal Code) against legitimate strikers. We note that Morocco is still working on reforms to the right to strike. The Government of Morocco has committed to reforming Article 288 and to using the same "social dialogue" model on the negotiations over new rules on the right to strike,

meaning any changes will receive the endorsement of the labor unions in Morocco. In response to our inquiries, the Government of Morocco also committed in a letter dated July 14, 2004 as follows:

> The government of Morocco is committed to protecting the right to strike in conformance with the International Labor Organization's core principles. In particular, the government will not use Article 288 of our penal code against lawful strikers.

The Government of Morocco, to its credit, has shown an up front openness and honesty about the situation in its country and a willingness to work with us to address our concerns. The letter provided by Morocco (which was made a part of the record of the Committee's mark-up proceedings and is attached to these Additional Views) committed to implement provisions of its law consistent with the ILO core labor standards and to seek the ILO's assistance in this regard:

> On the ILO involvement, Morocco has always worked with the ILO. For instance, the ILO assisted Morocco to write the Labor Code of 2003 and the new law on child labor. Morocco, as in the past, will continue to ask the support of ILO and work with this organization in all labor issues such as new laws and will ask its help in providing assistance for the implementation of the current rules.

In light of the major reforms of July 2003 – which addressed flaws in Morocco's labor laws relative to the ILO standards, which were negotiated with the full participation and ultimate endorsement of Morocco's independent labor movement, and which were based in many cases on the advice of the ILO; in light of the history and situation in Morocco; in light of Morocco's commitment to implement its laws consistent with ILO core labor standards; we believe that the situation with respect to labor rights in Morocco appears strong enough to implement and assure the internationally-recognized labor standards, leading to fair competition and the steady development of a substantial middle class for the benefit of Morocco and as a market for U.S. goods and services.

II. ACCESS TO MEDICINES

While we support this Agreement, we were concerned about sections of this Agreement (as well as other recently-negotiated U.S. free trade agreements (FTAs)) that affect the availability of affordable drugs in developing countries. In particular, we were concerned about the impact of restrictions on parallel imports and about test data requirements for pharmaceuticals included in the Morocco FTA. At stake are the health needs of Morocco's citizens, and we were determined to explore and clarify whether some of the provisions could undermine, both explicitly and in spirit, commitments made by the United States in the World Trade Organization in both the November 2001 *Declaration on the TRIPS Agreement and Public Health* (the Doha Declaration) and the September 2003 *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (the Paragraph 6 Decision). The Doha Declaration re-affirmed that the TRIPS Agreement does not prevent WTO Members from taking measures to protect public health, including measures aimed at promoting the availability of medicines, and identified specific provisions within the TRIPS Agreement that provide

flexibility for that purpose. Among the flexibilities identified were the right of countries to issue compulsory licenses to increase access to medicines (and to decide for themselves the grounds on which such licenses could be issued), and the right of countries to decide whether to allow parallel importation of medicines. Section 2102(b)(4)(C) of the Trade Act of 2002 (Trade Promotion Authority or TPA) directs the Administration to "respect [the Doha Declaration]," necessarily including subsequent agreements related to that Declaration.

We raised concerns in this area with USTR at both the Committee's mock mark-up and official mark-up, as well as in a July 15, 2004 letter to Ambassador Zoellick (the July 15 letter is attached to these Additional Views). USTR's verbal responses, and the July 19 written response to the July 15 letter from four Members (the July 19 USTR letter is attached to these Additional Views), as well as clarifications from the Embassy of the Kingdom of Morocco (the letter from Morocco dated July 19 is attached to these Additional Views), provide helpful clarification on some of the issues raised. For example, in its July 19 response, USTR makes clear that Article 15.9.6 (the "Bolar exception") does not preclude Morocco from exporting generic versions of patented drugs to least developed countries and certain other countries under the Paragraph 6 Decision. USTR also makes clear in its July 19 response that the United States "has no intention" of bringing a dispute settlement case against countries that act in accordance with the Paragraph 6 Decision.

That said, and as discussed in greater detail below, USTR needs to make explicit in future trade agreements with developing countries like Morocco that intellectual property protections for pharmaceutical products (including protections in the investment chapter of such FTAs) can be waived, so long as a country acts to effectuate its right to protect public health. USTR's July 19 letter and answers at both mark-ups seem to suggest that the Morocco Agreement's side letters on public health create such an exception. That clarification is helpful in considering whether to support the Morocco FTA; however, the exception needs to be explicit from the outset and in the basic content of future trade agreements with developing countries.

Remaining Concerns

(1) Restrictions on Parallel Imports

Article 15.9.4 of the U.S.- Morocco FTA requires both countries to recognize the exclusive right of a patent holder to import a patented product, at least where the patent holder has restricted the right to import by contractual means. In practical terms, this provision means that neither Morocco, nor for that matter, the United States, may allow parallel imports of patented pharmaceutical products from the other country, or where a national of the other country owns the patent. (We note that parallel imports are not imports of counterfeit products. These are products marketed by the patent owner or with the patent owner's permission in one country and imported into another country without the approval of the patent owner.)

With respect to Morocco, the provision appears to limit one of the flexibilities identified in the Doha Declaration, which left it up to each country to determine for itself what policy on parallel imports to adopt. Accordingly, one could argue that this provision in an FTA with a

developing country contradicts the direction in section 2102(b)(4)(c) of TPA to respect the Doha Declaration.

We note that Morocco's domestic law already prohibited parallel imports prior to negotiation of the FTA (as does U.S. law). That fact, however, is not dispositive of whether it is appropriate to include an absolute restriction on parallel importation in an FTA with a developing country. Given that the Doha Declaration recognized parallel imports as potential way for a developing country to address a public health problem, USTR should have allowed Morocco to preserve its flexibility on this point.

The Ambassador of Morocco, in the July 19 letter to Committee Members, indicates that the Government of Morocco believes that it retains sufficient flexibility to address public health issues, even absent recourse to parallel imports. In particular, the Ambassador notes that Morocco has a well developed pharmaceutical industry, and that domestic demand for medicines could be satisfied through compulsory licensing. With this explanation from the Embassy, we believe that the impact of the parallel import restriction, in the case of Morocco, is likely to be minimal. Moreover, we assume that the exception created by the side letters for "necessary measures to protect public health" apply to this restriction as well. (More on this point below.)

That said, we remain concerned about inclusion of such provisions in future trade agreements. In this regard, it is important that in its July 19 letter, USTR indicates that it would not seek such provisions with developing countries that do not already prohibit parallel imports.

(2) Test Data Provisions

Articles 15.10.1, 15.10.2, and 15.10.03 of the FTA require the United States and Morocco to protect certain test data submitted to obtain regulatory marketing approval of a drug. The provisions operate as follows: if a government requires submission of test data in order to obtain marketing approval for a drug (e.g., FDA approval), the government may not allow any other company to use these test data as the basis of obtaining marketing approval for a similar drug for a period of 5 years. The company first submitting the data has the right to prevent anyone else from using those data to enter the market for that period. Test data rights are separate and distinct from patent rights, and can exist for drugs not covered by a patent.

The key issue raised by the test data requirements in the Agreement is whether they can be waived if Morocco wants to approve a producer other than the test data owner to produce and sell a drug in Morocco during the test data protection period. An example may be helpful to illustrate the issue.

> Assume Morocco decides that it needs to increase the supply of HIV/AIDS Drug X in its market. Drug Company A owns the patent on Drug X, and also is the only producer to have obtained marketing approval for Drug X in the Moroccan market. If Morocco is unable to convince Drug Company A to produce more of Drug X at a reasonable price, Morocco could issue a compulsory license to another drug manufacturer, Drug Company B. However, the compulsory license, which is allowed under the FTA, is an exception

only for the patent rights related to Drug X. The compulsory license does not affect Drug Company A's right to prevent any other company from receiving marketing approval for Drug X based on the data it submitted.

(The above analysis applies if Drug X is not covered by a patent. The only difference is that Morocco would not need to issue a compulsory license.)

The Intellectual Property Chapter of the Agreement (Chapter 15) does not include any specific exceptions that would allow Morocco to waive the test data requirements to address a public health need. As such, our concern was that the test data requirements could effectively undermine Morocco's ability to use compulsory licenses. (Morocco could license the drug for production, but not for sale.) As such, we believed that language in the FTA violated at least the spirit of the Doha Declaration, because the key flexibility identified in that Declaration was the ability of developing countries to use compulsory licensing to "protect public health" and "promote access to medicines for all."

In its July 19 letter, USTR responded to our concerns in a way that provides some comfort. Specifically, in its July 19 letter, USTR stated that "if circumstances ever arise in which a drug is produced under a compulsory license, and it is necessary to approve that drug to protect public health or effectively utilize the TRIPS/health solution, the data protection provisions in the FTA would not stand in the way." USTR stated that it based this conclusion on side letters to the FTA. USTR does not explicitly say that the side letters should be read as a blanket exception to the obligations in the Intellectual Property Chapter. That said, their response – "the FTA would not stand in the way" – suggests that it is such an exception. (USTR provides a similar answer where the drug in question is not covered by a patent.) USTR confirmed the view that the side letters create an exception in an answer to a question at the official Committee mark-up. This means that Morocco can waive test data requirements in certain circumstances, based on the side letters.

The portion of the side letters on which USTR relies for this interpretation state, in relevant part, that "[t]he obligations of [the Intellectual Property Chapter] do not affect the ability of either Party to take necessary measures to protect public health by promoting access to medicines for all... ." We appreciate USTR's clarification as to how this language in the side letters should be interpreted. That said, we continue to believe that the side letters are not sufficiently clear as to whether they provide an exception. To the contrary, absent USTR's July 19 clarification and USTR's answer at the mark-up, the language could have been misinterpreted as a description of the chapter, rather than an exception to the chapter.

To eliminate any ambiguity in the future, USTR must make the exception explicit in the text itself of future agreements.

(3) Test Data Provisions and Investment

We also remain concerned that other provisions in the Agreement appear to make it more complicated and costly for Morocco to waive the test data requirements. In particular, the

Investment Chapter of the FTA (Chapter 10) treats intellectual property, including potentially test data, as an "investment." This means that if Morocco were found to have "expropriated" the intellectual property of a U.S. company, including potentially by waiving test data protections, the U.S. company might be entitled to compensation for the "expropriation." This would significantly increase the cost to Morocco of taking such actions.

In its July 19 response, USTR states that the Investment Chapter has a broad exception for measures related to intellectual property rights that are consistent with the intellectual property provisions of the Agreement. USTR goes on to state that "a determination concerning the consistency of an action with [the intellectual property provisions] would be informed by the side letter." This suggests that waiver of the test data requirements to meet a public health need would fall within that exception.

We believe that the exception in the Investment Chapter should be more explicit for three reasons. First, the Government of Morocco likely faces more "exposure" to potential causes of action under the Investment Chapter than under the Intellectual Property Chapter. Unlike the Intellectual Property Chapter, the Investment Chapter gives private companies the ability to sue the Government of Morocco directly for compensation (i.e., investor-state arbitration). Private cases tend to be more easily brought than cases by a government. Second, investor-state arbitration decisions cannot be appealed (despite direction in TPA for an appellate mechanism). Therefore, if an arbitration panel decided that the side letters do not create a clear exception for measures to protect the public health, and the panel required Morocco to provide compensation for waiver of test data requirements related a drug, nothing could be done to appeal that decision. Third, this threat of liability for compensation could have a chilling impact on Morocco taking action to promote access to medicines.

USTR's clarification that the side letter exception should apply to defend a claim of expropriation of test data consistent with the side letter exception, however, does provide sufficient clarity in the context of this Agreement. That said, the clarification should be explicit in future agreements.

III. WESTERN SAHARA ISSUE

In 1975, Morocco annexed Western Sahara, which it now claims as its own territory. This claim is not considered legitimate by the United Nations or the United States, although the United States recognizes Morocco's administrative control over Western Sahara. The United States is supportive of a 2003 United Nations plan to allow a referendum in Western Sahara, which would allow its inhabitants (the Saharawis) to vote on whether to become part of the sovereign Kingdom of Morocco or become an independent, sovereign state. The Saharawis have agreed to the United Nations proposal but the Moroccan government has not; as such progress on resolving the status of this disputed territory has halted. Although the U.S.-Moroccan Free Trade Agreement does not apply to trade and investment in Western Sahara, we encourage the President to use opportunities created by the Agreement to expeditiously pursue a settlement of the issue of sovereignty in Western Sahara. In no way should this agreement be used to advance Morocco's legal claim to Western Sahara or deepen its economic engagement in this disputed territory.

July 21, 2004

Additional Views on H.R. 4842
"To implement the U.S. - Morocco Free Trade Agreement"