



November 25, 2002

Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20508
Attention: Gloria Blue, Executive Secretary

Re: U.S. - Morocco Free Trade Agreement -- BSA Response to
Request for Written Comments 67 Fed. Reg. 63,187 (Oct. 10, 2002)

Dear Trade Policy Staff Committee:

The Business Software Alliance appreciates the chance to comment on the proposed U.S.-Morocco Free Trade Agreement (FTA) in response to the above-referenced Federal Register notice. Our comments relate to U.S. negotiating objectives in the areas of trade-related intellectual property rights, electronic commerce, trade in services and trade in goods.

As a representative of the leading software and computer companies in the United States, BSA supports the United States' efforts to liberalize trade around the world, whether through multilateral, regional or bilateral negotiations. BSA member companies are active in the Moroccan market, and look to these FTA negotiations to ensure that Morocco (i) implements and enforces the highest standards of intellectual property protection, (ii) preserves a liberal trading environment for electronic commerce and digital products in particular, (iii) commits to provide full market access and national treatment across a broad range of service sectors necessary for e-commerce, and (iv) ensures duty-free access for high technology products.

Intellectual Property Rights

Consistent with the negotiating objectives set forth in the Trade Promotion Authority Act, BSA seeks to ensure that the U.S. - Morocco FTA promotes the adequate and effective protection of intellectual property rights. Its substantive standards of protection should reflect technological developments and its enforcement provisions should ensure that Morocco provides "accessible, expeditious and effective civil, administrative, and criminal enforcement mechanisms." *Bipartisan Trade Promotion Authority Act of 2002*, 19 U.S.C. § 3802(b) (4) (2002).

The U.S. - Moroccan FTA should follow the high standards of intellectual property protection that we understand have been established in the U.S. - Singapore FTA. As the United States pursues its policy of “competitive liberalization,” all our FTA partners should be held to the same high standards. Each FTA should address specific problems in the bilateral trade relationship, but each should also reflect a common baseline level of protection. For these bilateral agreements to set useful precedents and positively influence global standards of protection, consistency is important.

The Intellectual Property Environment in Morocco

	1997	1998	1999	2000	2001
Piracy Rate for Business Software	72%	72%	64%	60%	61%
Retail Software Revenue Lost to Piracy (in 000’s)	\$4,559	\$3,829	\$5,267	\$6,045	\$5,531

Moroccan authorities have made important efforts to strengthen copyright protection in their country. The enactment of a new Copyright Law on February 15, 2000, substantially improved the level of copyright protection in Morocco.

With one important exception, the new Copyright Law is generally consistent with the Berne Convention and the 1996 WIPO Copyright Treaty (WCT). Unfortunately, the law provides a term of protection for software of only 25 years from the making of such software. Such a short period of copyright protection for software products violates both the Berne Convention and the TRIPS Agreement. *See* Berne Convention, Article 7; TRIPS Agreement, Articles 9 and 12.

The Copyright Law must be amended to remedy this clear violation of WTO obligations and to provide a term of protection for computer programs consistent with the level of protection for other literary works. In light of the U.S. negotiating objective to provide in all FTAs a level of protection similar to that found in U.S. law, 19 U.S.C. § 3802(b)(4)A)(i)(II), the United States should require Morocco to commit to provide a term of protection for software consistent with U.S. standards.

Enforcement remains the crucial challenge for software publishers attempting to protect their rights in Morocco. The piracy rate for business software in Morocco remains at a relatively high level, although it decreased substantially from 1996 to 2000. This positive trend unfortunately reversed in 2001 and the piracy rate for business software rose slightly to 61%. The U.S. - Morocco FTA should contain strong, comprehensive TRIPS-plus enforcement provisions that target the following deficiencies in the Moroccan enforcement regime.

- *Level of criminal sanctions actually imposed:* Moroccan law makes available criminal sanctions of 3 months to 2 years imprisonment and a fine of up to 20,000 Dirhams (\$1,900). The sanctions actually imposed by criminal courts, however, are substantially lower and not sufficiently high to function as a deterrent. BSA is aware of only one criminal case where the defendants were sentenced to pay substantial fines of 5,000 - 10,000 Dirhams (\$475 - \$950). To BSA's knowledge, no jail sentences have ever been ordered by Moroccan criminal courts in copyright infringement cases.
- *Level of civil fines actually awarded:* Although the 2000 Moroccan Copyright Law provides that civil damages must be assessed by reference to the losses suffered by the right holders as well as by reference to the revenues unduly made by the infringers, the level of damages actually granted by Moroccan courts is not sufficient to help prevent further infringement and to provide adequate compensation to right holders. For example, in one case in which the aggregate retail value of the infringed software products was estimated to be 800,000 Dirhams (\$76,000), the Court of Appeal of Casablanca awarded only 55,000 Dirhams (\$5,200) to the U.S. software publisher.
- *Fines to enforce injunctions:* When issuing temporary or permanent injunctions against infringers to prevent them from making or using infringing software, Moroccan courts should ensure that the fine that will be imposed on the infringers if they fail to comply with the injunction is sufficiently high to constitute a true deterrent. Moroccan courts have set wildly inconsistent fines in these situations. In some cases, the courts have imposed fines that operate as a true incentive to comply with the injunction, but in other cases the fines have been only nominal. For example, in one case, the fine imposed on infringers who failed to comply with an injunction was set at only 500 Dirhams (\$47) per copy, which is far below the average retail value of most, if not all, of the business software products sold in Morocco.
- *Ex parte searches:* Moroccan copyright law contains provisions on civil *inaudita altera parte* searches and seizures and judges generally grant authorizations to conduct such searches and seizures. In software piracy cases, judges require that such searches and seizures be made with the assistance of an IT expert enrolled with the courts of Morocco. The problem is that there are less than a handful of IT experts enrolled with the courts in Morocco, and thus the execution of software searches is considerably slowed. Often, it takes six months for the IT expert appointed by the judge to become available to execute the search. After such a delay, proof of infringement often no longer exists in the premises to be searched.
- *BMDA:* In September 2000, BSA signed a cooperation agreement with the *Bureau Marocain du Droit d'Auteur* (BMDA, the Moroccan Bureau for Author's Rights) to coordinate BSA's and BMDA's efforts in the fight against software piracy in Morocco. BMDA is a government entity placed under the control and supervision of the Ministry of Communication. Although it is empowered to investigate acts of copyright infringement and to report such acts to the courts, it has yet to start investigating and reporting software piracy. The Moroccan government should ensure that BMDA lives up to its obligation to take a more active role in the fight against software piracy.

- From a more general standpoint, the Moroccan judicial system lacks adequate and sufficient financial, technical and human resources. Court proceedings are frequently delayed, and the official and enforceable copies of judgments are generally made available only several months after being rendered by the courts. Right holders who obtain favorable decisions from the courts therefore have to suffer unwarranted delay in enforcing these decisions.

Key Intellectual Property Provisions in the U.S. - Morocco FTA

BSA supports a Intellectual Property Rights Chapter which is forward-looking and technologically neutral, and addresses the specific deficiencies that have hindered copyright protection in Morocco. The Chapter should be TRIPS and NAFTA-plus, and should include the obligations in the WIPO Copyright Treaty, as well as effective enforcement provisions that respond to today's digital and Internet piracy realities.

In accordance with these goals, the following substantive obligations should be included in the U.S. - Morocco FTA Intellectual Property Rights Chapter:

- *WCT*: Morocco is not a party to the WIPO Copyright Treaty. As part of the FTA, it should be required to accede to that important treaty.
- *Right of reproduction*: The right of reproduction should include a specific and express reference to the right -- including both permanent and temporary copies -- in line with the Berne Convention, the TRIPS Agreement and the WCT.
- *Right of importation*: Copyright holders should have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the right holder.
- *Right of communication to the public*: Copyright holders should have the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.
- *Right of distribution*: Copyright holders should have the exclusive right to authorize the distribution to the public of the original and copies of their works through the sale or other transfer of ownership, as provided in Article 6 of the WCT.
- *Term of protection*: The United States should insist that Morocco remedy its clear TRIPS and Berne violation regarding the term of protection for computer software. Computer software should receive a term no less than any other literary work, and the term should be consistent with U.S. law in this area. Where the term of protection of a work is calculated on the basis of the life of a natural person, the term should be not less than the life of the author and 70 years after the author's death. Where the term of protection is calculated on a basis other than the life of a natural person, the term should be not less

than 95 years from the end of the calendar year of the first authorized publication of the work. Failing such authorized publication within 25 years from the creation of the work, the term should end not less than 120 years from the end of the calendar year of the creation of the work.

- *Technological protection measures*: A provision must be included in the FTA that tracks the WCT obligations on making illegal the circumvention of technological measures and that ensures that devices, services and components thereof are fully covered. Adequate and effective legal remedies, both criminal and civil, must be incorporated into the enforcement text. This is an essential element of a protection system that is adapted to the digital and Internet Age, where new forms of piracy are already causing substantial harm to the software industry.
- *Protection of rights management information*: As required by the WCT, adequate and effective legal remedies should be afforded to protect rights management information from unauthorized alteration and removal.
- *Government legalization of software*: The FTA should require that each country issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only properly licensed computer software. Such instruments should actively regulate the acquisition and management of software for such government use, including through requiring periodic inventories of software assets and licenses.
- *Contractual rights*: Any person acquiring or holding any economic rights should be able to freely and separately transfer such rights by contract. Any person acquiring or holding such economic rights by virtue of a contract, including contracts of employment underlying the creation of works, should be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.
- *Narrow exceptions to protection*: The FTA should require each country to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the right holder.
- *ISP liability*: The Agreement should contain balanced ISP liability provisions that reflect those in the U.S. Digital Millennium Copyright Act.

The enforcement section of the U.S. - Morocco FTA should attempt to provide greater clarity regarding TRIPS-level protection, as well as building on the obligations in that Agreement. More specifically,

- *Lack of resources does not excuse compliance*: It is important to clarify that a lack of resources does not excuse compliance with the enforcement obligations of the FTA.

- *Written decisions:* To ensure transparency and the effective execution of judgments in Morocco, decisions on the merits of a case shall be in writing, and shall be available to the parties within a reasonable period of time after the proceedings conclude.
- *Civil ex parte cases:* In civil cases, searches and seizures conducted *inaudita altera parte* should be statutorily implemented and requests should be acted upon and executed within a short time period, generally not to exceed 10 days. The United States should also seek a specific commitment from Morocco to increase the number of trained IT experts enrolled with the courts in order to ensure the expeditious execution of such search orders. Any security or bonding obligations should not unreasonably deter recourse to these procedures.
- *Level of fines and damages:* Statutory maximum fines must be sufficiently high to act as a deterrent and actual fines and damage awards should be imposed by the judicial authorities at a level to make this deterrent effect credible by removing any gain to the infringer. Civil damages should be sufficient to compensate the right holder for the injury suffered because of the infringement as well as the profits of the infringer that are attributable to the infringement and not otherwise taken into account. In determining injury to the right holder, the judicial authorities must consider the value of the infringed-upon good or service, according to the suggested retail price of the legitimate good or service, or other measures established by the right holder for valuing such good or service.
- *Statutory damages:* To ensure deterrent civil damages, a system of pre-established damages should be adopted. Statutory minimum fines should also be considered as an important part of an enforcement system with deterrent capability.
- *Presumption of authorship and subsistence:* To improve the operation of the civil justice system by making it easier for right holders and judges to bring cases to conclusion, the U.S. - Morocco FTA should provide that the physical person or legal entity whose name is indicated as the author of the work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the lawful right holder. In the absence of proof to the contrary, it should also be presumed that the copyright subsists in such subject matter. Such presumptions should also pertain to criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright.
- *Remedies for violations of TPMs and RMI obligations:* Civil and criminal remedies should be expressly extended to cover violations of technological protection measures and RMI obligations. All remedies and enforcement procedures applicable to copyright infringement should apply to the obligations dealing with the circumvention of technological protection measures and with rights management information.
- *Customs:* Customs authorities should be able to initiate border measures *ex officio*, without the need for a formal complaint by an authorized private party or association or

the right holder. Border measures should be applicable to goods in-transit and to goods destined for export.

- *Ex officio criminal actions*: The competent authorities in each country should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or right holder.
- *Criminal remedies*: Criminal remedies are an important component of a deterrent judicial system. Such remedies should be available at least in cases of significant willful infringements which have no direct or indirect motivation of financial gain, as well as in cases of willful infringement for purposes of commercial advantage or financial gain.

Electronic Commerce

One of the most important changes since the conclusion of the Uruguay Round Agreements is the evolution and development of the Internet and the e-commerce opportunities it promises. BSA Members have a tremendous stake in these developments. Today just 13 percent of software is sold on-line. A recent survey of BSA CEOs showed that by 2005, they expect that 66 percent of all software will be distributed through the Internet.

To ensure that the U.S. - Morocco FTA satisfies the U.S. negotiating objectives set forth in the TPA legislation and facilitates Morocco's integration into the high tech-economy, it is essential that the Agreement contain a high quality chapter on electronic commerce. The obligations in this chapter should ensure clarity and predictability in the international trade rules applicable to electronic commerce, should prevent barriers to electronic commerce from arising, and should preserve the current liberal trading environment for digital products.

A key goal of this Chapter must be to ensure that software delivered electronically receives the same benefits and concessions that software traded on a physical medium currently enjoys under existing WTO agreements. Software that is made available on-line should receive market access, MFN and national treatment no less favorable than the software would receive if it were traded as a good through physical delivery.

Key Elements of the E-commerce Chapter in the U.S. - Morocco FTA:

- Confirmation that the supply of a service by electronic means falls within the scope of obligations on services.
- A permanent prohibition on duties on the importation or exportation of digital products, including both the transmission and its content.
- A requirement that national treatment rules apply to digital products. The FTA should include an obligation not to discriminate against digital products on the basis that they are created, produced, published, stored, transmitted, contracted for, commissioned, or first

made available on commercial terms outside Morocco, or on the basis that the author, performer, producer, developer or distributor of such digital products is a foreign person.

- A requirement that MFN rules apply to digital products. The FTA should ensure that Morocco does not treat digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the United States less favorably than digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in other countries.
- A prohibition on imposing quantitative restrictions on digital products.
- A requirement that domestic regulations affecting digital trade be transparent and non-discriminatory and that Parties select the least trade restrictive measure available to address valid public policy objectives.
- A requirement that existing disciplines on subsidies apply to digital products.
- A requirement that any formalities, including border measures, should be streamlined or eliminated wherever possible to ensure they do not become impediments to e-commerce and the technology required to sustain and improve it. Any formalities must be transparent, notified to the other Party, and can not impose requirements on how the devices and software used to consummate an e-commerce transaction are designed or deployed.

Services

A vast array of e-commerce services has evolved since the conclusion of the Uruguay Round. These include data storage and management, web hosting, and software implementation services. Given the increasing trend for technology users to purchase information technology solutions as a combination of goods and services, rather than buy discrete information technology products that they then use to create their own solutions, liberalization in this area now has even greater importance. Just as many countries have taken actions to open their markets in order to reap the benefits of information technology goods, countries such as Morocco must now also focus their efforts on the liberalization of information technology services to fully realize the potential benefits that the combination of information technology goods and services can bring.

Morocco has very poor WTO commitments in the area of Computer and Related Services. It has made no market access or national treatment commitments at all for software implementation, data processing, database or maintenance and repair services. Morocco has made no commitments in Modes 1 and 2 for services related to computer installation.

As it has done in its other recently-concluded bilateral Free Trade Agreements, the United States should insist that the U.S. - Morocco FTA take a “top-down” approach to

scheduling services commitments. Such an approach ensures far superior coverage than the WTO GATS architecture. Furthermore, it is important that no exceptions be scheduled in the Computer and Related Services sector, such that Morocco commits to full market access and national treatment for all information technology services. This structure and scope will help ensure protection for evolving IT services, including those that are delivered electronically, and will help prevent new trade barriers from being created in the future.

In addition to services that are needed to create the infrastructure for electronic commerce (*e.g.*, computer and related services, communication, distribution and express delivery services), all services that can be delivered electronically should also be liberalized (*e.g.*, banking services). Liberalization of these sectors will help to drive increased demand for IT services, and will help Morocco become a full participant in the e-commerce marketplace.

Goods

Morocco is not a participant in the WTO Information Technology Agreement, and should be required to join as part of this FTA. More generally, BSA seeks the elimination or phase out of all tariffs and non-tariff measures applied to information technology products. Tariff and non-tariff measures raise the cost of the very technology Morocco needs to be competitive in the digital economy, and are counterproductive to its development efforts.

Finally, the FTA should contain a requirement that the customs value of imported carrier media bearing digital products be determined according to the cost or value of the carrier medium alone, without regard to the value of the content stored on the carrier medium.

Conclusion

BSA appreciates this opportunity to comment on the intellectual property, e-commerce, services and goods issues that should be addressed in the U.S. - Morocco FTA. Our members look forward to working with U.S. Government officials as the negotiations proceed, and stand ready to provide any additional information that might be useful to support the negotiators.

Respectfully Submitted,

Business Software Alliance