

**FINAL ENVIRONMENTAL REVIEW OF
THE UNITED STATES - MOROCCO FREE TRADE AGREEMENT
July 2004**

Executive Summary

Pursuant to authority delegated by the President in Executive Order 13277 (67 *Fed. Reg.* 70305) and consistent with Executive Order 13141 (64 *Fed. Reg.* 63169) and its Guidelines (65 *Fed. Reg.* 79442), the Office of the United States Trade Representative (USTR) submits this Final Environmental Review of the United States-Morocco Free Trade Agreement (FTA), as provided for under section 2102(c)(4) of the Trade Act of 2002 (Trade Act).

On October 1, 2002, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Robert B. Zoellick notified the Congress of the President's intent to enter into negotiations for a FTA with Morocco. The negotiations were successfully concluded on March 2, 2004.

The environmental review process examines possible environmental effects that may be associated with the FTA. This Final Environmental Review summarizes the Administration's conclusions regarding the environmental effects of the United States-Morocco FTA. In identifying and examining these possible effects, the Administration drew on public comments submitted in response to an Interim Review (announced in 68 *Fed. Reg.* 57503), the advice of relevant advisory committees, including the Trade and Environment Policy Advisory Committee (TEPAC) and relevant published economic analysis. The review also draws upon environmental and economic expertise of federal agencies. Consistent with Executive Order 13141 and its Guidelines, the focus of the review is on potential impacts in the United States. Additionally, this review includes consideration of global and transboundary effects.

Findings

1. In this Final Environmental Review, the Administration has concluded that changes in the pattern and magnitude of trade flows attributable to the FTA will not have any significant environmental impacts in the United States. While it is conceivable that there may be instances in which the economic and associated environmental impacts are concentrated regionally or sectorally in the United States, we could not identify any such instances.
2. The Final Environmental Review did not identify any significant transboundary or global environmental effects associated with the FTA.
3. In considering whether provisions of the FTA could affect, positively or negatively, the ability of U.S. federal, state, local, or tribal governments to enact, enforce, or maintain environmental laws and regulations, the Administration focused in particular on the provisions of the FTA's Environment Chapter and related dispute settlement provisions. We concluded that the FTA will not adversely affect the ability of U.S. federal, state, local, or tribal governments to regulate to protect the U.S. environment, and that these and related FTA provisions should have

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positive implications for the enforcement of environmental laws and the furtherance of environmental protection in both the United States and Morocco.

4. This review also carefully examined provisions of the Investment Chapter and their environmental implications. We were unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the Agreement's substantive investment obligations. We do not expect the FTA to result in a significantly increased potential for a successful challenge to U.S. environmental measures under the FTA's investor-State mechanism, as compared with the risk of a successful challenge in a U.S. court. The FTA's innovations, as compared with NAFTA Chapter 11, should further reduce the risk that arbitral tribunals will misapply the investment provisions of the FTA.

5. Finally, and as a complement to the FTA, the United States and Morocco signed a Joint Statement on Environmental Cooperation that will enhance the positive environmental consequences of the Agreement. In this Joint Statement the Parties agree to establish a Working Group on Environmental Cooperation that will develop a plan of action and set priorities for future environment-related projects.

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I. LEGAL AND POLICY FRAMEWORK

A. The Trade Act of 2002

The Trade Act of 2002 (Trade Act) establishes a number of negotiating objectives and other priorities relating to the environment. As relevant here, the Trade Act contains three sets of objectives: (i) overall trade negotiating objectives; (ii) principal trade negotiating objectives; and (iii) promotion of certain priorities, including associated requirements to report to Congress.

Overall environment-related trade negotiating objectives include:

- (1) ensuring that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources (section 2102(a)(5)); and
- (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade (section 2102(a)(7)).

In addition, the Trade Act establishes the following environment-related principal trade negotiating objectives:

- (1) ensuring that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement (sections 2102(b)(11)(A)&(B));
- (2) strengthening the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development (section 2102(b)(11)(D));
- (3) reducing or eliminating government practices or policies that unduly threaten sustainable development (section 2102(b)(11)(E));
- (4) seeking market access, through the elimination of tariffs and non-tariff barriers, for U.S. environmental technologies, goods and services (section 2102(b)(11)(F)); and
- (5) ensuring that environmental, health or safety policies and practices of parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade (section 2102(b)(11)(G)).

The Trade Act also provides for the promotion of certain environment-related priorities and

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associated reporting requirements, including:

- (1) seeking to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science and reporting to the Committee on Ways and Means and the Committee on Finance (“Committees”) on the control and operation of such mechanisms (section 2102(c)(3));
- (2) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant Guidelines, and reporting to the Committees on the results of such reviews (section 2102(c)(4)); and
- (3) continuing to promote consideration of multilateral environmental agreements and consultation with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the GATT 1994 (section 2102(c)(10)).

B. The Environmental Review Process

The framework for conducting environmental reviews of trade agreements under the Trade Act is provided by Executive Order 13141 – *Environmental Review of Trade Agreements* (64 *Fed. Reg.* 63169) and the associated Guidelines (65 *Fed. Reg.* 79442). The Order and Guidelines are available on USTR’s website at <http://www.ustr.gov/environment/environmental.shtml>.

The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), identify complementarities between trade and environmental objectives and help shape appropriate responses if environmental impacts are identified. Section 5(b) of Executive Order 13141 provides that “as a general matter, the focus of environmental reviews will be impacts in the United States,” but “[a]s appropriate and prudent, reviews may also examine global and transboundary impacts.” Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality (CEQ) jointly oversee implementation of the Order and Guidelines. USTR, through the Trade Policy Staff Committee (TPSC), is responsible for conducting the individual reviews.

The environmental review process provides opportunities for public involvement, including an early and open process for determining the scope of the environmental review (“scoping”). Through the scoping process, potentially significant issues are identified for in-depth analysis, while issues that are less significant – or that have been adequately addressed in earlier reviews – are eliminated from detailed study.

The Guidelines recognize that the approach adopted in individual reviews will vary from case to

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case, given the wide variety of trade agreements and negotiating timetables. Generally, however, reviews address two types of questions: (i) the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the prospective agreement; and (ii) the extent to which proposed agreement provisions may affect U.S. environmental laws and regulations (including, as appropriate, the ability of state, local and tribal authorities to regulate with respect to environmental matters).

II. BACKGROUND

A. Economy and Environment in Morocco

Morocco is a lower-middle-income developing country of about 30 million people, predominantly Muslim, located in Northern Africa. Morocco borders the North Atlantic Ocean and the Mediterranean Sea and has a land area of 446,300 square kilometers (slightly larger than California), including a coastline of 1,835 km. Approximately 20 percent of the land is arable. The northern coast and interior of the country are mountainous with large areas of bordering plateaus, intermontane valleys, and rich coastal plains. The climate is Mediterranean.

In 2002, Morocco's gross domestic product (GDP) was \$37.3 billion (approximately \$1,200 per capita).¹ Services account for more than half of GDP (53 percent in 2002). Agriculture continues to be an important component of GDP (16 percent in 2002), but is highly variable as a consequence of periodic droughts. Trade is important to Morocco's economy: exports of goods and services accounted for 30 percent of GDP in 2002 (about \$11 billion), although Morocco is a net importer of both goods and services. Manufactures account for more than half of goods exports. Morocco's trade has historically focused on European markets. The European Union (EU) provided nearly 55 percent of Morocco's imports and took in nearly 67 percent of Morocco's exports in 2002.

Morocco has initiated significant economic reforms in recent years. The most promising reforms generally have focused on increased transparency across economic sectors. Morocco also has launched an initiative to streamline investment procedures and eliminate barriers to foreign and domestic investment. However, Morocco continues to face economic challenges characteristic of developing countries, including sustaining economic growth consistent with a growing population and labor force, while at the same time restraining government spending.

Morocco also faces environmental challenges common to many developing countries experiencing economic growth: pressure on natural resources and the environment that are the consequence of population growth; urbanization; limited funds available for natural resource management; and a nascent legal and regulatory framework for environmental protection. Nevertheless, Morocco has demonstrated a commitment to address its environmental challenges, and attention to environmental issues has increased markedly in recent years. Since the 1980's,

¹ These are the most recent data available; see: <http://www.worldbank.org/data/countrydata/countrydata.html>.

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Morocco has developed and started to implement action plans and programs to protect its environment. Most of the early programs were very general and addressed primarily water management issues. Morocco is currently in the process of updating its environmental regulatory regime through development of additional and more detailed environmental legislation.

In 1992, Morocco developed a National Action Plan for the Environment (PANE). Created with the support of the United Nations Development Program (UNDP) and the UN Fund for Population, the goal of PANE is to design tangible, concrete actions that reflect the objectives stated in Morocco's national environmental strategy and ensure their continuing development. Over 165 specific actions are recommended in the PANE, which is structured around seven broad priorities that reflect Morocco's environmental objectives: 1) protection and sustainable management of water resources; 2) protection and sustainable management of soil resources; 3) air protection and promotion of renewable energies; 4) protection and sustainable management of natural surroundings; 5) prevention of natural disasters and major technological risks; 6) improving urban and urban-related areas; and 7) environmental management and communication.²

In 1995, the Moroccan government reorganized its environmental protection and regulatory agencies, which had previously been dispersed, into one central entity - the Ministry of Regional Development, Urbanism, Habitat, and the Environment. Within the Ministry, the Department of Environment is responsible for the coordination of environmental activities and for implementation of the national environmental strategy, including drafting of Morocco's environmental laws and regulations. Among the Department's priorities is establishing a regulatory framework for the protection of Morocco's environment.³ In addition to the Department of Environment, several other ministries now include special offices concerned with environmental matters, including the Ministries of Agriculture, Fisheries, and the Interior. Morocco also created a National Environment Council, chaired by the Prime Minister, with representation from all ministries.

In January 2003, the Moroccan Parliament approved three important environmental laws: a general framework law on environmental protection; a law requiring environmental impact assessments; and an air pollution law. These laws have entered into force and implementing decrees are expected to be issued later this year. A bill concerning waste management and disposal practices is awaiting passage in the Moroccan Parliament. There are also a number of additional laws under development within the Department of Environment, including laws concerning management of coastal zones.

Although Morocco has demonstrated an increasing commitment to environmental protection and sustainable development, it still faces major challenges. The quality and quantity of water

² For further information see: <http://www.minenv.gov.ma> and www.undp.org/capacity21/arabstates/morocco.html.

³ An inventory of Morocco's environment-related laws and regulations (in French) can be found at <http://www.minenv.gov.ma>.

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present challenges for the country, which experiences recurring and severe droughts. Water pollution is a nationwide problem and, in addition to the health risks, creates social, environmental, and economic problems. To address water issues in 1995 Morocco enacted a water law, which is much more detailed and prescriptive than prior water-related measures. The law creates nine river basin agencies to manage water at the local level and regulates water use in an integrated manner. Water quality norms also were established. In addition, air pollution, resulting primarily from fossil fuel emissions, poses health and environmental risks, particularly in and around the industrial centers. The recently passed air pollution law is expected to help address this problem. Land degradation, caused by a variety of factors, including overgrazing, destruction of vegetation, and unsustainable farming practices, also is an environmental concern and results in loss of biodiversity as well as soil erosion.

Morocco has only begun to address seriously its environmental challenges and will need to continue to develop its environmental regulatory regime in order to meet the many goals that it has set out for itself in the PANE. Morocco faces resource constraints in its implementation, but the high-level commitment on the part of the Moroccan Government, including the personal commitment of King Mohammed VI, bodes well for Morocco's environmental future.

The inclusion of environment-related commitments as an integral part of the FTA is expected to increase awareness of environmental issues in Morocco and help support Morocco's environmental development priorities. Morocco is undertaking an environmental review of the FTA, which will focus in particular on potential impacts in the Moroccan agricultural sector.

B. United States-Morocco Trade

Two-way goods trade between Morocco and the United States totaled \$853.7 million in 2003.⁴ U.S. goods exports to Morocco totaled \$468.5 million, less than 0.1 percent of U.S. goods exports to all destinations in 2003. Goods trade between Morocco and the United States is relatively small (currently about 3 percent of Morocco's total exports) and for most products shows considerable variation from year to year.

The United States enjoyed a goods trade surplus with Morocco of \$83.3 million in 2003. Agricultural products (including cereals, grains, and oilseeds) accounted for 32 percent of U.S. goods exports to Morocco in 2003. Aircraft exports also were sizable, but vary from year to year. Notable U.S. export sectors in 2003 include: cereals (\$75 million); miscellaneous grain, seed and fruit (\$57 million); and machinery (\$39 million).

In 2003, the largest categories of U.S. imports from Morocco were: electrical machinery (\$93 million); salt, sulfur, earth and stone (\$70 million); apparel (\$49 million); and fruit and nuts (\$30 million). Because U.S. tariffs are already relatively low, and Morocco already benefits from

⁴ Detailed trade statistics are available from the U.S. Department of Commerce at <http://www.export.gov/tradestatistics.html>.

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special tariff treatment for many items through the Generalized System of Preferences, U.S. imports are not expected to change significantly as a result of the FTA.

U.S. foreign direct investment (FDI) in Morocco was reported to be \$269 million in 2002, a 0.4 percent increase from 2001.⁵ Morocco and the United States currently have a bilateral investment treaty in force. An investment chapter in the FTA is expected to build on that relationship.

III. The United States-Morocco FTA

A. Overview of the FTA

The FTA will expand an already strong relationship with a key economic and political partner in the Middle East. The FTA consists of a preamble and the following 22 chapters and associated annexes: establishment of a Free Trade Area and definitions; national treatment and market access for goods; agriculture; textiles and apparel; rules of origin; customs administration; technical barriers to trade; safeguards; government procurement; investment; cross-border trade in services; financial services; telecommunications; electronic commerce; intellectual property rights; labor; environment; transparency; administration of the agreement; dispute settlement; exceptions; and final provisions. The complete text of the FTA, related annexes and side letters, and summary fact sheets are available on USTR's website at <http://www.ustr.gov/new/fta/Morocco/final/index.htm>.

Based on the scoping process and developments since the interim review, the following is a summary of the FTA provisions most relevant to this Final Environmental Review. The provisions of the environment chapter are described in Section III.B.

Market Access for Goods

The FTA establishes the principal of national treatment and provides specific definitions and related industrial goods provisions. Tariff commitments by the United States and Morocco provide immediate benefits for both Parties. More than 95 percent of bilateral trade in consumer and industrial products will become duty free immediately upon entry into force of the FTA. All remaining tariffs will be eliminated within 9 years of entry into force.

Customs Matters and Rules of Origin

The FTA establishes methods for valuing products used to qualify for preferential treatment, creating obligations related to FTA preferential trade. Product-specific rules of origin are listed and the FTA establishes specific obligations on customs procedures to ensure compliance with laws governing importation. The FTA requires transparency and efficiency in customs

⁵U.S. Department of Commerce, *Survey of Current Business*, September 2003.

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administration, with commitments to publishing laws and regulations and ensuring procedural certainty and fairness. The FTA also includes a commitment to share information to combat illegal trans-shipment of goods.

Technical Barriers to Trade (TBT)

The FTA reaffirms commitments to the WTO Agreement on Technical Barriers to Trade (TBT) and creates a process for enhanced cooperation and coordination on technical regulations and standards.

Intellectual Property Rights (IPR)

The IPR Chapter provides for strong protection of copyrights, patents, trademarks and trade secrets, including enhanced enforcement and non-discrimination obligations for all types of intellectual property. Through the copyright provisions, Parties will address the challenge of providing protection in the digital environment of the internet and provide important protection for performers and producers of phonograms. Under the FTA, the Parties will provide strong protections for trademarks and will apply the principle of “first-in-time, first-in-right” to trademarks and geographic indicators applied to products. The chapter streamlines trademark filing processes while providing greater protection of owners’ rights.

Services

Substantial market access across the entire services regimes was achieved, subject to very few exceptions (based on a “negative list” approach); the disciplines of national treatment and MFN are extended to the Parties’ services suppliers. Commitments apply across a wide range of sectors and provide for nondiscriminatory treatment through strong disciplines on both cross-border supply of services and the right to invest and establish a local services presence. Traditional market access to services is supplemented by detailed disciplines on regulatory transparency. The FTA requires regulatory authorities to use open and transparent administrative procedures, consult with interested parties before issuing regulations, provide advance notice and comment periods for proposed rules and to publish all regulations.

Investment

The FTA's Investment Chapter establishes a more predictable framework for U.S. investors operating in Morocco. The FTA includes major obligations pertaining to non-discrimination (national treatment and MFN), expropriation, free transfers related to covered investments, prohibition on use of performance requirements, minimum standard of treatment, and limitations on requirements on senior managers.

Government Procurement

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U.S. and Moroccan Government entities will benefit from using open, transparent and non-discriminatory procurement procedures. The Chapter includes requirements for advance public notice of purchases, as well as timely and effective bid review procedures.

Transparency

The Transparency Chapter ensures that laws, regulations, procedures and administrative rulings on matters covered by the FTA are published and made available to the public, requiring notification of proposed measures and providing for a reasonable opportunity for interested parties to comment, whenever possible. Procedures for review and appeal of administrative actions covered by the FTA also are provided.

Trade Remedies

The FTA establishes provisions for implementing several bilateral safeguards and maintains the Parties' rights under the WTO Safeguards Agreement. A Party may exclude imports from the other Party from a WTO safeguard measure, if imports from the other Party are not a substantial cause of serious injury or threat of serious injury.

Labor

The FTA's Labor Chapter reaffirms the Parties' obligations as members of the International Labor Organization (ILO), and commits them to strive to ensure that their domestic laws provide for labor standards consistent with internationally recognized labor principles. Labor obligations are part of the core text of the Agreement. The United States and Morocco agree that it is inappropriate to weaken or reduce domestic labor protections to encourage trade or investment. Further, the FTA requires the Parties to effectively enforce their domestic labor laws, enforceable through the Agreement's dispute settlement procedures. Procedural guarantees ensure that workers and employers will continue to have fair, equitable, and transparent access to labor tribunals/courts. The Parties also establish a process for further cooperation on labor matters.

Dispute Settlement

The FTA provides for clear dispute procedures which set high standards of openness and transparency, calling for open public hearings and the public release of legal submissions by Parties. It provides opportunities for interested third parties to submit views. It promotes compliance through consultation, joint action plans and trade-enhancing remedies. Core obligations of the FTA, including labor and environment provisions, are subject to the dispute settlement provisions with the use of special labor or environment expertise for disputes in these areas. The chapter includes an enforcement mechanism providing for monetary assessments to enforce commercial, labor and environmental obligations of the trade agreement.

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Exceptions

For certain chapters, the Parties agreed to incorporate into the FTA Article XX of the GATT 1994 and the GATS Article XIV, including footnotes. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

The Parties also understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health. Nothing in the FTA shall be construed to compel a Party to reveal information contrary to its essential security interests, or from applying measures that it considers necessary to its essential security interests.

B. The FTA Environment Chapter and Related Environmental Provisions

Environmental obligations are part of the core text of the Agreement. The FTA commits Parties to effectively enforce their domestic environmental laws, and enforces this obligation through the FTA's dispute settlement procedures. Under the environment chapter, the Parties commit to ensure that domestic environmental laws will provide for high levels of environmental protection and strive to continue to improve such laws. Provisions also specify that it is inappropriate to weaken or reduce domestic environmental protections to encourage trade or investment.

To assist in the administration and implementation of the FTA, the Parties also agreed to establish a sub-committee dedicated to environmental affairs via a side letter, which constitutes an integral part of the FTA. This Sub-committee on Environmental Affairs will be composed of appropriate government officials from each Party and is expected to meet regularly to discuss matters related to the operation of the Environment Chapter.

The FTA also promotes a comprehensive approach to environmental protection. Procedural guarantees that ensure fair, equitable and transparent proceedings for the administration and enforcement of environmental laws are married with provisions that promote voluntary, market-based mechanisms to protect the environment. Finally, the Parties agreed to build on their history of collaboration and cooperation on environmental matters by negotiating a Joint Statement on Environmental Cooperation.

The Joint Statement outlines existing environmental cooperation activities and identifies opportunities for future cooperation. Through the Joint Statement the Moroccan and U.S. Governments announce their intention to consult regularly to review ongoing cooperative activities and to identify priority areas for potential future cooperative activities. They also agree to continue to promote public participation and cooperation between governments and civil society as a means of enhancing environmental stewardship and sustainable natural resource management.

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In the Joint Statement, the Governments recognize their common concerns and responsibilities for environmental protection and the sustainable use of natural resources. They reiterate commitments to continued cooperation on environmental issues. See Section VII for further information on environmental cooperation.

IV. Public and Advisory Committee Comments

To determine the scope of the review, the Administration considered information provided by the public and solicited comments through notices in the *Federal Register* and at a public hearing. Section IV.A summarizes public comments. In addition to providing guidance on the scope of the environmental review, any information, analysis, and insights available from these sources were taken into account throughout the negotiating process and were considered in developing U.S. negotiating positions.

Pursuant to Trade Act requirements (section 2104(e)), advisory committees, including the TEPAC, submitted reports on the U.S.-Morocco FTA to the President, USTR and Congress within 30 days after the President notified Congress of his intent to enter into the agreement. The TEPAC report is summarized in section IV.B.

A. Public Comments

The review was formally initiated by publication of a notice in the *Federal Register*, which requested public comment on the scope of the review (*see* 67 *Fed. Reg.* 70476, November 22, 2002). The Administration also requested public comments on all aspects of the negotiations and held a public hearing to discuss issues raised in connection with the FTA, including environmental issues (*see* 67 *Fed. Reg.* 63187, October 10, 2002). Comments and testimony addressing environmental issues received in response to that notice were taken into account in the preparation of the Interim Review. The availability of an Interim Review was announced in the *Federal Register* (*see* 68 *Fed. Reg.* 57503, October 3, 2003) and provided a further opportunity for public comments.

There were no public comments on the scope of the environmental review. Public comment on the Interim Review drew attention to the economic and environmental importance of water management in Morocco, including the need for investment in wastewater treatment and effective enforcement of environmental laws.⁶ A list of organizations that provided comments on the Interim Review is included in the annex.

B. Advisory Committee Report

Under Section 135(e) of the Trade Act of 1974, as amended, Advisory Committee reports must include advisory opinions as to whether and to what extent an agreement promotes the economic

⁶ See section II.A for background information on Morocco's environment.

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interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002. The reports must also include advisory opinions as to whether an agreement provides for equity and reciprocity within the sectoral or functional area of the particular committee. The advisory committee reports are available at: <http://www.ustr.gov/new/fta/Morocco/advisor/index.htm>.

A majority of TEPAC members supported the conclusion that the FTA provides adequate safeguards to ensure that Congress's environmental negotiating objectives will be met and expressed satisfaction at the manner in which environmental issues were integrated into the drafting of the Agreement. A majority of the Committee expressed the view that trade agreements can create opportunities to enhance environmental protection, noting that trade opens markets, creates business and employment opportunities, and can increase economic growth, leading to increased wealth and providing opportunities to enhance environmental protection, including the creation of a political will in favor of such protection. However, they also noted that trade can create and amplify adverse externalities that require enhanced regulatory oversight.

A majority of the Committee members concluded that the public participation and dispute resolution provisions are acceptable, although the majority also expressed the view that additional elements and obligations could have been added to both sets of provisions. The majority agreed that monetary assessments of up to \$15 million per year for instances of non-compliance with enforcement obligations is adequate.

With respect to investment, a majority of TEPAC found that the FTA's investment protection and dispute resolution provisions represented an improvement over corresponding provisions in the North American Free Trade Agreement (NAFTA). They believe that these FTA provisions reduce the possibility of successful challenges to a U.S. environmental measure. In addition, a majority of TEPAC took comfort in specific language clarifying the relationship between investment and environmental obligations.

Finally, a majority of TEPAC members agreed that the U.S.-Morocco Joint Statement on Environmental Cooperation provides a reasonable basis for meeting objectives regarding capacity building and sustainable development.

V. Potential Economically-driven Environmental Effects

Section V.A discusses the possible direct impacts of the FTA on the U.S. environment resulting from changes in the U.S. economy. Section V.B describes environmental issues associated with possible transboundary effects of the FTA. Although possible domestic impacts are the primary concern of this Final Environmental Review, global and transboundary impacts are to be considered as appropriate and prudent.

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A. Potential Impacts in the United States

Although Morocco is an important market for some U.S. producers and exporters, the impact of the FTA on total U.S. production resulting from changes in U.S. exports appears likely to be very small. Exports to Morocco currently account for less than 0.1 percent of total U.S. exports and a very small portion of total U.S. production.⁷ The FTA is expected to provide improved market access for some products, but substantial increases in U.S. exports and production are not expected.

Model-based analysis of the possible economic effects of the FTA provided a range of estimates of the impact on the U.S. economy: from an increase of 0.01 percent to an increase of 0.05 percent in GDP.⁸ Although small changes in production and exports in environmentally-sensitive sectors could have implications for the FTA's direct environmental effects in the United States, no such implications were identified. Therefore, we concluded that the FTA will not have any significant economically-driven environmental effects in the United States.

B. Transboundary and Global Issues

The Guidelines for environmental reviews encourage consideration, as appropriate, of potential transboundary and global environmental consequences that may flow from the prospective trade agreement. In examining these issues, the Administration took into consideration a number of factors, including the lack of shared borders with Morocco, the relatively significant geographic distance between the two countries and the *de minimus* anticipated environmental effects of the FTA in the United States. The Interim Environmental Review provides an extended discussion, including background information, on the possible environmental effects of the FTA through economic growth in Morocco and trade in selected goods and services.⁹ The following is a summary of our further consideration of these topics. We did not identify any significant transboundary or global effects of the FTA.

Our examination of possible transboundary and global effects of the FTA included consideration of the possible economically-driven environmental effects in Morocco. As compared to its effect in the United States, the FTA is expected to have relatively greater effects on the economy of Morocco. Changes in exports may be relatively small, however, because Morocco's exports to the United States already face low or zero tariffs. The FTA's investment provisions could contribute to increased production through U.S. investment in Morocco, although this is difficult to predict and analyze given the complex mix of considerations that shape investment decisions.

⁷ See section II.B.

⁸ See: D. Brown, K. Kiyota and R. Stern, "Computational Analysis of the Economic Effects on the United States of the U.S. Bilateral Free Trade Agreements with Central America, Australia and Morocco," April, 2004; and N. Behraves, R. Fullenbaum and J. Fuller, "Impact of the U.S. Morocco Free Trade Agreement on U.S. Employment by Industry," March, 2004; (both studies are available at: <http://www.dol.gov>).

⁹ The Interim Environmental Review is available at: <http://www.ustr.gov/environment/environmental.shtml>.

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The FTA may have positive environmental consequences in Morocco. Implementation of the FTA should positively affect Morocco's environment through FTA provisions requiring each country to effectively enforce its environmental laws, ensure that its environmental laws and policies provide for high levels of environmental protection, and not weaken environmental laws to attract trade and investment. In addition, certain aspects of economic activity stimulated by the FTA may have positive environmental consequences. For example, the FTA's provisions for the liberalization of goods, services and investment, and the protection of intellectual property could encourage increased dissemination of environmentally beneficial technology. The FTA also provides a context for reinforcing and extending existing cooperation activities to address both trade-related and other environmental issues.

Fisheries

Morocco is a low-cost, competitive producer of a number of fishery products based on abundant stocks in its territorial waters. The FTA is not expected to significantly affect production and exports to the United States because most of these products already enter the United States duty-free. Based on existing patterns of trade, the FTA provisions and conditions in fisheries in which Morocco is competitive, the FTA is not expected to have any significant, economically-driven environmental effects on U.S. or Moroccan fisheries.

Wildlife Trade and CITES

There is relatively little trade between the United States and Morocco in wild flora and fauna, including plants and animals listed on appendices of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). Generally, U.S. tariffs on wild plants and animals are already low; as a consequence, it is unlikely that the FTA will lead to an increase in this trade.

Both Morocco and the United States are parties to CITES and although Morocco ratified CITES in 1975, it has been classified as a "Category 3" country under the CITES National Legislation Project. Category 3 includes countries whose CITES implementing legislation "meets some requirements for CITES implementation, while additional legislation is needed in many areas." Morocco's status was reviewed by the CITES Standing Committee at its 50th meeting in April 2004 and will be reviewed again at the 51st meeting of the Committee. In the absence of legislative action by Morocco, further measures (which may include restrictions on commercial trade in specimens of CITES-listed species) could be required.¹⁰

The United States addresses concerns related to CITES-regulated species and effective implementation of CITES within the framework of CITES and through cooperation between the U.S. CITES Management Authority (the U.S. Fish and Wildlife Service) and the Moroccan Management Authority. The FTA can provide opportunities to reinforce such efforts through

¹⁰ See SC50 Doc. 29 (March 2004) and the report of the 50th meeting of the Standing Committee, available at <http://www.cites.org/eng/cttee/SC/index.shtml>.

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commitments to effectively enforce environmental laws and to ensure that environmental laws provide for high levels of environmental protection, as well as through additional environmental cooperation activities.

Environmental Goods and Services

Environmental goods and services can improve quality of life and economic well-being, enhance economic efficiency and foster environmentally sound business practices by helping control and mitigate air, water and soil pollution.¹¹ U.S. trade with Morocco in environmental goods is currently small, but FTA provisions to phase-out tariff and non-tariff barriers are expected to facilitate increased U.S. exports of environmental goods. Because U.S. trade barriers affecting these goods are already low, the FTA is unlikely to have any substantial impact on imports of environmental services by the United States. Because Morocco's services-related commitments in the FTA will be more comprehensive than those under GATS, the FTA may lead to increased imports of U.S. environmental services by Morocco. Therefore, through increased trade in environmental goods and services, the FTA may contribute to improvements in the environment of Morocco.

Tourism

Tourism is an integral element of Morocco's efforts to diversify and strengthen its economic base, and the Moroccan government has outlined an ambitious plan to increase its tourism sector. Tourism has the potential to create opportunities for sustainable development but it also may introduce new environmental stresses. The most significant tourism-related threats to the environment include land development (affecting terrestrial and especially coastal ecosystems), pressure on marine resources and habitats, air pollution, water pollution and solid waste disposal. Further threats to wildlife result from souvenir trade.

This review did not identify any significant governmental restrictions on the provision by U.S. firms of tourism services in Morocco. Therefore, we did not identify any direct impacts of the FTA on the tourism sector in Morocco.¹² The FTA's investment provisions could lead to increased investments in the tourism sector in Morocco, although this is difficult to predict and analyze given the complex mix of considerations that shape such business decisions. The FTA provides opportunities, however, to build on existing cooperative activities to encourage tourism development that is consistent with protection of cultural and natural resources.

¹¹ This broad sector includes goods and services related to: water and wastewater treatment; air pollution control; solid waste management; consulting; engineering and other related services; and hazardous and medical waste management.

¹² The FTA is not expected to have any impact on tourism services in the United States because the U.S. market for such services is already open.

VI. Potential Regulatory Impacts

A. Regulatory Review

Consistent with Executive Order 13141 and its Guidelines, this review included consideration of the extent to which the FTA might affect U.S. environmental laws, regulations, policies and/or international commitments. Within the range of FTA obligations, those related to investment, services and TBT can have particular significance for domestic regulatory practices concerning the environment, health and safety. Previous environmental reviews, including the preliminary and final reviews for the Jordan, Chile and Singapore FTAs, have considered potential impacts on the U.S. regulatory regime with respect to all of these obligations and have found that the respective trade agreements were not anticipated to have a negative impact on U.S. legal or regulatory authority or practices. Further, the reviews noted the potentially positive impact that the FTAs could have on the U.S. environmental regulatory regime as a result of FTA commitments to effectively enforce U.S. environmental laws, not weaken U.S. environmental laws to attract trade or investment, and ensure that U.S. environmental laws and policies provide for high levels of environmental protection.

Based on this previous analysis, and given that the core obligations in these areas are similar to those undertaken in the previous FTAs¹³, the Administration concluded that the FTA will not have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations.

For a more in-depth analysis of general FTA commitments and their potential regulatory impacts in the United States, see the preliminary and final reviews for Jordan, Chile and Singapore FTAs at <http://www.ustr.gov/environment/environmental.shtml>.

B. Investment

Investment provisions in FTAs were a matter of intense debate during Congress' consideration of the Trade Act. The central question was the appropriate balance that should be struck between protecting the rights of U.S. investors abroad and preserving the ability of the federal government and state and local governments to regulate with respect to health, safety and the environment.

In the Trade Act, Congress recognized that securing a stable investment climate and a level playing field for U.S. investment abroad is an important objective of U.S. trade policy. By fostering economic growth and job creation, investment can bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection.

¹³ For information on FTAs, see the USTR website at <http://www.ustr.gov/new/fta/>.

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Congress, however, also gave weight to concerns that arbitral claims brought by investors against governments (through “investor-State” provisions) could be used inappropriately to challenge U.S. domestic laws and regulations, including those concerning environment. As the Conference Report accompanying the Trade Act states, “it is a priority for negotiators to seek agreements protecting the rights of U.S. investors abroad and ensuring the existence of a neutral investor-State dispute settlement mechanism. At the same time, these protections must be balanced so that they do not come at the expense of making U.S. Federal, State, and local laws and regulations more vulnerable to successful challenges by foreign investors than by similarly situated U.S. investors.”¹⁴

The Trade Act strikes a balance between these two goals by setting U.S. trade negotiating objectives in a way that clarifies several substantive investment obligations of particular concern (notably provisions on expropriation and “fair and equitable treatment”). The objectives seek to ensure that foreign investors in the United States are not accorded greater rights than U.S. investors in the United States, while also securing for U.S. investors abroad core protections that are comparable to those that would be available to them under U.S. law. The Trade Act also establishes objectives to include a number of innovations in the investor-State procedures to help ensure that arbitral tribunals interpret substantive obligations in a consistent and coherent manner. After enactment of the Trade Act, the Administration consulted extensively with Congress and with the business and environmental NGO communities to clarify provisions and develop new procedures and to ensure that those provisions fully satisfied the Act’s objectives. These provisions were ultimately incorporated into the Chile and Singapore FTAs that Congress approved in 2003, and have been included in the FTAs we have negotiated since then, including the Morocco FTA.

The environmental reviews of the Singapore and Chile FTAs examined the investment provisions in detail, particularly those clarifications and improvements as compared with previous provisions, such as those of NAFTA Chapter 11. We concluded that the investment provisions should not significantly affect the United States’ ability to regulate in the environmental area.¹⁵ In this review, we have re-examined that conclusion in light of public and advisory committee comments and our most recent experience.

Relevant FTA Investment Provisions

As relevant here, the Morocco FTA Investment Chapter includes the following substantive clarifications and procedural innovations, as developed based on careful consideration of Trade Act guidance and consultations with interested constituencies:

- *Expropriation.* The expropriation provisions have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice, including a clarification

¹⁴ See: H.Rpt. No. 624, 107th Cong., 2d Sess., at 155 (2002).

¹⁵ The Interim and Final Environmental Reviews for the U.S.-Chile FTA and the U.S.-Singapore FTA are available at: <http://www.ustr.gov/environment/environmental.shtml>

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that nondiscriminatory regulatory actions designed and applied to protect the public welfare (including environmental protection) do not constitute indirect expropriation “except in rare circumstances.” To determine whether an indirect expropriation has occurred, the annex directs tribunals to examine several factors, which derive from the analysis of the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the seminal case on regulatory expropriation. The annex also clarifies that only property rights or interests in an investment are subject to the Agreement’s obligations with respect to expropriation.

- *Minimum standard of treatment/“fair and equitable treatment.”* The minimum standard of treatment obligation, including the obligation to provide “fair and equitable treatment” and “full protection and security,” is clarified to provide that these concepts do not require treatment in addition to or beyond that contained in customary international law, and do not create additional rights. Specifically, “fair and equitable treatment” is defined to include the obligation not to “deny justice” in criminal, civil or administrative adjudicatory proceedings, in accordance with “due process” protections provided in the principal legal systems of the world, including that of the United States. An annex gives further guidance concerning the Parties’ understanding of the term “customary international law.”
- *Increased transparency in the investor-State mechanism.* The FTA provides that all documents submitted to or issued by an arbitral tribunal shall promptly be made public and that hearings are open to the public, subject to provisions ensuring the protection of classified and business confidential information. It also expressly authorizes *amicus curiae* submissions, allowing the public to present views on issues in dispute.
- *Elimination and deterrence of frivolous claims.* The FTA includes an expedited procedure to allow for the dismissal of frivolous claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, *i.e.*, the claimant has failed to state a claim upon which relief may be granted) and for the dismissal of claims based on jurisdictional objections. It also expressly authorizes awards for attorneys’ fees and costs after a tribunal decides, as a preliminary question, whether to dismiss a claim for lack of jurisdiction or for failure to state a claim on which relief may be granted.
- *Promoting consistency and coherence of arbitral decisions.* The FTA allows interim review of draft tribunal decisions by litigants and by the non-litigating FTA partner. The litigants may comment on the draft decision. In addition, the investment chapter contemplates the establishment of an *appellate mechanism* to review arbitral awards. The Parties may seek to develop a bilateral appellate mechanism or agree that awards rendered in investor-State arbitration under the Agreement will be subject to review by an eventual multilateral appellate mechanism.

In addition to these improvements developed specifically in response to the Trade Act, the FTA

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includes several provisions, similar to those in previous agreements, that allow flexibility for environmental regulators and demonstrate the Parties' intent that the investment obligations should be interpreted in a manner consistent with each Party's ability to regulate in the environmental area:

- *National treatment and most-favored-nation treatment for investors and their investments "in like circumstances."* The provisions for national treatment and most-favored-nation treatment, similar to provisions in earlier U.S. bilateral investment treaties (BITs) and NAFTA Chapter 11, make clear that these obligations apply to investors "in like circumstances." This means that domestic regulation (including environmental regulation) may, in furtherance of nondiscriminatory policy objectives, distinguish between domestic and foreign investors and their investments, as well as among investors of different countries and their investments, without necessarily violating the national treatment and most-favored-nation obligations. For example, regulators in appropriate circumstances may apply more stringent operating conditions to an investment located in a wetland, or in a more heavily polluted area, than to an investment located in a less environmentally sensitive area.
- *Relationship to other provisions.* The FTA incorporates provisions making clear that in the event of any inconsistency between the Investment Chapter and any other Chapter (such as the Environment Chapter), the other Chapter will prevail to the extent of the inconsistency. While the United States does not believe there to be any inconsistencies between the Investment Chapter and any other Chapter, the latter provision reinforces the Parties' understanding about the relationship between different chapters. The FTA also provides, similar to NAFTA, that nothing in it shall be construed to prevent a Party from taking measures otherwise consistent with the Chapter to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. Further, as noted above (see section III.B), the Environment Chapter commits each Party to strive to ensure that it does not weaken its environmental laws as a means of attracting investment.

Potential Environmental Regulatory Impacts

We have been unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the FTA's substantive investment obligations, and none have been called to our attention by commenters. No claims have ever been brought against the United States under the almost 40 BITs that are currently in effect or under any of our FTAs other than NAFTA. In the ten years since NAFTA has been in effect, only ten cases have been brought against the United States by Canadian or Mexican investors. The United States has prevailed in all of the cases that have been decided to date.

We also considered the views of TEPAC and other commenters on investment issues. The TEPAC majority concluded that the clarifications to the FTA's investment provisions were an improvement over those in NAFTA Chapter 11 (particularly the clarification of the meaning of

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“indirect expropriation”), although the majority noted that some concepts could be further clarified. The majority also found that these clarifications reduced the possibility of a successful challenge to a U.S. environmental measure. In addition, the majority noted other provisions that provide important protections for environmental regulation: *i.e.*, the provision that another Chapter (such as the Environment Chapter) would prevail over the Investment Chapter in the event of an inconsistency; the provision that nothing in the Investment Chapter should be construed to prevent a Party from taking measures otherwise consistent with the Chapter to regulate investment in an environmentally sensitive manner; clarifications of the minimum standard of treatment obligation; and the national treatment and most-favored-nation treatment obligations. Some members in a minority found that the FTA provisions did not provide sufficient protection for U.S. environmental regulation, while other members in a minority expressed concerns that investment protections had been inappropriately weakened.

Based on the above considerations, we do not expect the FTA to result in a significantly increased potential for a successful challenge to U.S. environmental measures under the FTA’s investor-State mechanism as compared with the risk of a successful challenge in a U.S. court. The FTA’s innovations as compared with NAFTA Chapter 11 should further reduce the risk that arbitral tribunals will misapply the investment provisions of the FTA. We will, however, continue to review the potential impact of investment provisions on environmental measures as we implement the FTA and FTAs with similar provisions (such as the Chile and Singapore FTAs).

VII. ENVIRONMENTAL COOPERATION

The Trade Act of 2002 establishes that a principal U.S. negotiating objective is to strengthen the capacity of our trading partners to protect the environment through the promotion of sustainable development. In addition, the Trade Act instructs negotiators to seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science. A Joint Statement on Environmental Cooperation was developed as a complement to the environmental provisions of the FTA.

The United States and Morocco share common concerns and similar responsibilities for protecting and conserving the environment in their respective territories. The two governments have a common interest in promoting global environmental improvement and protection and in using science and technology to address environmental challenges.

Through the Joint Statement, the United States and Morocco express their recognition of the importance of recent and ongoing bilateral, regional and multilateral cooperative efforts and their intent to consult regularly both on the direction of ongoing cooperative activities and on areas for future cooperative efforts. Areas specifically identified for future bilateral cooperation include: developing and implementing environmental laws and infrastructure; developing environmental

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incentives and voluntary programs; promoting public awareness and participation in environmental protection; protecting coastal environments and fisheries; conserving natural resources and protected areas; and promoting the growth of the environmental technology business sector.

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ANNEX —Organizations Providing Comments

Comments on Scope for the Environmental Review (in response to 67 *Fed. Reg.* 70476)

No comments were received.

Public Comments on the Interim Review (in response to 68 *Fed. Reg.* 57503)

California Olive Association