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World Refugee Council Discussion Paper No. 3

Harnessing Trade Law to Support Refugees and Host Countries

Lawrence L. Herman



Centre for International
Governance Innovation

The logo for the World Refugee Council, featuring a purple square with a white diagonal line and the text "WORLD REFUGEE COUNCIL" in white capital letters.

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Centre for International Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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About the Series

World Refugee Council discussion papers are thought-provoking pieces intended to stimulate thought and discussion among political leaders, refugee experts, academics and civil society actors to help generate ideas and solutions for the global refugee system. The measures and concepts in these documents do not necessarily reflect the views of the World Refugee Council.

About the Author

[Lawrence L. Herman](#), of Herman & Associates, Toronto, has practised international trade and investment law and policy both inside government and in the private sector for more than 45 years. Lawrence was a member of Canada's mission to the United Nations and the General Agreement on Tariffs and Trade in the 1970s. In his law practice, he has acted as counsel for Canada in the International Court of Justice and advocated cases before the Canadian International Trade Tribunal, North American Free Trade Agreement (NAFTA) panels and Canadian courts. He advises governments, state agencies and international organizations. Lawrence is on the Canadian government's NAFTA Advisory Committee and the executive of the Canada-US Law Institute. As well, he is a senior fellow of the C. D. Howe Institute in Toronto.

Executive Summary

The global refugee system lacks a comprehensive and sustainable approach to responsibility sharing, in particular as it relates to the distribution of social and financial costs of hosting refugees and other forcibly displaced persons.

Selective use of World Trade Organization (WTO)-consistent trade measures offers the possibility of an economically sustainable and viable means of support for not only forcibly displaced persons but also the communities that host them.

This paper assesses the trade law aspects of various trade measures-based options, with a particular focus on the 1994 Marrakesh Agreement Establishing the World Trade Organization and the 2016 EU-Jordan Agreement. Overall, it is recommended that concerted efforts be made to assess the viability of trade concessions and duties relief.

Introduction

The recent and ongoing problems in the Middle East and elsewhere have resulted in vast numbers of people becoming refugees or displaced persons and created humanitarian crises of historic scale. According to the WTO's 2017 Aid for Trade Global Review's summary report (2017a, 76), there are an estimated 65.3 million refugees, migrants and displaced persons globally who are unable to return to their homes and previous lives. Beyond the human dimensions of this tragedy, destination and transit countries face enormous financial and social costs in sheltering these people, with the enormity of the crises detailed in reports issued by the UN Refugee Agency (UNHCR) and other humanitarian agencies, as well as in research published by the World Refugee Council (WRC).

The global community's response has been directed mostly to offering financial and other forms of short-term aid, which are seen as insufficient as a lasting solution to the problem (Rankin 2016, 76).

Proposals for providing support for refugee-host and transit countries beyond short-term infusions of cash have been made. One such notable proposal is to harness trade relief measures that could provide

longer-term and economically viable solutions for aiding these countries and their refugee communities, without making the refugee situation permanent in transit or host countries by segregating refugee communities and limiting their integration into the local economy and social system (Arroyo 2017).

The most direct, and in many respects, the least complicated, trade measure would entail the reduction of import duties on selected manufactured and agricultural goods produced by refugee/migrant communities in host countries. This measure would generate, simultaneously, employment for displaced persons and revenues for the host country concerned.

Despite its seeming simplicity, this idea entails considerable challenges in the execution, first, in overcoming the internal sensitivity of granting such preferences, and second, in reconciling such measures with established rules and obligations governing international trade.

The following sections examine the trade law aspects of these possible measures, taking into account the General Agreement on Tariffs and Trade (GATT) 1994/WTO Agreement — formally, the 1994 Marrakesh Agreement Establishing the World Trade Organization¹ — and considering the 2016 EU-Jordan Agreement² as a potential model.

WTO Rules, Obligations and Preferences

Employing trade policy as a means of assisting refugee/migrant communities and host countries was addressed in general terms during one of

1 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) [Marrakesh Agreement].

2 EC, Commission Decision 1/2016/EC of the EU-Jordan Association Committee of 19 July 2016 amending the provisions of Protocol 3 to the Euro-Mediterranean Agreement establishing an Association "between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, concerning the definition of the concept of originating products" and the list of working or processing required to be carried out on non-originating materials in order for certain categories of products, manufactured in dedicated development zones and industrial areas, and connected with generating employment for Syrian refugees and Jordanians, to obtain originating status [2016/1436] OJ, L 233/6.

the Development Hub sessions at the WTO's Aid for Trade Global Review in 2017: "Trade policy can foster economic initiatives by enabling refugees and migrants to generate income and improve their daily existence to build a new economic future. Strengthening the economic resilience of these populations requires sound policies to support refugee livelihoods. Within this context, the session explored concrete initiatives from different actors, including governments, private sector and international organizations" (WTO 2017a, 76).

The reference to "concrete initiatives" is open-ended and leaves certain things unclear. For one, the Marrakesh Agreement lacks provisions covering humanitarian situations. Trade policy options in the context of refugees and migrants — for example, tariff concessions for goods made in refugee camps — have been considered outside the WTO's mandate.

Moreover, most-favoured-nation (MFN) obligations require that imported goods from all sources be given equivalent treatment in terms of duties, taxes, regulations and so on. Any special or differential treatment in the context of refugee or migrant relief must find its way through these MFN obligations.

At the WTO Ministerial Conference in Buenos Aires in December 2017, Turkey and Qatar picked up on the aid-for-trade theme and tabled a broadly worded proposal for linking trade and humanitarian relief in the Syrian refugee situation, calling on WTO members "to explore ways that trade and the WTO can help in alleviating the adverse impact of this crisis" (WTO 2017b, annex).³

The Turkish-Qatari proposal did not specify how trade-related solutions applied in the Syrian crisis (or in any other refugee crises) could be implemented within the WTO framework. In the end, even this modest proposal was not approved in Buenos Aires, illustrating the difficulty in achieving consensus among WTO members taking this matter under examination.

While not spelled out in the Turkish-Qatari draft, one possible option for multilateral action could

be a general waiver from WTO obligations to allow selective trade concessions for countries that bear the greatest responsibility for hosting refugees. A waiver, as its name implies, allows legal departures from otherwise applicable WTO obligations and offers an avenue that has advantages over the frustrating and almost certain to fail approach of attempting to amend the Marrakesh Agreement itself.

Such a waiver would come under the "enabling clause" in article IX of the Marrakesh Agreement. Article IX allows the WTO Ministerial Council to waive any member's obligations under the agreement "in exceptional circumstances" by consensus or, failing that, by approval of three-quarters of the voting members.

Article IX waivers are applied case by case in consideration of an individual member's circumstances. The scale of most refugee crises and the enormous cost and responsibility borne by the host country could qualify as "exceptional circumstances" within the scope of article IX.

Given the magnitude of the global refugee crisis and the unsettling impact it is having on security and social stability in many countries, and given the fact that trade policy solutions to the crisis were referenced by the WTO in its summary report of the 2017 Aid for Trade Global Review (2017a), there is no reason to abandon advocacy via addressing forms of temporary trade relief under article IX within the WTO.

Generalized System of Preferences

An important model in this regard is the waiver adopted in GATT in 1979 to create the Generalized System of Preferences (GSP), a waiver that has been carried over into the WTO system.

Officially called the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,"⁴

3 The lead-in communication to the joint draft states in part, "Believing that 'trade' can be used as a means for more equitable sharing of responsibility by the international community to alleviate the adverse impacts on the countries hosting especially significantly large number of refugees, we call on the international community to ease the financial, economic and social responsibility of the host countries" (WTO 2017b, para. 1.5).

4 WTO, *Differential and more favourable treatment reciprocity and fuller participation of developing countries*. WTO CP Dec L/4903 of 28 November 1979.

the waiver enables developed country members to give differential and more favourable tariff treatment to developing countries.

Under the GSP, developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries. Preference-giving countries unilaterally determine which countries and which products are included in their schemes.⁵

The advantage of adjusting existing GSP schemes in the context of current refugee crises would be threefold:

- First, the GSP is a non-reciprocal, preferential and widely applied system that has been approved within the WTO framework under the GATT waiver provisions.
- Second, because GSP schemes are unilateral, developed WTO members can designate the beneficiary countries and the list of qualifying goods under their respective GSP measures, allowing tariff-relief measures to be applied to individual circumstances.
- Third, while coverage of individual GSP schemes vary, in most cases a range of agricultural and agri-food products are included, and these products can be of particular importance as sources of income for refugee communities.

The caveat is that such differential and favourable treatment has to be generalized, non-discriminatory and non-reciprocal with respect to developing beneficiary countries, that is, any duty relief for a specific product must apply on an MFN basis among listed beneficiaries.

To effectively address the current refugee/migrant crisis, the terms of the 1979 waiver would have to be altered by a WTO decision to allow preferential forms of GSP tariff relief to be applied to exports from refugee or migrant host countries or transit countries (or both) on different terms as circumstances of the current crisis require.⁶

5 Detailed information on the GSP is found on the WTO and the United Nations Conference on Trade and Development websites: www.wto.org/english/tratop_e/devel_e/d2legl_e.htm and <http://unctad.org/en/Pages/Home.aspx>, respectively.

6 Other adjustments would have to be examined to allow, for example, tariff concessions for goods made in refugee- or migrant-designated areas in developed countries, such as Italy or other EU members hosting large agglomerations of displaced persons.

This is another area where the WRC could be of assistance in further analyzing how the GSP system could be used as a mechanism for refugee/host-country relief. Follow-up discussions could be held between the WRC and Turkey, Qatar and other governments, as well as with the Secretary-General of the WTO and other global institutions engaged in the refugee crisis, in order to formulate options for consensus-based trade relief within the multilateral trading system.

Bilateral Options

Options outside of the WTO and a multilateral framework could include allowing tariff relief under existing bilateral trade agreements, as is the case with the EU-Jordan Agreement of July 2016, a bilateral approach providing duty relief geared specifically to the Syrian refugee crisis.

The essence of the EU-Jordan Agreement is a temporary relaxation of rules of origin that would otherwise apply under the pre-existing 2002 Association Agreement.⁷ It allows designated goods produced in specified refugee and/or migrant development zones and industrial areas in Jordan to be accorded preferential treatment, on a temporary basis, by making them subject to less stringent origin requirements (Panizzon 2017).

As stated in the preamble to the 2016 EU-Jordan Agreement, “This temporary relaxation of applicable rule of origin would be part of the Union’s support to Jordan in the context of the Syrian crisis and with the aim of mitigating the costs imposed by hosting a large number of Syrian refugees.”

The conditions are spelled out in the annexes to the agreement, in particular, the specific goods and the type of processing operations that qualify for tariff reduction; the locations where the work is to be performed; the proportion of the workforce in each location to comprise Syrian refugees; and the technical requirements for proof of origin.

7 The Association Agreement entered into force in May 2002, establishing a free trade area liberalizing two-way trade in goods between the European Union and Jordan.

There are advantages in these kinds of rules-of-origin relaxation agreements, in that they can be applied by individual countries bilaterally within existing preferential trade arrangements (PTAs), but outside the WTO criteria and the terms of the 1979 GATT waiver in the case of GSP schemes. These rules-of-origin relaxation agreements could thus be used as a means of sharing costs and responsibility among the global community, for example, where a given country does not or cannot host refugee communities, but would be prepared to provide trade concessions to exports from refugee host countries as a means of assistance.

The disadvantage with these agreements is that they must be done within existing PTAs; because not all industrialized countries have such agreements with refugee/migrant host countries, wide gaps exist in coverage and application.⁸ Nonetheless, applying selective trade preferences for refugee-generated exports within existing PTAs could fill some of these gaps.

It is premature to draw conclusions as to the success of the EU-Jordan Agreement, given that it has been operative for less than two years. One commentator has said that the results have so far been disappointing and attributes them to several factors: the lack of manufacturing operations with adequate experience in the designated zones; the absence of skilled and knowledgeable marketing personnel; the fact that products often do not meet EU standards; and the lack of Syrian workers willing to work in designated areas for fear of losing their refugee status (Arroyo 2017, 2).

Nonetheless, there are lessons that can already be drawn from the EU-Jordan Agreement that could inform future deployments of tariff-relief schemes under bilateral trade agreements:

- First, beneficiary countries must be in a position (in terms of competitiveness, including marketing and distribution channels) to exploit the opportunities offered by these trade preferences.
- Second, refugees must have the training profile for the type of operations of the firms using tariff relief.

⁸ As it happens, Canada has a PTA with Jordan, although none with other Middle East or developing countries that host refugee/migrant communities.

- Third, wages and labour conditions within these specified areas must be sufficiently attractive to encourage refugees/migrants to seek offers of employment (ibid., 4-5).

The WRC should further examine the possibility of using existing PTAs as vehicles for refugee relief, considering which criteria are most useful and the best possible template for a model agreement.

Other Forms of Trade Relief

In addition to tariff concessions, other forms of export assistance, such as loans and export credits for producers in refugee-host countries, could be provided by industrialized importing countries. However, these forms of assistance would be complicated to implement and less likely to gain political traction among granting countries.

Other mechanisms beyond tariffs, such as adjusting product standards and other technical requirements for refugee-produced and exported products, are not likely feasible, because they would run up against the MFN obligations in the Marrakesh Agreement, as discussed earlier.

Beyond these governmental measures, the voluntary labelling and certification of products made in refugee/migrant zones, whether or not tariff concessions are put into effect, could have beneficial effects in achieving consumer acceptance and thereby stimulate exports from refugee/migrant production zones.⁹

Other Models

Limited research has not uncovered other examples of trade concessions akin to the 2016 EU-Jordan Agreement. While the European Union has agreements with several other Middle East

⁹ There are recognized concerns about reducing product quality standards, in particular, health and safety requirements. However, the idea is not to make changes that will endanger public health and safety but, rather, to find areas where standards can be adjusted to accommodate refugee circumstances and still meet consumer needs.

and European migrant host countries,¹⁰ it has no refugee and trade relief agreements with other countries like the one it has with Jordan.

In 1996, the United States implemented a trade relief mechanism known as the Qualifying Industrial Zones (QIZ) initiative. The QIZ provided duty-free and quota-free access to certain goods produced jointly by Egypt, Jordan and Israel, as a means of furthering the Middle East peace process (Congressional Research Service 2013; Arroyo 2017).

That measure is no longer in full effect, but while it was operative, US trade concessions resulted in an expansion of both exports and employment in Egypt and, to a lesser extent, in Jordan. While the QIZ was not geared to refugees or migrants, its relevance to the current situation is that it was a targeted measure, encompassing trade relief based on designated goods produced in and exported from beneficiary countries.

Conclusion

On the basis of the points argued above, the WRC should consider a work program to develop the following ideas and add greater content to existing concepts respecting:

- multilateral initiatives within the WTO framework on the type of trade concessions for refugee/migrant host countries under article IX of the enabling clause;
- duties relief by individual WTO members through selective adjustments to the existing GSP, including appropriate qualifying criteria; and
- the 2016 EU-Jordan Agreement and elements in that agreement as a template for duties relief measures within existing PTAs between industrial countries and refugee/migrant host countries.

¹⁰ The European Union has various forms of trade, customs and association agreements with countries such as Turkey, Bosnia, Macedonia and so on.

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About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

About the World Refugee Council

There are more than 21 million refugees worldwide. Over half are under the age of 18. As a growing number of these individuals are forced to flee their homelands in search of safety, they are faced with severe limitations on the availability and quality of asylum, leading them to spend longer in exile today than ever before.

The current refugee system is not equipped to respond to the refugee crisis in a predictable or comprehensive manner. When a crisis erupts, home countries, countries of first asylum, transit countries and destination countries unexpectedly find themselves coping with large numbers of refugees flowing within or over their borders. Support from the international community is typically ad hoc, sporadic and woefully inadequate.

Bold Thinking for a New Refugee System

The United Nations High Commissioner for Refugees (UNHCR) is leading a consensus-driven effort to produce a new Global Compact on Refugees in 2018. The World Refugee Council (WRC), established in May 2017 by the Centre for International Governance Innovation, is intended to complement its efforts.

The WRC seeks to offer bold strategic thinking about how the international community can comprehensively respond to refugees based on the principles of international cooperation and responsibility sharing. The Council is comprised of thought leaders, practitioners and innovators drawn from regions around the world and is supported by a research advisory network.

The WRC will explore advances in technology, innovative financing opportunities and prospects for strengthening existing international law to craft and advance a strategic vision for refugees and the associated countries.

The Council will produce a final report grounded by empirical research and informed by an extensive program of outreach to governments, intergovernmental organizations and civil society.

À propos du Conseil mondial pour les réfugiés

Il y a en ce moment dans le monde plus de 21 millions de réfugiés, et plus de la moitié d'entre eux ont moins de 18 ans. En outre, de plus en plus de personnes sont forcées de quitter leur pays natal et partent à la recherche d'une sécurité, et elles sont alors confrontées aux limites importantes qui existent quant aux possibilités d'accueil et à la qualité de ce dernier. À cause de cette situation, les réfugiés passent maintenant plus de temps que jamais auparavant en exil.

En ce moment, le système de protection des réfugiés ne permet pas de réagir adéquatement à la crise des réfugiés d'une façon planifiée et globale. Quand une crise éclate, les pays de premier asile, les pays de transit et les pays de destination finale se retrouvent sans l'avoir prévu à devoir composer avec un grand nombre de réfugiés qui arrivent sur leur territoire, le traversent ou en partent. Et le soutien fourni dans ce contexte par la communauté internationale est en règle générale ponctuel, irrégulier et nettement inadéquat.

Des idées audacieuses pour un nouveau système de protection des réfugiés

Le Haut Commissariat des Nations Unies pour les réfugiés (HCNUR) dirige des efforts découlant d'un consensus et visant à instaurer un nouveau « pacte mondial pour les réfugiés » en 2018. Mis sur pied en mai 2017 par le Centre pour l'innovation dans la gouvernance internationale (CIGI), le Conseil mondial pour les réfugiés (CMR) veut compléter ces efforts.

Le CMR vise à proposer une réflexion stratégique audacieuse sur la manière dont la communauté internationale peut réagir de façon globale aux déplacements de réfugiés, et ce, en se fondant sur les principes de la coopération internationale et du partage des responsabilités. Formé de leaders, de praticiens et d'innovateurs éclairés provenant de toutes les régions du globe, le CMR bénéficie du soutien d'un réseau consultatif de recherche.

Le CMR examinera les progrès techniques, les occasions de financement novatrices ainsi que les possibilités pour ce qui est de renforcer le droit international et d'y intégrer une vision stratégique pour les réfugiés et les pays concernés.

Par ailleurs, le CMR produira un rapport final fondé sur des recherches empiriques et sur les résultats d'un vaste programme de sensibilisation ciblant les gouvernements, les organisations intergouvernementales et la société civile.

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67 Erb Street West
Waterloo, ON, Canada N2L 6C2
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