

12. The EU-Jordan compact in a trade law context: preferential access to the EU market to ‘Keep Refugees in the Region’

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Our goal, while staying focused on saving lives at sea ..., is to support the countries that host so many people We are ready to increase financial and operational support and to invest in long-term economic and social development, security, rule of law and human rights, improving people’s life and tackling the drivers of migration.

Federica Mogherini, EU High Representative/Vice-President on launching the Migration Partnership Framework under the European Agenda on Migration, 7 June 2016

1 INTRODUCTION

In Lebanon, one in six persons registered as Syrian refugee in 2018,² and in Jordan one in 11 persons,³ documenting to the fact that Arab Middle Eastern countries were ‘disproportionally affected by the crisis’.⁴ Global estimates

¹ I want to thank Juan Santos Vara, Sergio Carrera and participants of the ‘External Dimensions of EU Migration Policies: Effectiveness, Fairness and Rule of Law Reconsidered’ conference, Faculty of Law, University of Salamanca, 19–20 October 2017. I benefited from an exchange with Peter van den Bossche and from discussions with Jennifer Gordon, Hiroshi Motomura, Ayelet Schachar, Stefan Schlegel, and participants of the ‘Labor Migration: Global and Comparative Dimensions’ workshop, Max-Planck-Institute for the Study of Religious and Ethnic Diversity, Göttingen, 18 May 2018.

² UNCHR, ‘Syria Regional Refugee Response’ (Operational Portal, Refugees Situations) <http://data2.unhcr.org/en/situations/syria/location/71> accessed 16 July 2018; 991,165 Syrian refugees registered by UNHCR on 7 April 2018 in Lebanon and, 4.6 million Syrian refugees have been registered globally.

³ *Ibid.*, 661,859 Syrian refugees, registered by UNCHR 7 April 2018 in Jordan.

⁴ B. Weber, ‘Time for a Plan B in European Refugee Crisis’ (Heinrich-Böll Stiftung, 18 October 2016) <https://www.boell.de/en/2016/10/18/time-plan-b-european-refugee-crisis> accessed 16 July 2018.

confirm that today's 21 million refugee populations are clustered within a handful of countries. Contributing to the clustering were Trump's travel bans, diminished *intra*-EU solidarity and decreased *intra*-Arab unity.⁵ Protracting the crisis were 'homemade' policy factors, including the EU stepping up its border patrols around the Mediterranean and the *de facto* closure of the Balkan Route as a result of the EU-Turkey Statement. In consequence, the fair-sharing of Syrian refugee quotas was left to a handful of particularly affected host countries, including Turkey, Lebanon, Iraq and Jordan.⁶ Protracting the effects of the crisis in these countries were factors including a stiffer competition for livelihood generating activities leading to downturns in the tourism sector and strained humanitarian services delivery.⁷ The result was trade flows to partners in Europe weakened.⁸

When Hungary and the Slovak Republic refused to sign onto the EU resettlement decision in 2015,⁹ the numbers of refugees in first-safe-countries, like

⁵ Center for Global Development (CGD) and International Rescue Committee (IRC), 'Refugee Compacts: Addressing the Crisis of Protracted Displacement' (CGD-IRC Brief, April 2017) <https://www.cgdev.org/sites/default/files/refugee-compact-brief.pdf> accessed 16 July 2018.

⁶ C. Fröhlich, 'A Critical View on Human Mobility in Times of Crisis' (2017) 8 *Global Policy* 5, 11.

⁷ See, e.g. UNDP is operating two projects towards this goal, one in Jordan, 'Mitigating the Impact of the Syrian Refugee Crisis on Vulnerable Host Communities' and one in Lebanon 'The Host Communities Support Project' <http://www.undp.org/content/dam/undp/library/corporate/fast-facts/english/FFSyriaJune72013.pdf> accessed 16 July 2018; ILO, a similar one, 'Enhanced Access to Employment Opportunities and Livelihoods in Jordanian Host Communities within the Framework of ILO's Response to the Syrian Refugee from 2014–2016' http://www.ilo.org/beirut/projects/WCMS_226940/lang--en/index.htm accessed 16 July 2018; and UNCHR, UNICEF with the British Government through an initiative called REACH, http://www.reach-initiative.org/wp-content/uploads/2014/02/jeffrey.frankens-10022014-093154-REACH-FCO_Syrian-Refugees-in-Host-Communities_Preliminary-Impact-Assessment.pdf accessed 16 July 2018.

⁸ P. Seeberg, 'Jordan's Migration Diplomacy and the Syrian Refugees' (Center for Mellemostudier, News Analysis, Southern Danish University, November 2016); see also P. Seeberg, 'Jordan, the European Neighbourhood Policy, and Commonalities of Interest: Building a Security Partnership Rather Than a Security Community' in P. Rieker (ed.), *External Governance as Security Community Building: The Limits and Potential of the European Neighbourhood Policy* (Palgrave Macmillan 2016) 163–86.

⁹ Joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631; in response to Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2016] OJ L268/82.

Jordan and Lebanon increased. In return, the EU sought to compensate its neighbours through trade preferences and development aid.¹⁰

In its wake, the EU intensified its externalisation of migration and asylum policies, by closing the Balkan Route through the Turkey deal and by zooming in on the so-called ‘drivers’ of migration and flight in first-safe countries.¹¹ In this context, the EU re-enforced bilateral cooperation with third countries in a spirit of complementing unilateral humanitarian interventions, including via the EU Trust Funds for Africa and the Madad Trust Fund.¹² One feature of this ‘new intergovernmentalism’,¹³ is the deployment of legal-political instruments of cooperation, among which figure the Compacts. Common to the Compacts is the idea to revive an old precept of EU foreign affairs, the paradigm of conditionality. In the Compacts, the ‘leverage’ which the EU offers as a ‘positive commitment’ to a first-safe country willing to host large numbers of refugees, expands beyond tied aid and visa facilitation and includes *non*-refugee specific policies, like trade or education.

Traditionally, EU study scholars have criticised conditionality for re-introducing an asymmetry¹⁴ towards former colonies in the EU neighbour-

¹⁰ Norwegian Refugee Council (NRC), ‘Lessons from Responsibility Sharing Mechanisms, for an Ambitious and Strong Global Compact on Refugees’ (Briefing Note, August 2017) <https://www.nrc.no/globalassets/pdf/briefing-notes/lessons-from-responsibility-sharing-mechanisms/lessons-from-responsibility-sharing-mechanisms.pdf> accessed 16 July 2018.

¹¹ Global Compact Migration, intergovernmentally agreed and negotiated outcome (13 July 2018) is currently in process of adoption; the intergovernmental conference is foreseen for 10–11 December at Marrakesh. The 13 July 2018 outcome was preceded by six drafts (Draft Rev. 2, 28 May 2018, preceded by Rev. 11 July 2018, by Rev. 29 June 2018, by Rev. 28 May 2018, by Rev. 26 March 2018; 5 March Zero Draft Plus and 5 February Zero Draft; see https://refugeemigrants.un.org/sites/default/files/180528_draft_rev_2_final_1.pdf accessed 16 July 2018.

¹² P. García Andrade, ‘The Duty of Cooperation in the External Dimension of the EU Migration Policy’ in S. Carrera, D. Kostakopoulou and M. Panizzon (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff, forthcoming 2019).

¹³ A. Niemann and N. Zaun, ‘EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives’ (2018) 56 *JCMS* 3–22.

¹⁴ R. Kunz and J. Maisenbacher, ‘Beyond Conditionality Versus Cooperation: Power and Resistance in the Case of EU Mobility Partnerships and Swiss Migration Partnerships’ (2013) 1(2) *Migration Studies* 196–220; S. Lavenex, ‘A Governance Perspective on the European Neighbourhood Policy: Integration Beyond Conditionality?’ (2008) 15(6) *Journal of European Public Policy* 938–55; CONCORD, ‘EU Emergency Trust Fund for Africa – Partnership or Conditionality’, available at: https://concordeurope.org/wp-content/uploads/2017/11/CONCORD_EUTF_Monitoring_short.pdf?1fdb40&1fdb40 accessed 27 February 2019.

hood.¹⁵ Empirical research based on case studies into the EU Compacts have studied how trade conditionality negatively impacts effects on the lives and livelihoods of migrants and refugees.¹⁶ More theory-informed research analyses the EU's response to the refugee crisis from a governance perspective, and therein condones conditionality for its effect of blurring of policy categories, including the boundaries between desired migration, whose mobility is facilitated by visa relaxations, and undesirable migration, which readmission agreements seek to contain.¹⁷

This chapter draws on this latest 'conditionality' literature by investigating how the permeability of policies inherent in 'issue-linkage' obfuscate the categories between least-developed and developing countries under the United Nations Conference on Trade and Development (UNCTAD) principles and in result bring down the equal treatment principle underlying the General System of Preferences (GSP) under World Trade Organization (WTO) law. Compacts have ushered in a new wave of 'externalisation' of border, admission and asylum policy.¹⁸ Therein, issue-linkage between trade and refugee employment policies operationalise the 'holistic approach', which has not been studied for its implications on WTO trade law. A particular focus of this chapter is on the ironic coincidence that trade preferences, exchanged in the Compact for refugee employment, risk being in conflict with the global trade regime of WTO law.

This chapter analyses the legality of the EU-Jordan Compact trade preferences under WTO trade law and EU neighbourhood policy. It reviews the Compact's *macro*-level legality under WTO and EU law and for coherence with the Global Compacts.

Firstly, the Compacts have 'bilateralised' EU neighbourhood policy and in its wake endangered the European Neighbourhood Policy's (ENP) traditional premise, which is to create a level-playing field among former colonies. In particular, the EU's policy decision to downgrade Jordan to a least-developed country (LDC), risks to drive a wedge among particularly 'crisis'-affected EU neighbourhood countries. Tellingly, the EU partnership priorities and

¹⁵ P.J. Cardwell, 'Euromed, European Neighbourhood Policy and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean.' (2011) 49(2) *JCMS* 219–41.

¹⁶ J. Gordon, 'For Refugee Compact to Talk Jobs, It Must Listen to Migration Compact' (*News Deeply*, 5 March 2018).

¹⁷ K. Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection' (2013) 1 *Migration Studies* 4, 26.

¹⁸ C. Boswell, 'Evasion, Reinterpretation and Decoupling: European Commission Responses to the "External Dimension" of Immigration and Asylum' (2008) 31 *West European Politics* 491, 512.

EU Compacts, which revert to country-specific funding (Trust Funds), trade preferences (relaxed rules of origin under the Pan-Euro-Mediterranean (PEM) Protocol) have invalidated the EU ENP Action Plans.¹⁹ This new intergovernmentalism,²⁰ which manifests itself in intensified country-specificity of EU-third country ‘cooperation’,²¹ amounts to an exceptionalism, which, even if justified by the emergency nature of crisis-responses, raises grounds for complaint by other similarly situated countries under the WTO’s set of exceptions for developing and LDCs, the so-called Special and Differential Treatment (SDT).

Whereas others have studied the potential precarity of Syrian labour in Jordan as the EU-Jordan Compact’s *meso*-level labour market implication,²² we review the legitimacy of the EU-Jordan Compact’s one-time modifications to the EU-Jordan Association Agreement (AA) and its references to the PEM convention’s rules of origin under the EU Everything-but-Arms (EBA). It introduces into the notion of a compact from a cross-comparative perspective of the EU and global level to assess the innovative potential including by contextualising the Compacts within EU’s legal-institutional policy frames, e.g. the Global Approach to Migration and Mobility (GAMM), the European Agenda on Migration (EAM) and the Migration Partnership Framework (MPF), but also the EU Trade-for-All Strategy. Section 2 discusses the legal-political hybridity being a direct consequence of issue-linkage.²³ Section 3 analyses the EU-Jordan Compact as a tool of the ENP. Section 4 discusses the trade conditionality of the Compact under WTO law. If countries ‘hosting large refugee flows’ might be considered ‘vulnerable’ under WTO SDT, such a time-limited, crisis-induced interpretation of the WTO GSP vulnerability criteria could justify the EU-Compacts’ EBA preferences under WTO law. Section 5 focuses on the EBA, which has used trade conditionality in the past to hold third countries accountable under UN anti-terrorism legislation and to combat narcotic trade but so far has not held refugee host countries responsible under *non-refoulement*. Section 6 closes by advancing to a way to

¹⁹ S. Carrera, ‘On Policy Ghosts: EU Readmission Arrangements as Intersecting Policy Universes’ in S. Carrera, D. Kostakopoulou and M. Panizzon (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff, forthcoming 2019).

²⁰ Niemann and Zaun (n 13).

²¹ García Andrade (n 12).

²² See e.g., V. Barbelet et al., ‘The Jordan Compact: lessons Learnt and Implications for Future Refugee Compacts’ (2018) ODI Briefing Papers; L. Achilli, ‘Syrian Refugees in Jordan: A Reality Check’, Migration Policy Centre, EUI Policy Brief 2015/02.

²³ K. Lenner and L. Turner, ‘Learning from the Jordan Compact’ (2018) *Forced Migration Rev* 57.

bypass the WTO legality of the Duty-free, Quota-free (DFQF) market access into the EU for goods from Jordan produced with Syrian refugee labour in the EU-Jordan Compact, by suggesting to add a services trade commitment in a potential EU Deep and Comprehensive Free Trade Agreement (DCFTA) with Jordan, containing a clause to employ a certain percentage of Syrian refugees on EU humanitarian services delivery in Jordan. It also proposes to use aid-for-trade (AfT) facilities under the WTO and to insert a training provision for Syrian refugees employed by EU service providers. Thirdly, we suggest Jordan introduce a sustainable procurement clause in its public procurement tenders, which might improve the employability of tertiary educated Syrian refugees. Common to all three proposals is a vision to better respond to the often-voiced critique about the *meso*-level limitations on Jordan's labour market, including the employer sponsorship and the Special Economic Zone (SEZ) confinements.²⁴

2 UNPACKING THE NOTION OF A COMPACT

One objective of the Global Compact Migration (GCM)²⁵ is to reflect upon population movements as 'multidimensional reality' and to include respect for the full human potential of migration.²⁶ The notion of a compact further connotes the coupling of multiple spatial levels to connect otherwise unrelated policies and laws at local, national and regional levels. Once condensed into a global package, some of these are 'de-coupled' by groups of like-minded countries, who wish to advance a binding agreement on a specific topic. They also mix short-term humanitarian intervention with *post*-crisis livelihood programming.²⁷ Only this simultaneity of short- and long-term, local and global, state and non-state objectives enables to shift refugee policy's protection paradigm, from 'day-to-day' survival towards Betts and Collier's (2016) 'new approach', which empowers refugees through employment opportunities to live fuller 'life choices'.²⁸ Such 'multi'-views rely necessarily on a mix of

²⁴ Gordon (n 16).

²⁵ UN General Assembly Resolution, 'Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration' (UN Document A/RES/71/280 of 17 April 2017).

²⁶ Global Compact Migration, 'Final Draft' (13 July 2018) (n 11) Objective 2.

²⁷ C. Huang, Center for Global Development (CGD), 'A Bangladesh Compact: Beyond Aid Solutions for Rohingya Refugees and Host Communities' (CGD Brief, April 2018) <https://www.cgdev.org/sites/default/files/bangladesh-compact-beyond-aid-solutions-rohingya-refugees-and-host-communities.pdf> accessed 16 July 2018.

²⁸ A. Betts and P. Collier, 'Jordan's Refugee Experiment' (2016) 28 *Foreign Affairs* April 2016.

soft and hard law, which in turn renders compacts complicated legal-political hybrids.

A compact typically condenses the ‘whole-of-government’ or ‘whole of country approach’, through mainstreaming different foreign policies ‘specific’ or ‘related’ to migration in order to reflect on the multidimensional reality of migrant trajectories.²⁹ The idea behind is to open up bargaining space in view for resource-constrained states to find non-state stakeholders which could assist in the implementation of the Global Compacts. This mix of state and non-state stakeholders further explains the legal-political hybridity of Compacts.

For example, the Global Counter-Terrorism Coordination Compact and the UN Global Compact for the Environment³⁰ formally include business and the private sector, philanthropy to manage the risk of externalities of climate change, environmental degradation, on-set disasters and relevant population displacements. The global Migration and Refugee Compacts ‘move[d] towards inclusion and a plurality of voices’,³¹ which requires ‘compact[ed] packages to nudge sovereign states to reach out to the private sector, philanthropy and other civil society. Inspired by such ‘multidimensionality’ and the ‘whole-of-government’ approach, the EU-Jordan Compact co-opts the global marketplace to formulate a private-sector driven solution for the refugee crisis, even at risk of commodifying refugees and host communities.

3 COUNTRY-SPECIFICITY: DOES THE EU-JORDAN COMPACT NULLIFY EU NEIGHBOURHOOD POLICY?

With 9 per cent of the 5 million refugees who have fled Syria since 2011, Jordan is ‘particularly crisis-affected’.³² Jordan proposed at the London Donor Conference on ‘Supporting Syria and the Future of the Region’ of 4 February 2016, a ‘holistic’ approach to manage the ‘spillover’ from the crisis on its economy, by advancing the vision of ‘turning the crisis into a development

²⁹ O. Rittener et al., ‘Swiss Migration Partnerships: A Paradigm Shift’ in R. Kunz, S. Lavenex and M. Panizzon (eds), *Multilayered Migration Governance: The Promise of Partnership*. Routledge Advances in International Relations and Global Politics Vol. 89 (Routledge 2011) 249–64.

³⁰ See UN Global Compact, ‘Business for the Rule of Law Framework’ <https://www.unglobalcompact.org/about> accessed 16 July 2018.

³¹ T. Gammeltoft-Hansen et al., ‘What is a Compact? Migrants’ Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration’ Raoul Wallenberg Institute Working Paper (2017) 16.

³² P. Seeberg, ‘Jordan’s Migration Diplomacy and the Syrian Refugees’, Center for Mellemøststudier, News Analysis, Southern Danish University (2016).

opportunity’ for Jordan.³³The ensuing International Compact for Jordan, co-chaired by Germany, Kuwait, Norway, Qatar and the United Kingdom and the International Monetary Fund/World Bank and Multilateral Development Banks, disbursed \$700 million of grants for the Jordan Response plan in 2016–2018 and up to \$300 million in loans for job creation and education, including the plan discussed in this chapter, to create jobs in ‘sectors where there is low Jordanian participation and a high ratio of foreign workers (e.g. construction, agriculture, service industry, cleaning) and where there is a high degree of skills match (e.g. handicrafts, textiles)’.³⁴

Consequentially, the EU adopted on 19 December 2016 the Jordan Compact, as an Association Council decision, annexed to a political declaration, the EU-Jordan Partnership Priorities (PPs). The Compact (and not the PPs) modifies on a time-limited basis (until 2026) the rules of origin (RoO) protocol of the PEM³⁵annexed to the AA, as opposed to fully incorporated into an EU AA — which reflects their ambiguity of ‘standing between a rock’ (neither fully committing to an EU AA) ‘and a hard place’, nor remaining entirely as ‘soft’ as the PPs.³⁶ Jordan’s affiliation with the PEM cumulation is relaxed by modifying the Regional Convention on PEM, a preferential RoO of goods produced with refugee labour. At the same time, the Compact modifies two soft law components, firstly the United Nations Development Programme (UNDP) LDC requirements and secondly, by deactivating the EU ENP Action Plans.

The PPs and Compacts are instruments of EU Neighbourhood policy.³⁷ The EU PPs are country-specific two-year plans which define compacts as

³³ Organisation for Economic Co-operation and Development (OECD), ‘The Jordan Compact: A New Holistic Approach between the Hashemite Kingdom of Jordan and the International Community to deal with the Syrian Refugee Crisis’, OECD Document DCD/DAC/RD (2016)7/RD1, 3 June 2016. The intergovernmental declaration adopted at the Brussels follow-up conference co-chaired by the EU and the UN on 24–5 April 2018, among the 57 governments, 10 regional organizations, 19 UN agencies, 250 NGOs, renews this International Compact for Jordan by offering multi-year pledges of \$3.4 billion (€2.7 billion) for 2019–2020.

³⁴ L. Errighi and J. Griesse, ‘The Syrian Refugee Crisis: Labour Market Implications in Jordan and Lebanon’ (2016) European Economy Discussion Paper, No. 29.

³⁵ The relaxed RoO, which only apply to certain products produced with Syrian refugee labour in 18 designated zones, facilitate their export to the EU under an EBA status which lowered the non-originating part of the merchandise from 70% to 40% under the condition that the product is produced with 15% (and 20% as of 2018) refugee labour and that 200,000 employment are created.

³⁶ On the implication of soft law in EU migration cooperation with third countries see Santos Vara, Chapter 2 in this volume.

³⁷ Not every PP culminates in a Compact, the latter which figures as the technical implementation of PP. For example, Egypt only has PP, and not every Compact is based on legally binding commitments (only the one with Jordan).

‘comprehensive partnerships’, standing as a: new political framework of EU relations with third countries for continued and operational cooperation.³⁸ Thus, the Compact, and not the PPs, is the place where the ‘mutual commitments between the EU and the partner country’, are exchanged, or the ‘sticks and carrots’ policy dealt is struck.³⁹ As the EU-Jordan Compact finds, it construes a ‘comprehensive partnership’ or a ‘comprehensive support package’, which ‘combine(s) different policy elements within EU competencies’ to ‘stabilise’ a transit country, and towards that end operationalise the broadest cross-thematic range of policies involved in EU foreign policy to date.⁴⁰ Compacts respond to the EU’s ‘multi-sector policy approach’,⁴¹ the GCM’s multidimensional view and draw on migration-related leverages including trade, education, mobility, energy, security, development cooperation and neighbourhood policy,⁴² and the shared goals of a ‘common area of peace, prosperity and stability’. However, they replace the EU action plans as the traditional tool of EU neighbourhood policy. This finding raises some further implications, however, under WTO law.⁴³

The Compact downgrades Jordan under the UNDP definition to a LDC status, so it is legally entitled to benefit from the DFQF trade preference of the EU EBA scheme available normally under the WTO SDT to LDCs exclusively. This was justified by the temporal requirements of a humanitarian emergency, but the EU did not discuss the vulnerability under the WTO law. The EBA is derived from the WTO Enabling Clause’s GSP, which developed countries can apply to grant preferences to developing countries without infringing the WTO Most-Favoured-Nation (MFN) Clause.⁴⁴ By downgrading crisis-ridden Jordan on a one-time basis to an LDC status, the EU escaped having to modify the EBA scheme under WTO law and escaped to discuss the notion of ‘vul-

³⁸ Commission, ‘First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration’ (Communication) COM (2016) 700 final.

³⁹ Council of the EU, ‘EU-Jordan Partnership Priorities and Compact: Decision No. 01/2016 of the 12th EU-Jordan Association Council’, 12384/16, 20 September 2016, 5.

⁴⁰ Council Decision (EU) 2016/2310 of 17 October 2016, OJ L345/50.

⁴¹ S. Carrera, A. Geddes, and E. Guild, ‘Conclusions’ in S. Carrera, A. Geddes, E. Guild and M. Stefan (eds), *Pathways for Legal Migration into the EU Reappraising Concepts, Trajectories and Policies* (Center for European Public Policy 2017).

⁴² D. Wunderlich, ‘The Limits of External Governance: Implementing EU External Migration Policy’ (2012) 19(9) *Journal of European Public Policy* 1414–33; NRC, ‘Lessons from Responsibility Sharing Mechanisms’ (n 10).

⁴³ EU-Jordan Association Council Decision No. 1/2016 of 19 December 2016 agreeing on EU-Jordan Partnership Priorities [2016/2388] [2016] OJ L355/31.

⁴⁴ Art I, Most Favored Nation Treatment, General Agreement on Tariffs and Trade (GATT) Annex 1A: Multilateral Agreements on Trade in Goods, Marrakesh Agreement Establishing the World Trade Organization (WTO), 15 April 1994.

nerability'. Finally, the EBA scheme applied to Jordan escapes from holding Jordan accountable to human rights and refugee protection standards, a second criticism discussed below.

4 CHANGE-MAKER OF EU REFUGEE POLICY? THE COMPACT'S TRADE CONDITIONALITY

The 2015/16 refugee crisis re-assigned conditionality a renewed role in EU 'foreign policy'⁴⁵ and scaled up the cross-thematic range of linkage to non-migration-specific policy components to which migration as 'foreign policy' could relate.⁴⁶ *Pre-crisis*, conditionality, as in the EU Mobility Partnerships (MPs) was limited to visa and aid exchanged in return for cooperation on return and readmission – but required a firm negotiation mandate for concluding an EU readmission agreement;⁴⁷ in the *post-crisis* version, trade preferences are exchanged for 'keeping refugees close to home', i.e. employed.⁴⁸ Unlike in the Turkey deal,⁴⁹ where the 'carrots' being used are visa relaxations and prospects of accession exchanged for readmission, the compact uses a non-refugee-specific instrument, the one of a 'large funding agreement' and trade preferences as a compensation strategy to a displacement crisis.

As the International Labour Organisation (ILO) writes, 'at the center of the Jordan Compact is job creation for Syrian refugees and members of the Jordanian host communities'.⁵⁰ It also provides for access to education services 'for over 165,000 Syrian children to access education and increase opportunities for Syrian youth to receive vocational training'.⁵¹ Issue-linkage

⁴⁵ A. Geddes, 'Migration as Foreign Policy? The External Dimension of EU Action on Migration and Asylum' (2009) Swedish Institute for European Policy Studies.

⁴⁶ M. Panizzon, 'Trade –for –Refugee Employment: Nexing for Deterrence or Development in the EU-Jordan Compact?' in S. Carrera, D. Kostakopoulou and M. Panizzon (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff, forthcoming 2019).

⁴⁷ N. Reslow, 'Making and Implementing Multi-actor EU External Migration Policy: The Mobility Partnerships' in S. Carrera, D. Kostakopoulou and M. Panizzon (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff, forthcoming 2019).

⁴⁸ 'Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration' COM (2016) 385 final.

⁴⁹ On the EU-Turkey Statement see Carrera et al., Chapter 9 in this volume and Gatti and Ott, Chapter 10 in this volume.

⁵⁰ ILO Regional Office for the Arab States, 'Work Permits and Employment of Syrian Refugees in Jordan Towards Formalising the Work of Syrian Refugees', 2017.

⁵¹ Council of the EU, 'EU-Jordan adopted partnership priorities and compact' (Press Release 786/16, 20 December 2016) <http://www.consilium.europa.eu/en/press/>

had first been used in EU foreign policy to incentivise EU neighbourhood countries⁵² to sign onto UN human rights conventions. It was also applied to the Cayucos crisis off the coast of Senegal in 2007–2008 to the migration context.⁵³ Conditionality re-emerged in the DCFTA in the Eastern Partnership countries,⁵⁴ and the EU's use of its GSP⁵⁵ allowing, under the WTO Enabling Clause of 1979,⁵⁶ to treat certain developing countries differently with respect to trade preferences⁵⁷ when required to combat illicit traffic in narcotic drugs and psychotropic drugs under the UN Convention as a way to cooperate on anti-terrorism (Narco-Jihad),⁵⁸ and more recently refugee protection, as applied towards the 'Golden Crescent' (Afghanistan, Iran, and Pakistan).⁵⁹ The legal question before the WTO Appellate Body has been whether the preferences must be given on a non-discriminatory, non-reciprocal and non-conditional basis to all developing countries. In *EC-Tariff Preferences* the WTO Appellate Body concluded that the MFN-rule does not apply to SDT, as long as the same preferences are granted to 'similarly situated countries'. If the EU were to grant tariff preferences to all countries 'particularly affected by the crisis', such a criterion could be considered objective enough to justify the trade-for-refugee employment scheme before a WTO court. Turkey, which had applied for a similar scheme, but under Article 9 of the General Agreement

press-releases/2016/12/20/eu-jordan-partnership-priorities-and-compact/ accessed 16 July 2018.

⁵² A. Littoz-Monnet, 'Dynamic Multi-Level Governance – Bringing the Study of Multi-level Interactions into the Theorising of European Integration' (2010) 14 *European Integration Online Papers*.

⁵³ C. Bretherton and J. Vogler, 'The European Union as a Sustainable Development Actor: The Case of External Fisheries Policy' (2008) 30(3) *J of European Integration* 401, 417.

⁵⁴ B. Hoekman, 'The Deep and Comprehensive Free Trade Agreements' (2016) EUI Working Paper No. 2016/29.

⁵⁵ GSP programmes under the WTO Enabling Clause have to be notified to UNCTAD; since 1994, by Australia, Belarus, Bulgaria, Canada, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey, the European Community (now comprising 25 Member States) and the United States of America.

⁵⁶ WTO, Decision Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903, BISD 26S/203, 28 November 1979).

⁵⁷ K. Nadakavukaren Schefer, *Social Regulation in the WTO: Trade Policy and International Legal Development* (Edward Elgar Publishing 2014) 250.

⁵⁸ C. Thomas, 'Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics' (2003) 24 *Michigan J of International Law* 549.

⁵⁹ Commission and High Representative of the Union for Foreign Affairs and Security Policy (HR), 'Joint Staff Working Document: EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') assessment of Pakistan covering the period 2016 – 2017' SWD (2018) 29 final.

on Tariffs and Trade (GATT) justification could have had stronger claim under the EC-tariff preference jurisprudence,⁶⁰ while Lebanon, a non-WTO Member would have grounds from a WTO complaint.⁶¹ In that sense, as interpreted by the Appellate Body under *EC-Tariff Preferences* WTO law works against an EU favouritism of bilaterally preferencing some ‘crisis’-affected third countries over others. In the final analysis, WTO law uncovers why the EU-Jordan Compact has little to do with its widely hailed humanitarian motives of saving Syrian lives by preventing their dangerous onward journeys to Europe. The EU’s strategy behind relaxing Jordan’s non-originating content on goods produced with Syrian refugee labour also amounts to strengthening the EU’s competitive stance on the Arab Middle Eastern market against competition from Russia, China, the US and other trading nations’ interests.⁶²

As Bevelander notes, integrating refugees into the labour market benefits both refugees and host societies.⁶³ The Compact sets a precedent for this ‘new approach’ to refugee protection. Yet, to more fully deliver on the promise of a *post*-humanitarian development opportunity, the Compact would need to lift labour conditions when refugees are required to work in SEZs.⁶⁴ A second risk of the deal is that refugees working as labour migrants might lose some protection.⁶⁵ The EBA applied to Jordan refrains from holding Jordan accountable under *non-refoulement*. This chapter argues that a correct application of the EBA would entail an obligation to refrain from expelling Syrian refugees to unsafe third countries or ‘forcibly return these to Syria’.⁶⁶ While the Compact, *de jure*, does not prevent Jordan from deterring Syrian refugees from moving Europe, *de facto* Turkey’s border closure seals off the possibility to reach

⁶⁰ Achilli (n 22); see also International Organisation for Migration (IOM) and the International Centre for Trade and Sustainable Development (ICTSD), ‘Dialogue on Trade and Migration’ (4 July 2018) <https://www.iom.int/news/international-experts-meet-trade-and-migration-workshop-geneva> accessed 16 July 2018.

⁶¹ WTO Appellate Body, ‘European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries’ (Report WT/DS246/AB/R, 20 April 2004).

⁶² F. Heisbourg, ‘The Strategic Implications of the Syrian Refugee Crisis’ (2015) 57(6) *Survival*, 7, 20.

⁶³ P. Bevelander, ‘Integrating Refugees into Labor Markets’ (2016) IZA World of Labor.

⁶⁴ Barbelet et al. (n 22); R. Amjad J. Aslan, E. Borgnäs, D. Chandran, E. Clark, A. Ferreira dos Passos, J. Joo, and O. Mohajer, ‘Examining Barriers to Workforce Inclusion of Syrian Refugees in Jordan, Better Work’, Discussion Paper 21. Geneva: ILO (2017).

⁶⁵ On the obligation of *non-refoulement* see González Vega, Chapter 5 in this volume.

⁶⁶ Achilli (n 22); M. Janmyr, ‘Precarity in Exile: The Legal Status of Syrian Refugees in Lebanon (2016) 35 *Refugee Survey Quarterly* 58, 78.

Europe through the Balkan Route. The Compact seems to be a figure piece within the broader mosaic of the EU's externalisation strategy of 'keeping refugees in the first asylum country reached' rather than sharing in the responsibility to increase the intake of refugees to Europe.⁶⁷ At the same time, without an express *non-refoulement* guarantee attached to the EBA, the trade preferences under the EU-Jordan Compact, it could otherwise risk being complicit with illegal 'push backs' to Syria.⁶⁸

5 COMPLEMENTING THE COMPACT: REFUGEES AS SERVICE SUPPLIERS IN A PROSPECTIVE DCFTA

Several studies criticise the EU-Jordan compact for its negative labour market implications, a negative impact on the workers' rights situation in SEZs and the risk of forcible return to Syria. Work permits granted are often mismatched to the supply of tertiary educated Syrian refugees so that their skills are wasted on jobs.⁶⁹ Tertiary educated Syrian refugees are often unable to switch to more rewarding jobs.⁷⁰ In analogy to Hafner-Burton, who found that trade conditionality has repressed human rights compliance, the Compact's current scheme fits into this critic: Syrian refugees are at risk of *non-refoulement*, as well as the loss of refugee status.⁷¹ Adding a trade-in-services commitment to the EU-Jordan Compact could reverse this situation,⁷² and we draw on Errighi and Griesse to improve on the cash-for-work programmes:

Syrian refugee and poor host communities could be involved in projects to expand access to basic public services – such as healthcare and education under which direct cash payment or vouchers are given in exchange for donor-financed, public works performed by communities.⁷³

⁶⁷ On the externalization strategy, see Mitsilegas, Chapter 16 in this volume.

⁶⁸ Mixed Migration Platform (MMP), 'MMP Note on the Zero Draft of the Global Compact for Safe, Orderly and Regular Migration' (MMP Policy Brief, February 2018) <http://mixedmigrationplatform.org/wp-content/uploads/2018/02/MMP-note-on-GCM-Zero-draft.pdf> accessed 16 July 2018; Barbelet et al. (n 22); NRC, 'Lessons from Responsibility Sharing Mechanisms' (n 10).

⁶⁹ E. Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59(3) *International Organization* 593–629; see Barbelet et al. (n 22).

⁷⁰ Lenner and Turner (n 23).

⁷¹ Barbelet et al. (n 22).

⁷² Friedrich-Ebert Foundation (FES), *Towards Socially Just Development in the MENA Region*, Tunis 2017.

⁷³ Errighi and Griesse (n 34).

Another often criticised compromise of the Jordan Compact is that refugee employment is not to be confounded with job creation.⁷⁴ To create more jobs, we propose the EU and Jordan sign a DCFTA, which in itself is encouraged by the EU-Jordan Mobility Partnership 2014 and to add a services schedule committing the EU to a minimum employment of Syrian service providers.

Such a services commitment under a prospective EU-Jordan DCFTA could be labelled the **SyReSe** – **Syrian Refugees as Service Suppliers**, mode 4 horizontal or specific commitment. It could be added to Jordan's first-generation EU AA of 2002.⁷⁵ The link to Syrian refugee employment in services sectors opened to the EU could figure as a bargaining chip for Jordan in negotiating a DCFTA. Similarly, its European Free Trade Association (EFTA) trade agreement could be scaled up into second-generation agreement complete with a services chapter. Syrian teachers, doctors, engineers would be supplying their services as employees or contractual service suppliers of EU/EFTA-based services firms providing humanitarian infrastructure or health and education services to fellow Syrian refugees in Jordan.

The proposed SyReSe has several advantages over the current trade-in-goods deal:

- Firstly, the link between trade-in-services and refugee employment is an alternative to the currently applicable DFQF-deal of the EBA, which runs the legal risk of discriminating against non-WTO Members or similarly situated countries under the current EU-Jordan Compact.
- Secondly, tertiary educated Syrian refugees would be employed at their skill levels and experience and potentially have a skill-upgrading internship in the EU.
- Thirdly, the EU would have to 'pay' more significantly than under the trade-in-goods deal, for outsourcing its refugee problem to Jordan, by being compelled to employ Syrian refugees, but in return, would obtain the right to supply cross-border services in Jordan.
- Fourthly, Jordan would have an incentive to sign onto a second-generation trade agreement with the EU and possibly, the EFTA, which would boost its 27 per cent services trade.⁷⁶

⁷⁴ NRC, 'Lessons from Responsibility Sharing Mechanisms' (n 10).

⁷⁵ Council and Commission Decision 2002/357/EC, ECSC of 26 March 2002 on the conclusion of the Euro-Mediterranean Agreement establishing an Association between the European Commission and their Member States, on the one part, and the Hashemite Kingdom of Jordan, on the other part [2002] OJ L/129/1.

⁷⁶ Trade in services (% of GDP) in Jordan was reported at 27.42% in 2016, according to the World Bank collection of development indicators, compiled from officially recognized sources, see Trading Economics, 'Jordan – Trade in services' <https://tradingeconomics.com/jordan/trade-in-services>

- Fifthly, the proposed services-for-humanitarian infrastructure scheme offers a legal basis to cash-for-work programmes in humanitarian infrastructure services, which the EU, European Investment Bank (EIB) and European Bank of Reconstruction and Development (EBRD) are running in Jordan already.⁷⁷
- Sixthly, the scheme could be linked to tradeable refugee quotas with the EU (under the Moraga and Rapoport model of 2015).⁷⁸

Alternatively, Jordan's government procurement tenders could operationalise a 'sustainable' or 'social' procurement, which is 'public procurement to achieve a social outcome', *in casu*, creating jobs for refugees in Jordan while offering a development opportunity for Jordan's economy.⁷⁹ For example, Britain and the Netherlands used to employ disabled workers, while Malaysia reserved 30 per cent annual value of work contracts in for bumiputera contractors.⁸⁰ In social procurement clauses, conditionality is better accepted than under WTO law and certainly less disputed than under a General Agreement on Trade in Services (GATS) mode 4 service commitment, the latter, which is typically adverse to any types of conditionalities (see below).⁸¹

A refugee employment clause in Jordan's government procurement towards the EU or EFTA countries could be setting aside 20 per cent of the annual value of work contracts for Syrian contractors in Jordan. Jordan remains an observer and is yet acceding to the WTO Agreement on Government Procurement (GPA), so that the GPA rules do not yet apply to it.⁸² Yet, linking refugee employment to government procurement has the advantage of generating over time an entrepreneurial community of Syrian refugees in Jordan, which neither the trade-in-goods nor the trade-in-services scheme can achieve. Trade economists and trade lawyers would need to identify the prospects for

tradingeconomics.com/jordan/trade-in-services-percent-of-gdp-wb-data.html accessed 16 July 2018.

⁷⁷ Errighi and Griesse (n 34).

⁷⁸ J. Huertas Moraga and H. Rapoport, 'Tradable Refugee-admission Quotas (TRAQs), the Syrian Crisis and the new European Agenda on Migration' (2015) 4(1) *IZA Journal of European Labor Studies*, 1–13.

⁷⁹ Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcome' (2004) 28(4) *Natural Resources Forum*, 257, 267; see also UN Global Compact Environment, 'Ten Principles of Action' <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 16 July 2018.

⁸⁰ McCrudden (n 79).

⁸¹ Barbelet et al. (n 22); Janmyr (n 66); Panizzon (n 46).

⁸² Five other WTO members have undertaken commitments, in their WTO accession protocols, to initiate accession to the GPA (Afghanistan, Kazakhstan, Mongolia, Saudi Arabia and Seychelles) https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm accessed 27 February 2019.

EU service providers in key essential services required for a humanitarian crisis situation (energy, housing/infrastructure, health, education) in transit countries of refugees (Jordan, Lebanon and Egypt). National service providers could then be sub-contracting from EU services firms under AfT schemes and employ refugees thereunder, which would offer Jordan business communities an incentive to employ Syrian refugees.⁸³ Whereas the legality under a WTO SDT clause for developing countries of placing such ‘additional commitments’ and ‘conditionality’ in the North-South Euromed AAs is to be examined more closely, the scheme is potentially also applicable to the South-South Free Trade Agreements (FTAs) between the Arab League and Egypt, Lebanon and Jordan of 13 April 2018 as part of the Greater Arab Free Trade Area, to liberalize trade-in-services.⁸⁴ Thus, a ‘deal’ similar to the one with the EU could be projected with Egyptian firms supplying services to Jordan. In an additional step, the EU could trade-off such a humanitarian services commitment under a prospective EU-Jordan DCFTA against its UN-resettlement quotas, in a variation of the ‘tradeable refugee-admission quotas’ suggested for EU asylum policy by Moraga and Rapoport.⁸⁵ The SyReSe commitment in Table 12.1 would offer the policy re-composition of an EU-Compact:

6 CONCLUSION

The most recent 2017 report to the Commission’s Trade-for-All Strategy mentions the EU-Jordan compact as illustration of the EU’s ‘value-based trade policy’. The Commission defines value-based as a ‘trade policy’ that is more ‘effective’, in a way that it ‘address[es] not just interests but also values’. The Jordan Compact might contribute to reduce the vulnerable situations of refugees and the vulnerable economy of Jordan as a host community for Syrian refugees. A first step has certainly been the ‘trade-for-development’ deal of the Compact,⁸⁶ which has worked to lift Syrian refugees from material deprivation

⁸³ B. Hoekman and A. Shinghal, ‘Aid for Trade and International Transactions in Goods and Services (2017) CEPR Discussion Papers 12250.

⁸⁴ C. Sieber-Gasser, *Developing Countries and Preferential Services Trade* (CUP 2016).

⁸⁵ Moraga and Rapoport (n 78).

⁸⁶ Annex to the Joint Proposal for a Council Decision on the Union position within the Association Council set up by 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, with regard to the adoption of EU-Jordan Partnership Priorities and annexed Compact, JOIN(2016) 41 final ANNEX 1, 17.

Table 12.1 Model SyReSe Schedule of Mode 4 Services Commitments under an EU-Jordan DCFTA

| Horizontal commitment | Limitations on market access | Limitations on national treatment | Additional commitment |
|------------------------------|---|--|--|
| All sectors | 1) none 2) none 3) none 4) Unbound, except for Syrian refugees employed in EU/EFTA humanitarian infrastructure, health and education services projects in Jordan for a maximum duration of 2 years | 4) Wage and working conditions in Jordan apply Access to entrepreneurship and other self-employment support | 4) For every Syrian refugee employed in Jordan by Jordanian firms, the EU takes in a refugee through UN resettlement or in the SyReSe scheme |
| Specific commitment | Limitations on market access | Limitations on national treatment | Additional commitment |
| Sector/Sub-sector Health | Unbound, except for as indicated in the horizontal commitment, medical experts can work with the permission of Jordan's medical board for a maximum of one year ¹ | Unbound, except as indicated under horizontal section | As indicated in the horizontal section |
| Infrastructure | Unbound, except for as indicated in the horizontal commitment ² | Unbound, except as indicated under horizontal section | As indicated in the horizontal section |

Notes:

¹ Free to add some regulatory licensing and other qualifications.

² Free to add some regulatory licensing and other qualifications.

and disadvantage.⁸⁷ However, the work permit being tied to a single employer without the possibility to switch or become self-employed, the mismatched skill levels to jobs on offer and the SEZs' working conditions have limited the refugees' mobility, and reforms are being undertaken to remedy the risk of precarious work.⁸⁸

This chapter has instead focused on the macro-level vulnerability for Jordan under the EU-Jordan Compact and its legality under WTO law. Firstly, it criticises the current use of the EU's EBA scheme, which the EU uses to leverage Jordan to issue the 200,000 work permits on two grounds: Jordan was downgraded to an LDC status to be eligible for the EBA in the first place. The

⁸⁷ *MSS v Belgium and Greece*, App No. 30696/09 (ECtHR, 21 January 2011).

⁸⁸ ILO, 'Enhanced Access to Employment Opportunities' (n 7); Barbelet et al. (n 22); Janmyr (n 66).

country-specificity of this deal risks being arbitrary and to infringe the WTO EC-Tariff Treatment jurisprudence which requires ‘similarly situated countries’ to benefit from the same preferences. The controversial GATT Enabling Clause which so far exempts ‘vulnerable developing and least-developed countries’ from the MFN, would have to be interpreted in a creative way to allow countries like Jordan, who become ‘vulnerable’ as a result of a humanitarian crisis, to qualify at least for the time-limited duration of that crisis for SDT and the GSP schemes. WTO law and jurisprudence would need to establish clear criteria to define which are ‘particularly affected’ countries qualifying for SDT, so as to ensure that all similarly situated countries benefit from GSP and GSP+ schemes of the EU. Secondly, the EBA typically requires in return for obtaining DFQF preferences into the EU market, to respect good governance, including signing onto key UN conventions on human rights, refugees, children, persons with disabilities, anti-smuggling and trafficking. A fuller compliance with the EBA exemptions from the WTO MFN obligation would imperatively require holding Jordan accountable for *non-refoulement* and the right to asylum, among other human rights guarantees in return for obtaining the QDFD preferential access to the EU market.

A less controversial policy proposal than re-interpreting the WTO SDT to allow for trade preferences in humanitarian crisis situations is at the level of trade negotiations. This chapter proposes that Jordan negotiate market access openings for EU service providers in Jordan under a prospective DCFTA with the EU. If such an opening were negotiated it could be tied to Syrian refugee employment under such a prospective services chapter of a future DCFTA. EU services supply in Jordan would be linked to refugees becoming employed in humanitarian services infrastructure projects in Jordan. In analogy, a sustainable procurement clause could be linked to refugee employment creation. Both a services commitment and a sustainable procurement clause could enhance the livelihood perspectives and training opportunities in particular of tertiary educated Syrian refugees while holding the EU more directly accountable for outsourcing its refugee (resettlement) problem to third countries.⁸⁹ The EU’s ‘value’-base trade would be improved, if trade-in-services commitments could lift refugees stranded in Jordan from poverty and precarious work often associated with employment in SEZs.⁹⁰ Chances might be that refugee employment could thus become a true *post*-humanitarian alternative to return and resettlement.

⁸⁹ Moraga and Rapoport (n 78).

⁹⁰ Gordon (n 16).