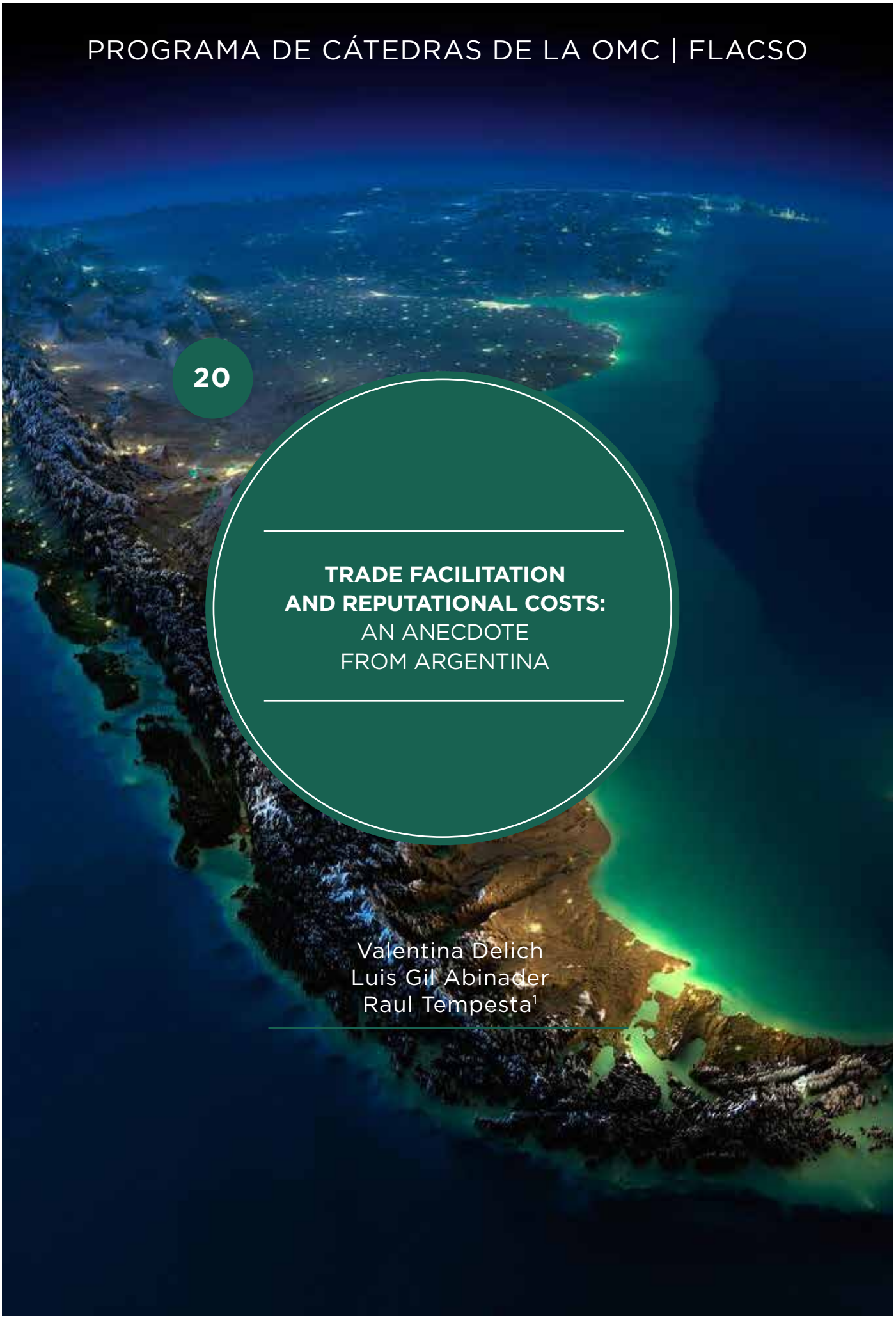

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TRADE FACILITATION AND REPUTATIONAL COSTS: AN ANECDOTE FROM ARGENTINA

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PROGRAMA DE CÁTEDRAS DE LA OMC | FLACSO

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Agosto 2016

FLACSO
ARGENTINA

Publicado por
Cátedra OMC FLACSO Argentina
Ayacucho 555
(C1026AAC), Buenos Aires
Tel: (5411) 5238-9459
www.catedraomc.flacso.org.ar

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Trade facilitation and reputational costs: An anecdote from Argentina

Valentina Delich, Luis Gil Abinader and Raul Tempesta[1]

Introduction

Argentina is often considered a trade 'protectionist' nation. Some local observers have even deemed the South American country as the "world leader" in that area[2]. This criticism has been echoed internationally. For instance, a periodical report published by the European Parliament's Directorate-General has repeatedly labeled Argentina as "the most protectionist country in the G20 group"[3]. A special report from the same body uses the expression "the world's biggest user of trade-restrictive measures"[4] to describe the country.

With the exception of the 1990s decade, the 'import substitution' policies implemented in Argentina dominated the second half of the XX Century. Many view these development strategies as protectionists since their primary aim is favoring national production over foreign imports. In the mid-2000s some of the inward-oriented policy approaches reemerged. As commodity prices –particularly soybean– fell, and the global financial crisis that started in 2008 deepened, the response from Buenos Aires frequently came in the form of trade-restrictive measures. The general objective of these measures was to avoid trade deficits and balance of payments crisis.

Nevertheless, other developed as well as developing countries have stood alongside with Argentina in regards to implementing trade-restrictive measures. In fact, during the global financial crisis the number of trade-restrictive measures implemented by World Trade Organizations (WTO) members rose significantly. This has been heavily documented. For instance, Global Trade Alert (GTA) records States' measures that could adversely affect international trade and has verified a rise on those types of measures since 2009. Moreover, the bulk of protectionist measures during those years have been implemented by G20

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[1] Researchers at the WTO Chair at FLACSO-Argentina

[2] La Argentina es el líder mundial en proteccionismo. (2012, February 5). La Prensa. Retrieved from: laprensa.com.ar

[3] Gajdos, L. (2012). Protectionism in the G20 (2012). Brussels: European Parliament – Policy Department; Barone, B. & Bendini, R. (2015). Protectionism in the G20 (2015). Brussels: European Parliament – Policy Department;

[4] Bendini, R. (2012). Protectionism in Argentina: Old habits die hard. Brussels: European Parliament – Policy Department;

countries. For example, its 11th report (year 2012) suggests that Japan, Turkey, and France were accompanying Argentina at the top of the list[5].

In sum, while Argentina has in recent years engaged in some trade-restrictive policies, it is definitely not the only and arguably not the main promoter of these types of practices. This suggests a perceptional gap: although several national and international influential actors perceive the country as one of the main protectionist in the world, effective trade policies promoted by Buenos Aires in recent years had objectives and impacts comparable to the ones sought by other –including G20– countries during the global financial crisis. Those nations also implemented trade-restrictive measures, and in some cases more frequently than Argentina.

One distinctive characteristic of the policy adopted by Argentina, however, is the implementation of a system of non-automatic import licenses, the *Declaración Jurada Anticipada de Importación* (DJAI) that, in addition to the alleged restriction of trade, has resulted in a loss of transparency and predictability of the import system, features that, through trade facilitation negotiations and measures, are being promoted and encouraged in recent years by several international organizations.

This essay argues that Argentina has taken a particular costly reputational toll at the WTO (and beyond) due to the context, type and method of implementation of such a trade-restrictive measure. At a period in which trade facilitation is at the top of the agenda of several international organizations, including the WTO, Argentina implemented a discernibly nontransparent and un-predictable trade border measure. These elements –lack of transparency and unpredictability– distinguished Argentina in a global context in which protectionist measures were in the rise. Against this backdrop, reputational costs for Argentina were disproportionally high due to the global visibility provided by the WTO Dispute Settlement Body (DSB) to the issue and given the meager domestic benefits obtained thorough the import licenses.

To develop these ideas, this article first presents the basics concepts around trade facilitation together with a brief description of its inclusion in the agenda of international organizations and particularly the WTO; then it describes the trade (restrictive) border procedures implemented by Argentina including a short analysis of how they were addressed at the WTO DSB; furthermore, it discusses reputational costs and its particular links with trade facilitation; and finally, it concludes by drawing lessons for others.

Trade Facilitation

The WTO considers *trade facilitation* as the "simplification and harmonization of international trade procedures, including practices and formalities involved in collecting,

[5] Evenett, S. (2012). The landscape of crisis-era protectionism. In Evenett, S. (Ed.). *Débâcle: The 11th GTA report on protectionism*. London: Centre for Economic Policy Research (CEPR)

presenting, communicating and processing data required for the movement of goods in international trade."[6] A key aspect is that trade facilitation is the simplification of trade procedures. Those procedures can be broadly understood as the activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods. Trade facilitation therefore relates to a wide range of policies affecting at the border and behind-the-border.

As the United Nations Conference on Trade and Development (UNCTAD) notes, the group of measures and procedures under the term *trade facilitation* aim at reducing transactional cots[7] and enhance the movement of goods and services once cleared by customs authorities. They favor the establishment of a "transparent, consistent and predictable environment for border transactions based on simple and standardized customs procedures and practices, documentation requirements, cargo and transit operations, and trade and transport conventions and arrangements."[8]

Trade facilitation is often characterized as a win-win situation for all parties involved[9]. Efficiency and transparency in border procedures helps in reducing frauds and increasing government revenue. The possibility of delivering goods more quickly is generally viewed as a gain for business, in particular to small and medium enterprises. Since the cost of border procedures delays are probably transferred to consumers, they should also benefit from shortening the time it takes to clear goods at the customs.

These perceived benefits of trade facilitation are one of the main factors explaining the growing momentum it has experienced in the international scenario during recent years. The need to address the global crisis of 2008 through the acceleration of economic growth, and the unlikeliness of achieving this with a swift conclusion of the Doha Round, also explains the international momentum of trade facilitation[10]. For these reasons, several international organizations have included trade facilitation as an important issue of their agenda. These include: UNCTAD, which among other things assists developing countries in identifying their particular trade and transport facilitation needs and priorities, and helps them program the implementation of specific trade and transport facilitation measures[11]; the World Customs Organization (WCO), which also has capacity building programs in this area[12]; the World Bank, which in 2013 spent approximately $5.8 billion on trade facilitation projects, including customs and border management and streamlining documentary

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[6] WTO (2003). World Trade Report. World Trade Organization: Geneva.

[7] UNCTAD (2006). Trade facilitation handbook. Part I: National Facilitation Bodies: Lessons from Experience. UNCTAD/SDTE/TLB/2005/1. Geneva: United Nations.

8 Ibidem.

9 OECD (2005). The costs and benefits of trade facilitation. Paris: OECD

10 Trade facilitation has been suggested as a response to the crisis, for instance, in: Taylor, B. J. & Wilson J. S. (2009). The crisis and beyond: Why trade facilitation matters. Washington, D.C.: The World Bank

11 See: unctad.org/en/Pages/DTL/TTL/Trade-Facilitation.aspx

12 See: wcoomd.org/en/topics/wco-implementing-the-wto-atf.aspx

requirements[13]; the Organization for Economic Co-operation and Development (OECD), which has developed indicators to measure trade facilitation at the country level[14].

At the WTO, the momentum is reflected in the Member's higher-level involvement and the consensus reached around it. In 1996, the Singapore Ministerial Conference directed the WTO Council for Trade in Goods "to undertake exploratory and analytical work, drawing on the work of other relevant organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area." Then, the Doha Ministerial Conference of 2001 embodied a mandate for negotiations, which were launched in 2004 with the First Meeting of the Trade Facilitation Negotiation Group. These negotiations continued during the following years, with varied levels of advances. However, shortly after assuming as the new Director-General (DG) in 2013, Roberto Azevêdo personally chaired a series of negotiating sessions based on the Singapore mandate[15]. Days before the Bali Ministerial Conference in 2013, DG Azevêdo presented a trade facilitation agreement draft with around 70 square brackets. WTO consensus over this agreement was reached at that same conference. This became as one of the first agreement successfully negotiated at the WTO since it has become WTO.

Trade facilitation continues to be in the agenda of the WTO. Their current projects include a trade facilitation facility[16]created with the objective of supporting developing and least-developed countries to assess their specific needs and to identify possible development partners to help them meet those needs through a diverse number of activities.

The Argentinean trade regulations in the light of the GATT and trade facilitation

As said, according to the WTO, trade facilitation encompasses the "simplification and harmonization of international trade procedures. Trade procedures include the activities, practices and formalities involved in collecting, presenting, communicating and processing data and other information required for the movement of goods in international trade."

In turn, the WTO Agreement on Trade Facilitation (which has not entered into force yet) clarifies and improves relevant aspects of several articles, among them, Article VIII of the GATT 1994 on Fees and Formalities connected with importation and exportation and Article X on Publication and Administration of Trade Regulations. Clearly then, Article VIII is about trade facilitation.

13 See: worldbank.org/en/topic/trade/brief/trade-facilitation-and-logistics
[14] See: oecd.org/trade/facilitation/
[15] Neufeld, N. (2014). The long and winding road: How WTO members finally reached a Trade Facilitation Agreement. Geneva: WTO Economic Reached and Statistics Division
[16] See: tfafacility.org/about-the-facility

The questioned Argentinean DJAI system encompasses trade facilitation measures – falling under Art. VIII c) – whose implementation lacks transparency (Art X), allows wider and unjustified discretional decisions and results in a high degree of unpredictability regarding the possibility of importing goods in Argentina. While in the case, the WTO referred to Articles VIII and XI:1 among others, Article VIII was not used to evaluate Argentina's measures but only in its relation with Article XI (just to make the point that being a measure of Art VIII type does not preclude the measures to be evaluated with Article XI). Simply, as far as Article VIII has mainly hortatory language ("Members shall" type) Argentinean measures were found inconsistent with Article XI:1 (trade restrictive).

In effect, this dispute concerns actually two measures: the procedure connected to the DJAI required by the Argentine Government since February 2012 for most imports of goods into Argentina; and, the imposition on economic operators of one or more of the following trade-related requirements (TRRs) as a condition to import into Argentina or to obtain certain benefits: (a) to offset the value of imports with, at least, an equivalent value of exports; (b) to limit imports, either in volume or in value; (c) to reach a certain level of local content in domestic production; (d) to make investments in Argentina; and, (e) to refrain from repatriating profits. The requirements are in some cases contained in agreements signed between economic operators and the Argentine Government or in letters addressed by economic operators to the Argentine Government[17]

The DJAI procedure imposed the need to fill out a form with detailed information before any import-transaction to be approved by the authorities through the issue of a certificate (whether for final consumption or as inputs for industrial transformation). According to the government the DJAI was only about "a customs or import formality subject to Article VIII of the GATT" that did not constitute a trade restriction. In relation to the alleged TRRs Argentina argued at the DSB that "the complainants did not produce evidence of the existence of a single "overarching" measure with general and prospective application. In Argentina's view, even if the Panel were to accept the complainants' characterization of the evidence relating to the TRRs, at most this might indicate the existence of a series of individual one-off and isolated actions that concern a limited number of individual economic operators in a limited number of sectors, whose content varies considerably and lacks general and prospective application"[18]

However, the complainants (European Union, United States and Japan) requested the Panel to find that: (a) the DJAI procedure is an import restriction inconsistent with Article XI:1 of the GATT 1994; (b) the DJAI procedure is administered in a manner inconsistent with Argentina's obligations under Article X:3(a) of the GATT 1994; and, (c) Argentina failed to publish promptly information relating to the operation of the DJAI procedure in the

[17] See: www.wto.org/english/tratop_e/dispu_e/cases_e/ds444_e.htm
[18] Ibidem.

manner required by Article X:1 of the GATT 1994. In addition, the complainants advanced claims in respect of the TRRs under Articles XI:1 and X:1 of the GATT 1994.

Argentina argued that the DJAI procedure is a customs or import formality subject to Article VIII of the GATT 1994 and therefore not subject to Article XI:1 of the GATT 1994 or the Import Licensing Agreement. Argentina also argued, with respect to the TRRs, that the complainants did not produce evidence of the existence of a single "overarching" measure with general and prospective application.

With regard to the DJAI procedure, the Panel found that "irrespective of whether the DJAI procedure is considered to be a customs or import formality subject to the obligations contained in Article VIII of the GATT 1994, this fact per se would not exclude the applicability of Article XI:1 of the GATT 1994 to the measure. The DJAI procedure is inconsistent with Article XI:1 of the GATT 1994, since it has a limiting effect on imports, and thus constitutes an import restriction." And, with regard to the TRRs, "the Panel found that the imposition on economic operators by the Argentine authorities of one or more of the five requirements identified by the complainants as a condition to import or to obtain certain benefits operates as a single measure (the TRRs measure) attributable to Argentina. The TRRs measure is inconsistent with Article XI:1 because it has limiting effects on the importation of goods into Argentina."

The Appellate Body concluded that Article VIII does not excuse Members from their obligations under Article XI:1 prohibiting certain import restrictions. Although formalities and requirements connected to importation will often entail a certain burden on the importation of products, not every burden associated with them will entail inconsistency with Article XI:1. Rather, only those that have a limiting effect on the importation will do so."

In sum, trade facilitation is a relevant issue in the WTO political agenda. But also it is meaningful in the WTO legal ambit. This is so even if cases had arisen around Article X and not around Article VIII. Even if Article VIII combines hortatory and mandatory language -giving flexibility over trade facilitation measures and less enforcement capacity to the WTO- it may be enforced if it is proved that trade measures restrict the importation of products. Although this case does not shows a breach of the newly adopted Trade Facilitation Agreement, which has not entered into force, it nonetheless reflects a trade-restrictive policy that mainly consisted in imposing excessive and unnecessary formalities to importers. Therefore, this case is highly related to the ongoing trade facilitation debate.

Trade facilitation, reputation and bargaining power

To further understand the impact the Argentinian's measures had, we will now address the issue of reputational costs. Several international relations scholars have drawn links between reputation and compliance with international agreements[19]. Their general premise is that agreements that cannot be enforced by parties, in order to be effective must be self-enforcing. Two self-enforcing mechanisms available are reciprocity and reputation. If gains from cooperation exceed potential benefits that can derive from non-compliance, then compliance will be in the interest of a State. Since (good) reputation can increase effectiveness in international negotiations, a State seeking to maintain or increase its bargaining power presumably is interested in avoiding the reputational costs imposed by non-compliance.

Reputational costs may differ depending on the commitments breached. For instance, a strategic legal and politically defensive discourse can be built by a non-compliant State upon breach. However, the credibility of those arguments would depend upon the character of the commitments breached. If a treaty provides precise commitments, and therefore it has almost no ambiguity, then the non-compliant State is severely exposed. The same if a treaty has been subject to thoughtful debates and interpretations or there were extensive negotiations or adjudicative precedents (reasonable interpretations of the commitments are then narrowed down). In any case, the precision of a commitment limits the maneuvering space of a State for non-compliance behavior without reputational costs.

Similarly, the reputational cost may relate to the degree of political contestability of an agreement. International security and human rights commitments have little or zero contestability. However, in other areas of international relations some commitments can be unpopular for a like-minded group of nations. This is likely in trade negotiations, where countries generally try to reach a balance between offensive and defensive interests. In principle, the consensus-based design of forums like the WTO allows all members to reflect their interests in the negotiations. In practice, however, the outcome often better reflects the interest of the more powerful. For some countries, international power asymmetries can ultimately generate imbalances in the landscape of trade commitments they agree to. That is, the sum of favorable provisions obtained in the negotiation is far surpassed by the breadth of defensive interests conceded.

However, being part of a treaty does include costly commitments (in a wide sense) for some membership does not necessarily determinate a non-compliance behavior. Especially if the room for interpreting or progressive evolution of the obligations is still available; nations with jeopardized interests might continue to pursue a defensive narrative within the organization. Actually, this is the most common behavior in international law.

[19] A general overview of the literature is provided by Simmons (2010). Treaty compliance and violation. Annual Review of Political Science 13:273–296

In addition, and in some cases, non-compliance could become part of a State narrative. Although this would produce heavy reputational cost, its full impact will depend on the perceived contestability of the agreement and the ability of the State to build a new consensus around the questioned commitments. But if a large number of members deem those obligations contestable, then the reputational cost would be lower.

In the same vein, even if a commitment has relatively low political contestability, temporarily non-compliance of some agreements could represent relatively less reputational costs for certain developing countries. Compliance of international agreements, particularly in the area of trade, often requires institutional and technical reforms by local governments. Implementing the institutional arrangements and generating technical capabilities generally require economic efforts by local governments. In many countries the time required to be in a compliant position exceeds the timeline provided by an agreement. In those cases non-compliance could be relatively tolerated, and the reputational costs therefore are lower.

The reputational costs of non-compliance with the WTO in general and trade facilitation in particular, however, are unlikely to be attenuated by the above described factors. On the first place, because the margin for the interpretation of trade facilitation provisions is not as wide even their hortatory formulation. While the full breadth and reach of certain principles such as transparency or predictability can be subject of debates, these can be easily deemed unmeet when certain straightforward facts are present. For instance, there is little room for debate when basic public information is not available.

Secondly, the political contestability of trade facilitation commitments is very close to zero. This is due to the favorable view to this area, which is high in most international forums. Several organizations have indeed included trade facilitation in their agenda and allocated a significant amount of resources to it, including development-oriented organizations such as UNCTAD. The negotiations on trade facilitation at the WTO are, as of now, unique in their kind: they successfully concluded with a consensus-based agreement. The Doha Rounds, which have been ongoing at the WTO for fifteen years with less promising progress, evidences how difficult this type of outcome is at multilateral trade negotiations. This relative momentum and success of trade facilitation, therefore, suggest that constructing a fruitful political narrative based on implementing less efficient, transparent or predictable custom procedures will probably be unviable at international forums. If the procedures actually downgrade in terms of trade facilitation, the narrative will be even less successful.

Additionally, while improving trade facilitation surely requires strengthening capabilities for instance in regards to custom logistic, most of these capabilities are probably accessible to middle and upper-middle income countries. These types of countries should be able to implement trade facilitation reforms within a reasonable amount of time. In order to achieve this, developing countries can also benefit from a number of programs and funding that have been made available by international organizations such as the World Bank.

In fact, Argentina is one of the countries that have built technical capacity in this area. According to the trade facilitation indicators created by the OECD: "Argentina matches or exceeds best performance across the sample as regards information availability, automation, and internal border agency cooperation. Argentina matches or exceeds the average performance of upper middle income countries in all TFI areas except for the simplification and harmonization of documents. Performance has improved between 2012 and 2015 in the areas of advance rulings, automation and internal border agency cooperation"[20]. This suggests that Argentina has the capabilities to implement trade facilitation, and indeed does implements the required procedures in almost all dimensions.

Despite this, the DJAI procedures implemented in Argentina have not been oriented to facilitating trade but to restrict trade in line with the former government policy. In a context in which several WTO members were implementing trade-restrictive measures as a response to the global economic crisis, Argentina did too. However, as opposed to the traditional protectionism implemented by most countries, Argentina restricted trade through a less efficient way but also less transparent and predictable border procedures.

Nonetheless, this policy miscalculated the long-term reputational costs. Without credible attenuations, and due to the distinctiveness of its trade-restrictive border procedures, Argentina took a special reputational toll due to this policy. This is reflected, or instance, in the opinions of decisions takers that consider the nation as the "world leader in protectionism", although in reality trade-restrictive measures are implemented across the membership of the WTO, in many case more frequently and with more profound economic consequences than the DJAI.

The effects over reputation are particularly costly at the WTO, where it becomes a crucial bargaining tool. This is especially true for developing countries like Argentina, which normally cannot promote their multilateral interests based solely on political power, legal or technical capabilities. On the other hand, the claimants in the above mentioned case probably did take into account these reputational costs. In fact, considering that the WTO is a political forum as much as a technical forum, imposing these reputational costs over Argentina was probably one of the main motivations to invoke the DSB.

In hindsight, these reputational costs were not even compensated by the presumed benefits of the trade-restrictive procedures. Although they probably increased the time and costs of importers had to bear, these measures seemly had little effects over the industrial structure of the country. Indeed, during the period they were implemented Argentina faced its largest trade deficit in more than ten years.

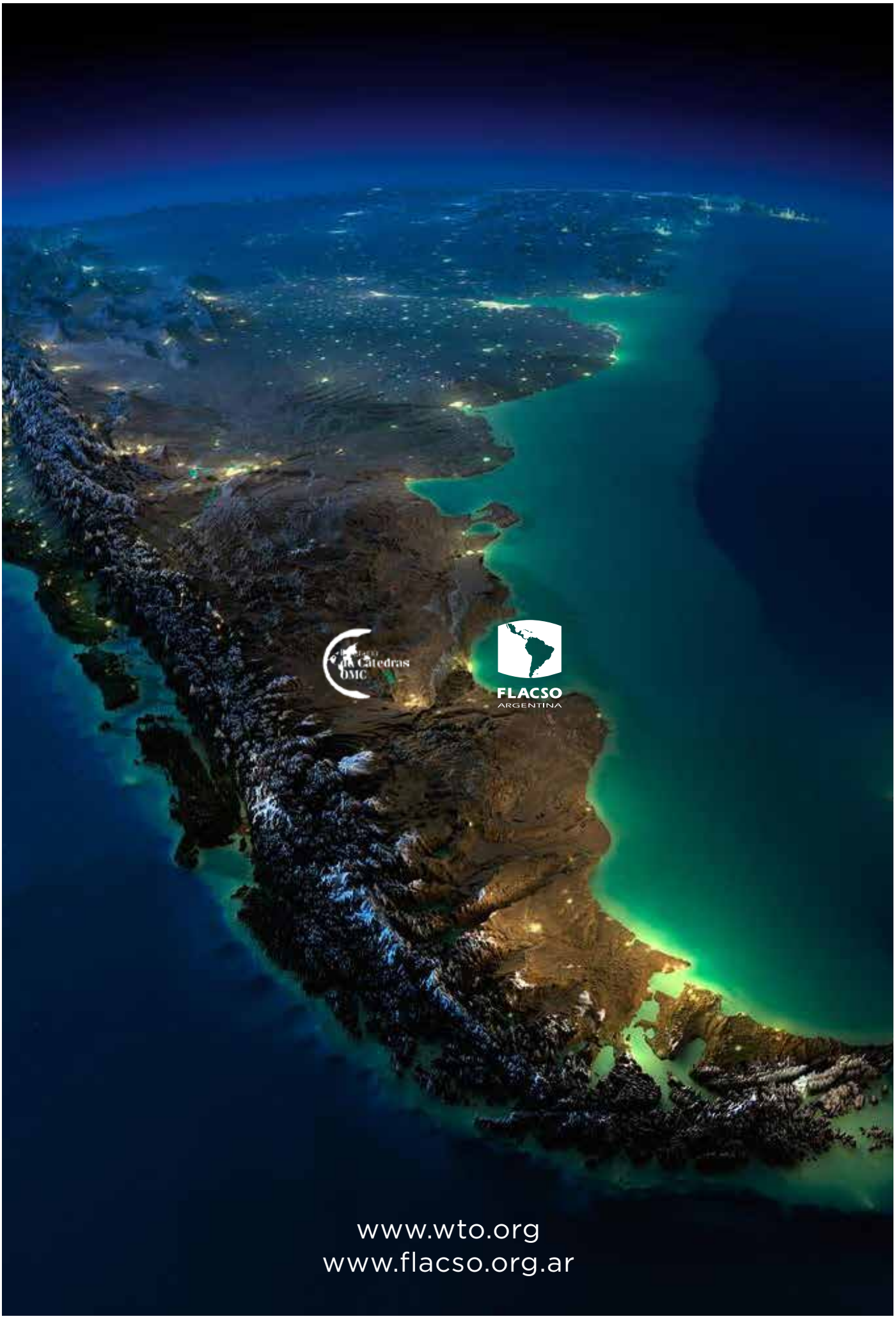
Lessons for Argentina and other countries

[20] See: oecd.org/trade/facilitation/indicators.htm

The debate about trade facilitation has been spurred by a growing number of empirical studies that investigates the cost and benefits of improving border and behind-the-border procedures for importers. These studies are generally based on economic arguments.

However, trade facilitation policies can also impact a country reputation. This seems to be the case of Argentina, often characterized as the world leader in 'protectionism' despite the fact that -especially during the economic crisis- other WTO members have also implemented similar numbers of trade-restrictive measures. Without obvious and significant quantitative differences, this perceptional gap can perhaps be attributed to the nature of the trade-restrictive measures implemented by Argentina. As shown here, the most visible trade-restrictive policy promoted by Buenos Aires in recent years has been the formalities-increasing, transparency-reducing DJAI. Because these measures conflicted with procedures that are being recommended in the growing literature on trade facilitation, implementing them imposed a particularly high reputational cost for Argentina.

The other way around may work out. It is possible that implementing trade facilitation policies can significantly benefit the trade reputation of countries. These reputational effects could be potentiated by the visibility of indicators that measure trade facilitation, such as indicators suggested by the OECD. Therefore, these reputational costs and benefits should also be taking into account when considering the importance of implementing trade facilitation policies or ratifying agreements in this area, including the agreement signed at the WTO.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