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## The WTO and International Trade Law after Doha: Where Do We Go from Here

Alejandro Jara

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STEFAN A. RIESENFELD  
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Keynote Address –  
The WTO and International Trade Law  
After Doha: Where Do We Go From Here?

By  
Dr. Alejandro Jara, Deputy Director-General, WTO

INTRODUCTIONS BY: SHARLA DRAEMEL AND PROFESSOR RICHARD BUXBAUM

SHARLA DRAEMEL: Good afternoon, thank you so much for joining us today, we're really delighted to have such an esteemed keynote address. [Dr. Jara] couldn't be a more appropriate speaker for our topic today. To give him a more appropriate welcome, I would like to first introduce Professor Richard Buxbaum who will be introducing our keynote speaker.

RICHARD BUXBAUM: Thank you. It's not only a privilege and an honor to introduce Ambassador Jara, it's a personal pleasure as well. It is now just a little over thirty years ago that he joined us at Boalt for his LLM degree having graduated at that time a year earlier at home. And that was the year in which Professor Reisenfeld retired. So we have contiguity if not overlap on that point. And the reason I mention that is that we spoke this morning, Dean Edley in particular, of Stefan Reisenfeld's engagement here. And what some of you may not realize, some of you newer folks, is that he is the only academic, not only in the United States but also in Europe, who was actually fascinated by the

European Community's common agricultural policy. And when Hans Schmidt at Columbia helped to organize a collective commentary on the law of the European Community, Reisenfeld wrote—and in fact it delayed the publication of the volume, a 240 page commentary on the common agricultural policy. I personally still remember when commissioner Hand Vandergruben came to Berkeley around that time and saw this. He was dumbfounded. And one of his questions was, why? [laughter] But Steve was always interested in details. He knew more about salmon from their row to their location on the Safeway shelves than any other human being I've ever met. And that was the bedrock sense that all of us who had continuity with Steve Reisenfel got. And I hope that all of you received some indirectly through the related generations—the respect for details and the related facts without losing the overall picture. And I just thought it was too nice to let that common agricultural policy go. I was talking to Professor Nettisheim this morning and I asked him what European academic works on the European Agricultural policy? And he said well frankly, in law, no one. It's very detailed, very technical. There may be some.

Ambassador Jara is one of the people I would say who has earned the right, if you want to put it that way, to be seen as a leading figure in this field. His entire professional, diplomatic career has indeed been spent not only in international economic relations taken as a whole, but in world trade in particular. His major appointment upon returning to Chile and entering the diplomatic service was to be immediately sent to the GATT delegation in Geneva, and he spent several years in that early stage of his career there really learning those ropes at that time. He returned home and after working again in the international economic field went to Caracas in the early 80s. Again in the Latin American economic system. Then he went back and became the director of both the bilateral and multilateral trade negotiation structures for Chile over the next several years.

He returned to Geneva. He had been, in the meantime, the Chilean negotiator of several of their most important bilaterals. Mexico is a very important example of that. And then returned to Geneva as the head of the Chilean representation to the WTO with the rank of Ambassador. It is a matter of public record that Chile had a different candidate in mind for the director general in the last round. Even if you wouldn't say it Alejandro, it is a particular tribute to you and to your deep experience that the Director-General requested you to join in October 2005 as one of the four Deputy-Director Generals at that time. We've had a lot of nice conversations including in Geneva and I'm really looking forward to not only your reflections on this morning's panel, but also on the larger theme of Doha Round and afterwards. Thank you very much for being here.

DR. ALEJANDRO JARA: Thank you very much. Perhaps they appointed me Deputy-Director General because they wanted to keep me quiet for a number of years. That's why I welcome very much the occasion to be here. We in the Secretariat, we don't have the right to take the floor during meetings.

Thank you very much, I feel flattered to be here. Thank you to the Berkeley Journal of International Law, to the International Legal Studies Program, thank you Sharla and Laura. You sent me a letter and an email, and soon after Jon Huenemann—thank you for your kind words this morning, John, sent me an email and I immediately accepted. It was just too flattering to be asked to be back here at this very prestigious Symposium and to be the Keynote speaker. Irresistible.

I studied here in 1975-76, thanks to the Fulbright fellowship. And I have to say something to correct the record. Somewhere it says that I got a Master of Law degree. I didn't. I was 3 credits short of it because I told Professor Buxbaum, he was my tutor, that I'd rather spend my last three weeks in California traveling instead of typing. [laughter] He said be careful because those papers have a tendency to get yellow and get old, and maybe you'll never send it in. And I never did. One reason why is because two years later I looked at what I had written and I totally disagreed with what I had done. And I had much to do with other things to keep me busy.

I don't have a Power Point. I have a friend who works at the World Bank who says that power corrupts [laughter] and that Power Point corrupts absolutely.

International Trade Law after Doha. Do we have an after? I do believe sincerely that we do. But international trade law is not only about the WTO, we have bilateral investment agreements. There is a lot of law and case law out there. And we have numerous free trade agreements and the agreements themselves are law and we have case law under those agreements. Trade to me is an expanding concept. We've gone from trade in goods, the GATT, to the WTO covering services. And in services, investment is there. And we have intellectual property as part of the trading system as well. What lies in the future? I think we have to tackle the question of whether or not to include investment per se in the WTO. I think we should, because investment out there is being regulated by many bilateral agreements and there is no multilateral control. Maybe competition policy. And maybe if we are lucky we'll be able to include air transportation into the system which today is excluded.

To me trade also is a deepening concept. Trade law is getting more sophisticated, more detailed, and certainly more complex. About thirty, twenty years ago I could say I'm an expert in the GATT and trade. Today I think no one can say I'm a WTO expert. You become an expert in goods or an expert in services, or in financial services or in intellectual property etc. It's an increasingly complex world which requires greater specialization. The WTO is at the very center of all this because it's a forum for trade negotiations although you can say we have not done very well on this score lately. It's also a set of rules of discipline, that's the public good we have. It's protected by dispute settlement mechanism that works. More on that. We provide technical assistance and we undertake a lot of monitoring and surveillance.

Let me say a few things about the dispute settlement mechanism since we

are in the school of law. The dispute settlement mechanism of the WTO is not a court of law, it's quasi-judicial. It has compulsory jurisdiction, it's accessible to all members, it decides according to law. It's quasi-automatic, the decisions are made by persons who are independent and it's got an enforcement mechanism. It's coherent. It's got one set of rules for all the covered agreements of the WTO. But the outcome of any dispute in the WTO is negotiated. In other words a panel or an appellate body will go so far as to say whether a measure is or is not in violation of an obligation. And if it is they will *recommend* that the measure be terminated or that it is otherwise put into conformity with the obligation. But that's where it stops. What happens to that measure and in what period of time is something that has to be negotiated by the two parties to the dispute.

It is very much also a system where at the very end is a lot of diplomatic and political control. And it works. It works because [of] a very common perception that it is in the interest of all to abide by it. We have had over 350 disputes, over 40% of which have been initiated by developing countries. We've had more than 123 panels covering 159 disputes. The United States has been a complainant or respondent in 51% of the cases. Half of the cases that we have in the WTO, the disputes involve trade remedies. And of those, a big chunk are with regard to those measures which I will abstain myself from qualifying but I will refer to Professor Cho.

In 90% of the cases a violation has been found and at the end of the day there is enforcement. Countries, governments comply with the rulings. Sometimes it becomes difficult to comply. It takes more than one would hope. Particularly, where you have to move a congress and particularly with that is the United States Congress. It takes even longer. But at the end of the day you can apply counter measures to encourage compliance. And we have two sets of counter measures being applied today. One is against the European Union, the United States applies measures because of a hormones case; and the other one is against the United States by several countries because of the so-called "Bird Amendment." I think these broad numbers will tell you that it works. The test of the system, does it help to solve disputes?—absolutely.

And Professor Aggarwal was saying something this morning about developing countries and the cost of the dispute settlement mechanism. The cost is not that big. And particularly when you have a problem and there is an industry behind it, the industry will finance it, particularly in a developing country. And there's something called the Advisory Center for WTO Law which can help a developing country and that's another means of doing it. And as for politics, his words were, "you don't sue your donor." I don't think that corresponds exactly to the reality. The reality is that when you have a bilateral problem, a trade dispute, you start having political meetings. It raises the political profile and affects the bilateral relationship. But once you take it to the WTO, and I say this out of experience, then the problem is removed from the bilateral agenda. There is someone else who will decide. You don't have to spend your political capital trying to move the other party, perhaps a bigger party, to change the measure. I

think it's perhaps politically effective, cost effective if you will, in this regard. And the record is there.

Anyway, let me turn now to liberalization. Let's have a look at the Doha Round. I am very grateful to all the speakers this morning because they have said a number of things which will spare me the trouble of saying this to you, and since I'm very jet lagged that's even more helpful. As one looks around the world economy in the last, let's say twenty [or] thirty years, the rhythm and scope of trade liberalization is very impressive. In goods, in investments, in services, and this is ongoing. Services are even being liberalized as we speak. In Europe or in Japan postal services for example. Most of this has been done unilaterally. By some accounts, if one takes what's happened over the last fifteen or sixteen years, sixty percent of liberalization is explained by measures that governments have taken unilaterally. Twenty-five percent thanks to the multilateral trade negotiations, mainly the Uruguay round. But also, after the Uruguay Round, many processes of accession by important economies. Only ten percent is due to bilateral agreements. Now, these numbers may change in the future. Particularly on the side of bilateral agreements, but there you're going to say that most of the liberalization has been done unilaterally. Now we hope we can catch that in the WTO.

Mention was made this morning of a correlation, particularly in the field of trade agricultural, between trade openness and poverty reduction. But some figures are very impressive. Sixty percent of the world population lived in poverty in the year 1915. By the year 2002 that was reduced to 20%. This means China, India. Many countries have gone in the reverse direction. Poverty has increased. But, where it has decreased, you can see the correlation between opening up the economy, amongst other policies, and poverty reduction.

Free trade agreements. [There are] many of them, and this is continuing and growing. And perhaps more will come and be more important as [they] involve larger economies. I'm talking of an agreement between the United States and Korea, the United States and Malaysia, and others, for example. This is not all due to free trade agreements, but certainly it tells you a lot about the world; the European Union applies a most favored nation duty only to 9 countries around the world. With all the rest of the countries or economies of the world they have a preferential tariff. Who do they trade most with? With those nine. In many ways, and I think the argument was made by Christina [Sevilla], the free trade agreements have become a struggle against discrimination...[J]ust listening to some of the conversations this morning, I'm thinking of John Huenemann, and what we have done in the past with negotiating agreements, and I started saying here we have two criminals [laughter].

Let me say a little more about this. Chile did a free trade agreement for example with Korea. The duty for wine in Korea I think is 23%. Ask any California exporter, or any French, New Zealand or Australian, how do they feel about Korea, and they don't feel very good about it because Chile took the market over. Of course it's the best wine, so, anyway... [laughter] Also, Professor Ag-

garwal said it, when a small country negotiates a free trade agreement with a big country...that this will reinforce the rule of power instead of the rule of law, I don't agree. For example, many developing countries have access to developed country markets by virtue of preferential schemes such as a generalized system of preferences...or the...Preferences Act, etc. Every time one of these has to be renewed there may be more conditions attached. You may only have access to the preferences if you do this on labor standards, if you do that on intellectual property, etc. So there's a constant pressure on these countries that if they want to maintain their access they will have to changes in some things, there's not a negotiation. Whereas when you do a free trade agreement, that's it and it's forever. So it's good. No more pressures.

Having said all that, let's say, as has been said—these agreements do not solve everything. They can't. For economic reasons they cannot deal with subsidies in agriculture or maybe even tariffs, where many tariffs in agriculture are part of an agricultural policy. But the main point is that subsidies can only be dealt with multilaterally. Or take for example, fisheries subsidies. Subsidies granted to keep vessels out there which they otherwise couldn't, which encourage exploitation of fishery resources. That can't be done bilaterally. As my boss likes to say—there's no multilateral or bilateral farmer. Anyway, there's also anti-dumping. Anti-dumping, because of the politics behind, can only be dealt with if the rules improve in a multilateral setting. Those three are examples of changes that can only be done in multilateral trade negotiations and that means the WTO.

If it's so easy to liberalize, liberalization has been done so wide scale, why is it so difficult at the WTO? Well, I think the panel this morning on agriculture explained it all. We have a very difficult situation in the Doha Round right now. Last July, the negotiations collapsed and they were suspended. They were suspended because they couldn't go any further. And in order to salvage what was on the table, which was very much, things were stopped because otherwise countries could start rolling back on their positions, and making a bad situation even worse. And the point on which it collapsed was agriculture. In particular domestic support and market access. Why does this happen? The high level of ambition. And I think Tim Josling explained that this morning, why what we could get out of these negotiations is far more than what was negotiated in the Uruguay Round, and [it's] very important to many developing countries. But a high level of ambition requires more exceptions. There are sensitivities that have to be addressed one way or another. And in Agriculture, the sensitivities mean the larger markets: beef, dairy, sugar, maybe bananas, and others. So we had to suspend, but we have had a very active suspension. And we have only restarted the negotiations now in late January when we got enough signals of political support and impatience. But really, not an increasing flexibility.

However, one must say that the situation of these negotiations has improved very much since then because the major actors in this game are finally sitting down and negotiating what they should have long ago. As John Huene-

mann explained, the reverse engineering. And let me stop here for a sec, and just to show you the mistakes we sometimes make in organizing negotiations.

Our point of departure was that we would first deal with modalities. In other words, we would first find the numbers of the tariffs, how much they were going to be reduced on agriculture, on industrial products. By how much you would reduce your domestic support, by how long it would take to eliminate export subsidies, etc. All the details. And one month later, or two, governments would come back with their schedules, line by line, showing how to apply these modalities on a line by line product basis. But it's only then the governments would be aware of what would be their sensitive products or special products for developing countries. Some developing countries would be applying special measures should it become necessary etc. And frankly, no one likes to negotiate blind-folded. And I think the United States had a point way back in July where it said, 'I can be more flexible on domestic supply, but I cannot show my hand because you're going to pocket this first and ask me for more and I will not know until much later where the impact of these modalities will be on products of interest to the United States.' And that's no way to negotiate.

So what's going to happen right now, including this weekend, is that governments are talking to each other, discreetly. It has to be done bilaterally because most people don't like to undress in public. The only way to do this is very discreetly, bilaterally, to let the other side become aware of where the sensitivities are where the problems are. And once you know that you have problems, you switch to a problem solving mood. That's the way to go on agriculture. And this should also be part of a package that would also include industrial products, etc. and an understanding of the depth of tariff cuts.

And a lot has been said already, I just want to say a few things here. We hope that by the middle of the year, if we are very lucky, we can get traction moving from these bilateral talks and work back to Geneva and to build the modalities and the rules of the game for agriculture and for non-agriculture market access. And in doing so, one does have to start putting special numbers or disciplines for special cases. And just to show you two things on the complexity, and also the fact that negotiations are not north-south; it's not a developing-developed country problem. But it's certainly more complex because you have to accommodate the so-called RANS—the recently acceded numbers. You know China, Chinese Taipei, Kyrgyzstan and others, Georgia, etc, who claim that when they entered the WTO they paid a lot. To use an American expression they were taken to the cleaners. And I think they have a point therefore they say they cannot politically or economically do a lot more now. So I want to pay, but less.

Then you have those countries which are concerned about preference erosion. For example, many Caribbean countries will be concerned that they will lose their preference for sugar or bananas in the European Union market or in the US market in some cases. So they are against liberalization of those products. That is counteracted by the Central American countries who say exactly the opposite. They want all tropical products to be liberalized immediately.

Then you have the problems of geographical indications, and this pits the old world against the new world. Be it on wines and spirits and the desire of some to extend geographical protection that wine enjoys today to some other products. And some even will say to services but fortunately that hasn't caught up very much.

Then you have the small and vulnerable economies. And this goes on and on and on. There are many coalitions mixing developed and developing countries that interact, some with offensive, others with defensive interest and one has to accommodate all of that at least where agriculture and non-agriculture are concerned in one big Christmas tree and hopefully achieve a balance.

Much has been said about agriculture so I'll say no more about that right now. But let me say a few words about what we call NAMA—non-agricultural market access. Trying to use a Swiss formula with a coefficient that will change tariff structures all over the world. It will compress the tariff. In other words, make it much more flat. And therefore, it could mean a big change in terms of opening new markets and generating new incentives for investment everywhere. For example, it would be very development friendly [when] you think [about] Bangladesh, a least developed country. Its exports into the United States pay more by way of duties than the combined exports of Denmark, Norway, Finland and Sweden into the United States because of textiles and clothing. So by applying a formula, the Swiss formula, on textiles and clothing, then Bangladesh will stand to win greatly.

I have also to say that there have been some comments this morning that to make this more feasible politically we all need more market access and real terms. But it so happens that many countries have already liberalized their industrial products or part of the agricultural products in the past. So when, let's say the United States, asks some developing countries to make real cuts, you apply a formula cut, then the country will be reducing from its bound level, to get closer to its applied level. Let's take Chile for example. Chile has a binding of 25%. It's applied is 6%, because of many free trade agreements its average is 1.9% actually. You'd have to have a formula with a very low coefficient to get Chile to go below its applied level. But wait a minute. What are the other countries gaining by eliminating what is called the 'water in the tariff.' A lot. They're gaining their liberalization which has already been anticipated so there's a real gain there. For many countries this is a reality. In many countries the businessmen and the politicians are devaluing the value of binding in the system what you have already done unilaterally. Big political mistake maybe.

Let me say a few words about the other areas in the negotiations and then I'll wrap up. Another very important area is services. Before joining the secretariat I was chairing the negotiations of services for four years. Sometimes I would tell the governments' delegations: would any delegation that has made an offer that will create a new business opportunity raise its hand. And I would always have silence. In other words, what we have on the table is a total or partial binding of unilateral liberalization. As a matter of fact, even the most ambitious

agreements on services, meaning those in bilateral free trade agreements do very much that. They simply bind the existing liberalization and they put in the annex the existing restrictions. And there's an annex too in the NAFTA model which will reflect carve outs for future restrictions that will be applied in carefully defined circumstances.

There's the exclusion game. When Europe says, 'audio visuals—no way,' the US says, 'managed transportation—never'. Canada says, 'cultural industries—out of the question.' It's like a snow ball. Everyone feels entitled to say no to this, no to that, I don't want to talk, etc. etc. So that adds another difficulty to the services negotiations. This is all to say that the services negotiation now, we can get a lot of progress in some key areas but I don't think we're going to get to the point where the results in services will capture what has been negotiated unilaterally. In the words of a French economist, in his particular French accent, he says, 'the world still has to learn to negotiate services or liberalize services through trade negotiations.' Anyway, I say this because we have to do a lot more research and learn how to do this; how to do services liberalization and how to negotiate better, how to organize negotiations better. We've already made a lot of mistakes in this area in the past.

We have another area called rules which implies anti-dumping. A lot has been said there, I just want to make the point that to my mind today, to improve the rules on anti-dumping means something like a multilateral disarmament. Today measures of anti-dumping are not applied by the developed countries, but by the developing countries and also against the other developing countries. India and China and Argentina and many others do it all the time, this is increasing. But we also have fisheries subsidies where we are learning, and we still have a lot of technical work to do there, on how to eliminate certain subsidies. And we have a very interesting outcome possible in this negotiation of better rules for regional trade agreements, because the rules we already have are of little value to control this growing spiral of free trade agreements.

Another very important area of the negotiation is what we call trade facilitation. And no one contests this very much. Everyone is very much attached to getting good results. This has to do with customs procedures, administrative procedures, and freedom of transit. This would help to reduce transaction costs very much. And incidentally, the mandate for trade facilitation does contain a very interesting novelty in the system. It says that the implementation of the eventual results on trade facilitation will be linked to the capacity of each government to implement those. In other words, a special and differential treatment *a la carte*. It applies not like special and differential treatment like one rule for *all* developing countries, but maybe Brazil will not need it whereas Honduras will need more, etc. etc. Each one will have to make its own case. This may improve and make more effective the special and differential treatment inside the WTO.

We also have negotiations on improvements that could be made to the dispute settlement understanding. Many are of the view that the system works,

quite well. If it ain't broke don't fix it. But there are some things which could be done. I won't go into many details here, but this can affect things like third party rights, like making a remand authority, given the authority of the appellate body, the authority to remand the case to the panels to complete the analysis or the fact finding that they have to do, etc. Complex questions undoubtedly, but possible if put inside a package of balanced results across the issues.

Then we have, as I said, geographical indications, which is basically about having a multilateral registry for wines and spirits. And the quarrel is that the EU wants this to be legally binding, and the rest of the world, the new worlds, wants this to be just for indicative purposes and to facilitate the protection of geographical indications.

We also have an area of trade and environment. Perhaps achieve a little bit more liberalization for environmental goods and services. But also, if needed, to clarify the relationship between the WTO and multilateral environmental agreements. There's so far no conflict of law, but if it will bring a greater degree of comfort to governments, civil society, etc, perhaps a few things can be said in that direction.

We have another area which is a work in progress which is not part of the negotiation, but I must highlight it because this is very much to the core of what one calls a development agenda. And that is something that we call "aid for trade." In other words, for many countries in this world, particularly the least developed, it doesn't matter by how much you bring down tariffs, by how much you eliminate subsidies, because if you don't have the infrastructure, if you don't have controls, I mean quality controls to see if you comply with certain standards, etc., you will not be able to export anything. Therefore, negotiations can be quite meaningless for many unless you change the supply side, unless you help improve the infrastructure and you do the capacity building.

Now the WTO is not a development agency and we are certainly not equipped to handle all that, but certainly we can coordinate all efforts into this program which can grow in years to come to bring all the resources together. All the resources from the World Bank, from the OECD, from the regional development banks, including from the private sector, into coherent development programs designed by each country. Each country will [identify] their priorities in order to improve their capacity to take advantage of trade opportunities. And if this program is attractive, I'm pretty sure they will attract increased funding by donor countries to help the poor to take advantage of the trade liberalization.

I would like to draw these remarks to a conclusion by saying that right now we have a great deal of political support to conclude the round; that we have a seen some movement in the key players in terms of they're finally talking to one another and negotiating what they should have done a long time ago.

Very attractive ideas about having a moratorium on free trade agreements, perhaps it could be put in a different way. Ask governments to devote all the necessary resources to conclude the round in the next eight, ten, twelve months. And, therefore to not let the activities around free trade agreements take away

necessary resources to conclude the round right now. It is very important to realize that what is on the table, Tim Josling made some remarks in this regard, it's big—huge. It's an opportunity that should not go away. We cannot lose it. If we don't get this right, we are going to lose a great deal. And we're going to get more free trade agreements, we're going to get a lot more litigation, certainly. And mind you, we're going to be missing opportunities to reduce poverty world wide on a big scale. And that's really scary.

So, I'm very happy to be here, very happy to be here at this moment. It's a very crucial moment for the multilateral trading system. Things appear to be moving in the right direction, albeit too slowly. I wish I could perhaps come back here in a year or so with good news if you would be kind enough to let me come here to explain the results that we have and how good they are. Anyway, I thank you very much for the opportunity to exchange the ideas with you today and I will be ready to answer any easy questions that you might have.

[Applause]