

**AN INTRODUCTION TO THE WTO DECISION  
ON DOCUMENT RESTRICTION**

By L. Brennan Van Dyke & John Barlow Weiner



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

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**PUBLIC PARTICIPATION IN THE INTERNATIONAL TRADING SYSTEM**

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Center for International Environmental Law (CIEL)



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## INTRODUCTION

The WTO General Council adopted a Decision on July 18, 1996 establishing procedures for the dissemination of WTO documents to the public.<sup>1</sup> This discussion will first explain how documents can become available under the new decision and then evaluate these procedures and the access to documents that now exists under them.

Following an overview in Part A, the three methods by which derestriction can occur -- automatically, through scheduled consideration, or through unscheduled consideration -- are discussed in more detail, in Parts B, C, and D. In Part E, the reconsideration of documents for derestriction is explained and the lack of stipulated evaluative criteria for derestriction determination is discussed. Part F explains how to obtain unrestricted and derestricted documents. Finally, Part G critiques the current processes for releasing documents to the public pursuant to the July decision.

### A. Overview

The Decision is being implemented by the Secretariat in accordance with two assumptions:

- The General Council intended to prevent any reduction from past practice under the GATT in the availability of documents to the public; and
- Where the Decision does not explicitly overrule prior GATT practice, the Secretariat is obliged to continue to act in accordance with that practice.

Therefore, in its implementation of the Decision, the Secretariat is attempting to ensure that no documents are less readily available than they would have been under the GATT. However, where the language of the Decision is ambiguous, the Secretariat will act in accordance with prior GATT practice, rather than read the Decision as establishing a new one.<sup>2</sup>

#### *1. Most Important Policy Documents Remain Restricted under the Decision*

Ostensibly, the Decision reversed the existing presumption in favor of restriction, carried over from prior practice under the GATT. Under the GATT, documents were always restricted, requiring action by the Contracting

Parties to derestrict them. In contrast, official series WTO documents<sup>3</sup> are now to be circulated as unrestricted, unless they are of a type specifically identified in the Appendix to the Decision as restricted.<sup>4</sup> However, the documents listed as restricted in the Appendix include most of the documents pertaining to pending policy decisions, making the current presumption, in fact, if not in theory, not all that different from the presumption that operated under the GATT.

## *2. Currently Restricted Documents*

Depending upon the document type, derestriction of restricted documents can either be automatic or subject to Member consideration. Below is a chart listing the scheduled timing for (1) derestriction or (2) consideration for derestriction of restricted WTO documents:

### **CHART OF THE SCHEDULED AVAILABILITY OF THE DOCUMENT TYPES IDENTIFIED IN THE APPENDIX TO THE DECISION**

- All official series documents that are not in this chart should be available to the public without any delay;
- Even if the document type is listed as restricted, if a particular document of that type contains only (1) publicly available information or (2) information that must be published under any agreement in Annexes 1-3 to the WTO Agreement,<sup>5</sup> the document cannot be restricted at all,<sup>6</sup> and
- A Member can always designate any document that it submits as unrestricted.<sup>7</sup>

#### *Automatically Derestricted*

- **Documents produced by working parties on accession:** Derestricted upon adoption of the report of the working party; prior to adoption, reviewed for derestriction at the end of the first year following the year in which the document is circulated.<sup>8</sup>
- **Panel reports:** Within 10 days after date of circulation to the Membership.<sup>9</sup>
- **Reports by the Secretariat and government concerned relating to the Trade Policy Review Mechanism** (including annual reports of the Director General): Upon the expiry of the press embargo thereon (a press embargo is imposed, forbidding publication or

quotation from these documents until the trade review is conducted; these documents are generally circulated 3-4 weeks before the review and should be derestricted immediately after the review).

- **"SECRET/-" series documents** (i.e., documents relating to modification or withdrawal of concessions pursuant to Art. XXVIII of the GATT 1994): Upon completion of the Art. XXVIII process.
- **Working documents other than those specifically identified below** (working documents are drafts, such as agendas, decisions, proposals, and papers issued as "-/W/-" documents in any series; agendas are drafts until they are adopted at the meeting; final versions of agendas may not be produced, depending upon the policy of the body -- some bodies consider it sufficient to refer in the record to the items discussed): (1) Derestricted upon adoption of the report or decision and (2) reviewed for derestriction 6 months after the date of circulation to the Membership, if the report has not yet been adopted.<sup>10</sup>

Subject to Scheduled Derestriction Consideration

- **Balance of payments consultations documents** (including working documents and reports on the consultations); **Documents designated restricted by the Member submitting them for circulation; Working Documents Relating to the Committees on Market Access and on Trade & Development, and the Trade Policy Review Mechanism; and Meeting Minutes:** Reviewed for derestriction at the end of the six month period in which they are circulated to the Membership.
- **Background notes by the Secretariat** (a class of working documents): Reviewed for derestriction 6 months after date of circulation to the Membership (except for the minutes of the Trade Policy Review Body, which are circulated as unrestricted).

Never Derestricted

- **Budget working documents in the "Spec/-" series:** Unless a Member requests that they be considered for derestriction.<sup>11</sup>

### *Methods & Timing of Derestriction*

As presented in the chart above, some restricted documents are automatically derestricted, and some are considered for derestriction according to stipulated schedules. In addition, both the Membership and authorized WTO bodies can consider the derestriction of a restricted document at any time. If a Member objects to the derestriction of a document (that is not automatically derestricted), the document will be reconsidered for derestriction within two years and annually thereafter, if it continues to remain restricted.

#### *i. Automatic Derestriction*

Documents that qualify for automatic derestriction are derestricted upon the occurrence of stipulated triggering events without any review by the Membership.

- The timing of automatic derestriction depends upon when the triggering event occurs (see the chart on pages 4-5).

#### *ii. Scheduled Derestriction Consideration*

The timing of derestriction for documents subject to scheduled derestriction consideration varies considerably depending upon the document type and when the document is circulated to the Membership. By this method:

- *In the absence of an objection by a Member*, derestriction of a document generally will occur between 2 and 9 months after circulation of the document to the Membership (derestriction of documents from accession working parties is the exception, taking over a year).

#### *iii. Unscheduled Derestriction Consideration*

There are two forms of unscheduled derestriction consideration. They are alternatives to scheduled derestriction consideration but only supplement the automatic derestriction process by making it possible to derestrict a document prior to the triggering event. Either the Membership or an authorized WTO Body can consider the derestriction of a document at any time. If no Member objects to the derestriction, the timing for derestriction of documents by the Membership is fairly consistent. The timing varies, however, for WTO bodies, according to when the next meeting of the body is scheduled to occur.



Derestriction of a document, *in the absence of an objection by a Member*, can take:

- Approximately 2 months through review by the Membership; and
- At best, a couple of weeks, and at worst, several months through consideration by an authorized WTO body.

*iv. Derestriction Reconsideration*

Members can object to the derestriction of any document that is not automatically derestricted and can do so indefinitely. However, the document will periodically be reconsidered for derestriction.

- *In the absence of an objection by a Member during reconsideration*, derestriction reconsideration will result in the derestriction of a document 1 to 2 years after the most recent objection to its derestriction.

**B. Automatic Derestriction**

As noted in the chart (pages 4-5), the following documents are eligible for automatic derestriction: documents relating to modification or withdrawal of concessions, to the Trade Policy Review Mechanism, and to accession working parties; many "working", or draft, documents; and dispute settlement panel decisions.

Automatic derestriction means that the derestriction of the document is not subject to consideration by WTO Members. If the triggering event occurs, the document is derestricted; no Member can prevent the derestriction by objecting to it. It is also, therefore, the only derestriction method that is not delayed by the incorporation of a review period, as described below, for Members to consider the matter.<sup>12</sup> The speed of automatic derestriction depends solely upon how quickly the triggering event occurs.

**C. Scheduled Derestriction Consideration**

When the above-mentioned chart refers to documents that are "reviewed for derestriction," the process of periodic notice to Members described below applies.

### *1. The Timing of Scheduled Derestriction Consideration*

As the chart shows, there are two primary schedules that govern the scheduled consideration for derestriction of most documents.<sup>13</sup> Some of the documents subject to derestriction consideration become eligible for consideration six months after the date of their circulation. Others become eligible at the end of the six-month period (January-June or July-December) in which they are circulated. (Note: If they are circulated near the end of the six-month period, documents subject to the latter review requirement will become eligible for derestriction consideration almost immediately. Those circulated near the beginning of the period, however, become eligible only after practically a full six months.)

The Secretariat is responsible for notifying the Membership as documents become eligible for consideration.<sup>14</sup> If no Member objects to the proposed derestriction of a document before the date of derestriction indicated in the notice, generally 60 days after the date of circulation of the notice, the document is derestricted upon that date.<sup>15</sup>

### *2. The Scheduled Derestriction Consideration Process*

The Secretariat notifies the Membership of which documents must be considered for derestriction by circulating lists of documents. While the Decision stipulates when the Membership must consider the derestriction of certain types of documents, it does not explicitly state the time period for this consideration. The practice of the Secretariat is:

- Always to give the Membership 60-days notice to ensure the Members sufficient time to consider the derestriction;<sup>16</sup>
- To circulate its lists approximately monthly (as a matter of administrative efficiency); and
- Not to include a document in a list of documents proposed for derestriction until the entire restricted period for the document has passed (e.g., for a document that is to be considered for derestriction six months after the date of its circulation, notice will not be sent until a full six months have passed).

The consequence of the third of these practices, i.e., not notifying Members of the eligibility of a document for scheduled derestriction

consideration until the end of the restricted period mandated for the document -- a practice that is *not* required by the Decision<sup>17</sup> -- is to add an additional 60 days to the restricted period for every document successfully derestricted through the scheduled derestriction consideration process (i.e., to the derestriction of which no Member objects).

*i. Documents Considered for Derestriction at the End of the 6-Month Period in which They are Circulated*

Documents relating to balance of payments consultations, working documents of the Committees on Market Access and Trade & Development and the Trade Policy Review Mechanism, and any document designated restricted by the Member submitting it to the WTO are all eligible for scheduled derestriction consideration at the end of the six-month period in which they are circulated.

Depending upon when they are circulated to the Membership, documents of these types may be derestricted, *if no Member objects to their derestriction*:

- No sooner than 2 months after their circulation to the Membership (even if they are circulated at the very end of the six-month period, the Members will still have an additional sixty days to consider their derestriction under the current practice of the Secretariat), and
- No later than 8 months after their circulation (6 months plus 60 days, if they are circulated at the very beginning of the six-month period).

*ii. Documents Considered for Derestriction 6 Months after their Date of Circulation*

Meeting minutes and background notes prepared by the Secretariat are considered for derestriction 6 months after their date of circulation.

Unlike documents that are to be considered at the end of the six-month period in which they are circulated, documents of this type become eligible for consideration on a daily basis. However, as noted above, the Secretariat circulates lists of documents eligible for scheduled derestriction consideration only monthly. As a result, in addition to the 60-day delay the Secretariat currently adds (for Members to consider the derestriction of documents),

there also will be an administrative delay for any document not circulated to the Membership on the day of the month the Secretariat has chosen for its monthly notice to the Members. Depending upon the day on which a document is circulated to the Membership, this additional delay could be as short as a day or nearly a month.<sup>18</sup>

This means that, including the 60-day review period, *if no Member objects*:

- A document that is to be considered for derestriction six months after the date of its circulation to the Membership may be derestricted between 8 and 9 months after its date of circulation.

#### **D. Unscheduled Document Derestriction Consideration**

Documents that would otherwise be subject to the automatic derestriction or scheduled derestriction consideration processes may be derestricted by other means as well. There are two alternatives: derestriction consideration (1) by the Membership or (2) by an authorized WTO body. Both methods can be initiated at the request of a Member. They merely supplement the automatic derestriction process by offering a means to attempt to derestrict documents earlier than they would be otherwise. In contrast, under the current practice of the Secretariat, they serve as an optional *replacement* for the scheduled derestriction consideration process.<sup>19</sup>

Either of these methods may, though not necessarily, accelerate the derestriction process. Both, therefore, may be of interest to non-Members, such as NGOs, who cannot directly affect the derestriction process but have an interest in increasing its speed.

- Non-Members might be able to convince a Member to request the unscheduled consideration of documents for derestriction and, thereby, expedite the derestriction process.

##### *1. Consideration by the Membership*

Any Member can request that the Membership consider the derestriction of any<sup>20</sup> document at any time.<sup>21</sup> A Member may call upon the Secretariat to notify the Membership of the proposed derestriction of a document.<sup>22</sup> The Secretariat will then notify the Membership, giving the Members 60 days to consider whether to derestrict the document.<sup>23</sup> Just as for scheduled

derestriction consideration by the Membership (discussed above), under this requested, unscheduled Membership consideration, a document will become derestricted on the date specified in the notice, *unless a Member objects*.<sup>24</sup>

Unscheduled derestriction consideration by the Membership (in the absence of an objection by a Member) takes two months, making it as fast as the fastest derestriction possible through scheduled derestriction consideration. Derestriction consideration by a WTO body (discussed below) can, though not necessarily, be faster.

## *2. Consideration by WTO Bodies*

The Ministerial Conference, General Council, or the WTO body that circulated the document may consider derestricting a restricted document at any time.<sup>25</sup> It should be noted that representation on WTO bodies is generally either open to all Members or mandatory for all Members, even though most of the Members do not regularly attend these meetings.<sup>26</sup>

When a WTO body considers whether to derestrict a document, the decision must be made in accordance with the decision-making requirements of Article IX of the Agreement Establishing the WTO.<sup>27</sup> The process is quite straightforward. Consideration of derestriction of the document is placed upon the agenda<sup>28</sup> for a meeting of the body.<sup>29</sup> If no Member objects to the derestriction at that meeting, the document becomes derestricted.

This can be the fastest way to get a document derestricted, depending upon the amount of time before the next scheduled meeting of the body. It is unlikely that a WTO body would convene simply to consider derestricting a document, and a WTO body with the authority to consider the derestriction of a particular document might not be scheduled to meet for months. In addition, any agenda item calling for a decision of the body should be listed in the convening notice of the body, as a practical matter, at least 10 days prior to the meeting. While the chairman of the body or a Member could, in theory, even call for consideration of the derestriction of a document at a meeting already in progress, the body probably would not decide the issue at that meeting. It seems, Members typically are not willing to act if they have not been notified about an issue at least 10 days in advance (and, therefore, have not had sufficient time to consider it prior to the meeting).

*Therefore, in the absence of an objection by a Member:*

- Derestriction consideration by a WTO body may result in the derestriction of a document, at best, within 10 days, but, depending upon when the next meeting of the body is to occur, derestriction could take months.

#### **E. Automatic Derestriction Reconsideration and Lack of Stipulated Valuative Criteria for Derestriction Consideration**

Finally, two related features of the derestriction process should be noted. First, if a Member objects to the derestriction of a document during any type of document derestriction consideration (Members cannot object to the derestriction of documents that are automatically derestricted, as discussed above), the document will be reconsidered for derestriction at the end of the next calendar year,<sup>30</sup> if it still remains restricted at that time. If a Member objects during the reconsideration of a document, the same rule applies. If, however, an objecting Member notifies the Secretariat that it no longer objects to the derestriction of a document before the document is due for reconsideration, the document will be immediately derestricted without any need for further consideration by the Membership.

In addition, as noted above, under the current practice of the Secretariat, a document will not be considered for derestriction again at the time stipulated for its *scheduled* derestriction if unscheduled derestriction consideration has already been given (either by the Membership or a WTO body).<sup>31</sup> In such a case, if the objecting Member does not withdraw its objection, the document will not come up for derestriction reconsideration until the end of the year following the objection.<sup>32</sup> It is unclear whether, under the Decision, such a document would be reconsidered for derestriction sooner if a WTO body or Member demanded that it be.

Second, no valuative criteria have been established by the WTO for determining whether to derestrict a document under any of the derestriction consideration methods discussed above, including derestriction reconsideration.<sup>33</sup> This means that the WTO does not limit the bases for objecting to the derestriction of documents; Members can object for any reason, no matter how arbitrary. Further, only one method, unscheduled derestriction consideration by a WTO body, has the potential to involve any official, recorded debate among the Members which can later be reviewed by nonMembers (if the minutes of the meeting become derestricted). If any other method of consideration is employed (scheduled or unscheduled

consideration by the Membership or reconsideration by the Membership), the objecting Member will not have to state the reasons for objecting to the derestriction of a document, and no recorded debate can occur as to whether the document should be derestricted.

#### **F. Access to Documents and Information on Their Availability**

All derestricted and unrestricted documents should be available to the public promptly.

- Once a document has been derestricted, it should be obtainable from the Secretariat within days;
- Members have the right to disseminate derestricted documents immediately; and
- All derestricted and unrestricted documents should also be available on the internet at <http://www.unicc.org/wto>.

On the internet, documents should be organized by category (e.g., documents related to Trade and the Environment or Trade and Development should be found on the "pages" for these topics). However, the Secretariat adds documents to the internet only monthly.<sup>34</sup>

In addition to the lists of documents proposed for derestriction (discussed above), the Council Division also produces lists of both those documents that have been derestricted,<sup>35</sup> and those that remain restricted.<sup>36</sup> To date, such lists have included only index references (e.g., "WT/L/162") and have been produced only every few months. In the future, these lists will contain titles as well. However, these lists are not available by internet.

Contacts at the WTO to obtain derestricted and unrestricted documents and information about them are listed below. Note: all WTO phone extensions begin with the prefix 739 (when calling internationally, dial 41-22 and then 739, followed by the extension).

Contact Director, Alain Frank, or Peter Pedersen of the External Relations Division at 5152 or by fax at 5777 to:

- Find out which documents have been derestricted;
- Get lists of documents (1) proposed for derestriction, (2) that have been derestricted or (3) that have not been derestricted; or

- Obtain a limited number of derestricted documents that cannot be found on the internet.

Contact Director of the Information Division, David Woods, at 739-5015, or a member of the staff of the Division.<sup>37</sup>

- To obtain large numbers of documents (for instance all of the minutes available from a particular body).

Contact Director of the Council Division, Paulo Barthel-Rosa, at 5191 or Nadir Alikhan, Counsellor to the Division, at 5222, or either of them by fax at 5761:

- To learn more about the derestriction process itself.

Additionally, information can be obtained directly from the WTO bodies responsible for the subject matter (e.g., the Trade and Environment Division for summaries of meetings of the Committee on Trade and Environment).

### **G. Evaluation**

The new WTO Decision on public access to documents is a welcome change from prior GATT and WTO practice. However, there remains much room for improvement. Fundamentally, the procedures do not reflect a desire for the kind of public participation necessary to protect the interests of the many constituencies concerned with the activities of the WTO and affected by these activities. To the contrary, the procedures reflect a determination by the WTO Membership to permit the public to consider the issues addressed by the WTO only after the fact, and then, often, only if no Member finds even such belated review offensive for any reason.

Public participation in trade policy-making is of critical importance to the legitimacy and quality of trade regimes. The public should insist on fundamental adjustments to the Decision to establish a rules-based system that facilitates, through an objective process, the right of the public to information necessary for meaningful input into trade policy deliberations. Recommendations offered below outline an alternative approach which could be adopted by the Ministerial Conference or the General Council. An annex to this discussion (see page 26) offers a framework for public participation at the WTO.



## *Critique*

### *Documents Are Unavailable Until After Decisions Have Been Made*

Virtually every type of document of consequence to the policy-making processes of the WTO can remain unavailable until after essential consideration of the issues to which it relates is complete.

Even when automatically derestricted, documents do not become available until after the bodies primarily responsible for reviewing the issue to which they relate have completed their consideration of the question. Every WTO Member is or can be a member of all of these WTO bodies, and achieving consensus in such a large intergovernmental forum as the WTO is a difficult process. As a result, once the bodies given primary responsibility for particular issues have completed their review, the issues might well not receive serious reconsideration. In short, automatic *but after the fact* access to documents is of limited value. Any response the public might have would have to overcome what is likely to be a consensus position of the Membership.

Document derestriction consideration by WTO bodies and by the Membership is even less helpful. These processes can be relied upon only to derestrict documents that Members do not deem politically sensitive. And even then, derestriction will require, perhaps, two months, by which time such nonsensitive issues may already have been settled. Administrative lag and some of the current practices of the Secretariat exacerbate what are already unacceptably long delays.<sup>38</sup> Furthermore, documents subject exclusively to derestriction consideration (as opposed to those automatically derestricted after triggering events) can be kept from the public indefinitely if a Member chooses to object for any -- or no -- reason to their derestriction.

### *Members Enjoy Arbitrary and Absolute Authority to Keep Documents from the Public Indefinitely*

The arbitrary and absolute power of the Membership to object to the derestriction of many documents further dims the prospects for effective public participation. Since Members are especially likely to object to the derestriction of documents that they consider politically sensitive, the documents that could be of the greatest significance to the public are the most likely to remain restricted until well after their relevance to WTO policy-making has ended.<sup>39</sup>

This problem is exacerbated when derestriction is considered by a method other than review in a WTO body. As discussed above, at least when a WTO body considers the derestriction of a document an opportunity for debate exists, during which the rationale of a Member that wants to object to the derestriction can be challenged. In addition, meeting minutes may provide some insight into why a document was not derestricted. Where derestriction consideration is pursued through mere notice to the Membership, neither of these safeguards exists.

The potential two-year delay before a document may be eligible to be reconsidered for derestriction (after a Member objects) makes this arbitrary and absolute power of each Member all the more dangerous to the public interest.

*Current Restriction Periods Are Both Unnecessary and Arbitrary*

Even in the absence of Member objections, the restricted periods applicable to documents are an unnecessary and, apparently, arbitrary hindrance to public input. Automatic delays of two months, let alone eight or nine months, before the public can see documents which Members have produced and upon which they have relied in their policy discussions, make derestricted documents likely to be of use only for historical analyses of the issues to which they relate. These unnecessary restrictions impede Members efforts to pursue a national program of citizen debate. Why should Members be denied the benefit of the insight that their citizenry and the citizenry of other Members could provide were these documents publicly available?

Perhaps for some documents, a restricted period serves some productive purpose in negotiations, but blanket, fixed restricted periods for entire classes of documents cannot be justified on that basis. That the Membership was, in fact, largely thinking merely of its own convenience when it defined the restriction periods, is reflected in the arbitrariness of the length of the restricted periods of many documents. For instance, what other justification could there be for releasing some documents to the public in two months and others in eight, simply because the former were circulated to the Membership at the end of a defined, six-month period, while the latter were circulated at the beginning of it?

## *Recommendations*

In order to:

- Guarantee the citizens of the WTO Members the democratic right to evaluate and recommend changes to the trade policies being considered by their governments; and
- Ensure the frank and complete disclosure of issues under deliberation that is necessary for Members of the WTO to benefit fully from the expertise and political insight of their citizens and the citizens of other WTO Members;

The WTO should establish a policy:

1. Making all documents available to the public at the same time as to WTO officials and Member States unless a specific, enumerated rule applies that would authorize limiting access to the information in the document (such rules might authorize restrictions necessary to protect information that either: (i) is proprietary, or (ii) could endanger the national security of a WTO Member State);
2. Requiring Members to argue for the derestriction of individual documents for specific periods; and
3. Requiring the Membership, when it decides to restrict an entire document or to redact any content from a document, to provide an explanation as to why it would have been impossible to impose less censorship.

A policy consistent with these recommendations would recognize the right of individuals and NGOs to receive, at the same time as the WTO Membership all documents, draft and final, relating to the activities of WTO bodies. This right should not be limited unless the Membership affirmatively agrees, based on pre-established rules, to restrict the circulation of the particular document, for a specified period of time.

A Member should have to request that a specific document be derestricted. The Membership should only have the authority to restrict the distribution of a document if the rules authorize the restriction. The decision to restrict a document should be made by consensus, if possible, and

otherwise require a two-thirds affirmative vote, which must be a majority of the Membership, to take effect.

The restricted period should be no longer than necessary. In addition, a document should never be restricted in its entirety where redaction of portions from it would serve the purpose of restriction adequately. Finally, whenever a document is fully restricted or its content is redacted, the reasons for the restriction or redaction of this particular document (not just a blanket explanation for the restricted circulation of documents in general) should be explained in the decision of the Membership to restrict the document.

The implementation of these reforms, while not fully protecting the public from potential abuse or misinformed use of policy-making authority, would decrease the likelihood of either. It would reflect a true shift in the WTO from a presumption favoring document restriction to one favoring immediate public availability, enabling advance public consideration of trade policy.

The WTO Decision on document restriction provides for its own review in 1998.<sup>40</sup> However, the dissemination of documents to the public by the WTO needs to be reformed now. The General Council or the Ministerial Conference could implement the principles underlying these recommendations immediately and should do so.

Until such a new policy is implemented, NGOs should ask Member governments to routinely request the immediate derestriction of the documents of all WTO bodies. The Decision allows any WTO body to derestrict any of its documents. Consequently, WTO bodies can choose to derestrict all of their documents automatically. This process depends, however, upon Member unanimity; any Member can prevent the derestriction of any document by objecting to its derestriction. Still, repeated requests from Members could make faster derestriction more common.

#### CONCLUSION

Citizens should not be left in the dark as a matter of routine, let alone automatic, practice. There are pragmatic reasons that the WTO should welcome public participation in trade policy deliberation. First, it would allow for early identification of unintended incidental problems associated with proposed trade policy measures. NGOs and other private parties could

help generate ideas both for how to avoid and to ameliorate such problems. In addition, public participation, by exposing the deliberative process to the light of day, would help protect Member governments from undue influences that might otherwise lead Members to adopt policies inconsistent with the public interest. Further, public participation would help the public to take advantage of trade globalization by presenting the opportunities that liberalized trade offers, as well as the associated difficulties that should be anticipated. Finally, public participation could help ensure broad public support for trade policies.

Even if these pragmatic justifications did not exist, however, the current blanket restrictions on circulation of WTO documents are unacceptable and must be removed. They are inconsistent with basic precepts of public participation, fundamental to the right of all human beings to democratic participation in their governance, recognized under international law.<sup>41</sup>

Public participation offers great benefits for trade-policy deliberations. It is a right the WTO should embrace and that it must respect. Ready access to information is a crucial component and one which the WTO can and should satisfy without further delay.

## Endnotes

<sup>1.</sup> WTO, *Procedures for the Circulation and Derestriction of WTO Documents*, WT/L/160/Rev.1 (July 22, 1996) (General Council Decision of July 18, 1996) (hereafter Decision).

The interpretation of the Decision offered here is based upon a close reading of it and conversations with the WTO Secretariat. Where the language of the Decision is unclear, the interpretation offered is in accordance with the current practice of the Secretariat in its implementation of it. However, this practice could change if the Membership determines that the Decision should be interpreted differently.

Wherever the language of the Decision is ambiguous, an endnote will briefly discuss the ambiguity. Where information about the document derestriction review process is given that is not derived from the Decision, it is based upon conversations with the Secretariat, unless otherwise noted.

The evaluation offered of the Decision reflects solely the views of the authors.

<sup>2.</sup> If a decision is ambiguous with regard to new practice, the Secretariat may also call upon the Membership for guidance as to how to implement the provision.

<sup>3.</sup> Submissions to and interim reports of dispute resolution panels, among other documents, are not within an official WTO document series and, therefore, are not covered by this decision. See *Decision, supra* note 1, at n.1. Further, the Decision does not apply to documents associated with the four plurilateral agreements. See *Id.* To date, only the International Dairy Council has established derestriction procedures in light of the Decision of the General Council. See, WTO, *Derestriction of International Dairy Agreement* (IDA) Documents, IDA/6 (September 20, 1996) (Decision of the International Dairy Council of September 17, 1996) (all IDA series documents will be circulated as unrestricted, except for (1) working documents and (2) documents which the submitting party has indicated should be circulated as restricted, both of which will be considered for derestriction 6 months after the date of their circulation).

<sup>4.</sup> See *Decision, supra* note 1, at ¶ 1.

<sup>5.</sup> Annex 1 includes all WTO multilateral agreements on trade in goods, the General Agreement on Trade in Services, and the Agreement on Trade-

Related Aspects of Intellectual Property Rights; Annex 2 is the Understanding on Rules and Procedures Governing Settlement of Disputes; and Annex 3 establishes the Trade Policy Review Mechanism.

<sup>6</sup>. *Decision, supra* note 1, at ¶ 1.

<sup>7</sup>. *Id.* at ¶ 2(a).

<sup>8</sup>. *Id.*

<sup>9</sup>. This provision is unclearly phrased. However, according to an unattributable source, a Member requested clarification of this language from the Chairman at the meeting of the General Council at which the Decision was adopted, and the interpretation the Chairman was that these reports are to be immediately released in the absence of a proper objection, which can only delay their release for 10 days.

<sup>10</sup>. Although the language of this provision is ambiguous, it is the practice of the Secretariat to derestrict documents of this type upon the occurrence of the automatic derestriction triggering event, even if a Member has objected to their derestriction during the prior derestriction consideration provided for in the Decision.

<sup>11</sup>. *See infra* note 20.

<sup>12</sup>. *See infra* note 17 and accompanying text.

<sup>13</sup>. The documents relating to the work of accession working parties are the only class of documents eligible for scheduled derestriction consideration that are not subject to one of these two review schedules. Scheduled derestriction consideration occurs one year after their circulation for the documents of these working parties (if they have not already been automatically derestricted upon the adoption of the report of the working party).

<sup>14</sup>. *See Decision, supra* note 1, at ¶ 4. The Decision is ambiguous as to which documents should be included in this notification. However, the current practice of the Secretariat is to include any documents eligible for automatic derestriction reconsideration, discussed below in Part E, but not to include any documents that are considered for derestriction by an unscheduled method (review by a WTO body or requested review by the Membership) since separate notice is sent as part of these methods.

<sup>15</sup> See *id.* at ¶ 4.

<sup>16</sup> This is not clear from the language of the Appendix. However, ¶ 4 of the Decision reflects an expectation that Members will "normally" receive notice of the proposed derestriction of a document sixty days before it will occur. The Decision does not compel this delay, nor does it stipulate a time-limit for Member consideration.

<sup>17</sup> This practice is consistent with the wording of the Decision. However, an alternative, reasonable reading of the Decision would permit the Secretariat to notify the Membership of documents eligible for derestriction consideration before the end of the mandated restricted periods for the documents. Under such a reading, documents would still remain restricted for the entire mandated period, but the Membership could begin to evaluate whether to object to their derestriction earlier. If such an interpretation were to be applied, documents could be made available immediately, in the absence of a Member objection, upon the expiration of their mandated restricted periods. Further, such an interpretation would not be inconsistent with either of the assumptions relied upon by the Secretariat in implementing the Decision. See Part A. Such a reading (1) would not slow the derestriction process, and (2) it would not be inconsistent with prior GATT practice. See Part G for further evaluation of the Decision and its implementation.

<sup>18</sup> If a document is not circulated on the date the Secretariat chooses in each month to notify the Membership, the Secretariat will have to choose whether to include it in the list it circulates after something less or something more than 6 months have passed. According to its current practices, noted above, the Secretariat would not include a document in a list less than six months after its circulation. Therefore, where such a choice has to be made, the Membership will not be notified and, as a result, will not begin to consider the derestriction of such a document until the next list is released by the Secretariat. If the document is circulated to the Membership just after the date the Secretariat has chosen for distributing its lists, waiting for the next list to announce the eligibility of the document to the Membership will delay consideration of its derestriction by nearly a month. Similarly, notification concerning a document circulated mid-way between two notification dates will be delayed by approximately two weeks.

<sup>19</sup> See *infra* notes 31-32 and accompanying text.



20. Decision, *supra* note 1, at ¶ 2(b). The Appendix to the Decision provides that WTO budget working documents in the "Spec/-" series are permanently restricted. *See id.* at n.8. However, this status can be overridden by WTO bodies and Members; the "notwithstanding" language of paragraph 2(b) of the Decision establishes this. *See Id.*

21. *See id.* at ¶¶ 2(b), 3.

22. *See id.* at ¶ 3. It is not clear from the language of the Decision whether these two kinds of Member requests are exclusive of one another. However, if a Member could pursue both options simultaneously, awkward results could occur. For instance, upon the request of Member A, a WTO body could approve the derestriction of a document while Member B, who did not attend the meeting of that body, could meanwhile object to the same derestriction, in response to the notice sent by the Secretariat, also at the request of Member A. Of course, similar problems could arise if two or more Members make requests concerning the same document without coordinating their requests to ensure that these request are not made to multiple WTO bodies, to a WTO body and the Membership by notice, or, in the absolute worst case, to multiple bodies and, by notice, to the Membership. In any case, the practice of the Secretariat is currently to treat these two types of requests as exclusive, as opposed to overlapping, options open to each Member.

23. *See id.* at ¶ 3. The Decision does not require that the Membership be given 60-days notice, but states that they "normally" will be. *See id.* The current practice of the Secretariat -- which is consistent with prior GATT practice, in accordance with the second assumption discussed above (*see* Part A) -- is always to give the Members 60-days notice when it notifies them of a proposal by a Member to derestrict a document.

24. *See id.* at ¶ 3.

25. *See id.* at ¶ 2(b).

26. The Agreement Establishing the WTO does not require that representation on every body be open to all Members. However, representation on all the bodies established in the Agreement is either open to all Members or required of them. *See Marrakesh Agreement Establishing the World Trade Organization*, April 15, 1994, reprinted in, WTO, *Results of the Uruguay Round of Multilateral Trade Negotiations* 6 (1995). This

seems to reflect a consensus among the Membership that all Members should have the right to representation in any WTO body (other than dispute settlement panels or specialized, e.g., expert, bodies) and, therefore, it seems likely that this right will also apply to any future bodies established in the WTO and to all of the subsidiary bodies to those established in the Agreement.

27. *Id.* at 11.

28. *See Decision, supra* note 1 at ¶¶ 2(b), 3.

Derestriction of a document could get onto the agenda of a WTO body in various ways. Either at or prior to a meeting of the body, the chairman of the body might act on his or her own authority or in response to a request by one or more Members. Or a Member or Members might call for its consideration at a meeting of the body.

29. *See id.* at ¶¶ 2(b), 3.

30. *See id.* at ¶ 5.

31. It is not clear from the language of the Decision that such documents would not be reconsidered at the time when they would ordinarily be eligible for scheduled derestriction consideration. However, in light of its second assumption (*see* Part A), the Secretariat deems it appropriate to view derestriction reconsideration under ¶ 5 as the sole method for reconsidering a document after a Member has objected to its derestriction.

Derestriction Reconsideration, as provided for in ¶ 5, is a new derestriction requirement. No other bases for reconsideration were explicitly established in the Decision, and prior GATT practice did not provide for it. As a result, the Secretariat is implementing the Decision as not calling for any. The soundness of this derestriction reconsideration policy is discussed in Part G.

32. *See Decision, supra* note 1, at ¶ 5.

33. Members may have their own criteria of course. The primary, if not only, criterion of the Members is probably the political sensitivity of the document. The lack of evaluative criteria established by the WTO and of control over those relied upon by individual Members is addressed in the evaluation of the Decision, offered in Part G.

<sup>34</sup>. Also, the Secretariat has been attempting to eliminate a backlog of documents circulated prior to the adoption of the Decision (since the commencement of operation of the WTO in January 1995). The Secretariat expects to be up to date by January 1997. By then, all of the unrestricted documents circulated as of the end of 1996 and the documents derestricted as of that date should be available on the internet, and the regular monthly addition of new documents will begin.

<sup>35</sup>. *See Decision, supra* note 1, at ¶ 6. Other WTO bodies are currently circulating lists as well; this process still needs to be stream-lined.

<sup>36</sup>. *See id.* at ¶ 6.

<sup>37</sup>. The staff of the Information Division are:

- Liliane Rastello, Senior Information Officer, 5186/5019
- Luis V. Ople, Information Officer, "Focus" Editor, 5374
- Nusrat Nazeer, Information/Press Officer, 5393
- Hans-Peter Werner, Information/Press Officer, 5286
- Eliane Falcicola, 5019
- Geneviève Guinchard, 5019
- Tessa Bridgman, 5348

<sup>38</sup>. *See supra* notes 16-17, 18, 31-32 and accompanying text.

<sup>39</sup>. As noted above in the discussion of derestriction review by WTO bodies, no criteria have been established for Members to use when considering whether to derestrict a document. Such criteria would be helpful, while the Decision remains in force, to increase the transparency and ensure the soundness of derestriction consideration when a document is reviewed by the Membership.

<sup>40</sup>. *Decision, supra* note 1, at ¶ 7.

<sup>41</sup>. *See Universal Declaration of Human Rights*, G.A.RES. 217 (III 1948) at Art. 21-1, *reprinted in* Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit, *Basic Documents Supplement to International Law: Cases and Materials* 143, 145 (3d ed. 1993).

## ANNEX

### A Proposed Agreement on Public Participation and Transparency within the WTO

*Recalling* the Ministerial Declaration adopted at Marrakesh, Morocco on 15 April, 1994, affirming the widespread desire of the Ministers to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples<sup>1</sup>,

*Desiring* an open information policy in the international public sector to enhance the global citizenry's understanding of, and ability to intelligently consider, global trade policy matters,

*Recognizing* that open and participatory international institutions can be structured so as not to unduly inhibit or retard the efficient functioning of the international public sector,

*Considering* that there should not be, nor need be, any policy contradiction between: (i) an open, non-discriminatory, and equitable multilateral trading system; and, (ii) the fundamental right of global citizens to participate in democratic self-governance and, in that context, to enjoy freedom of expression and information as a basic element of democratic and pluralist society<sup>2</sup>,

#### *Decide:*

- (a) to establish rules providing for and governing the participation of the public in WTO meetings;
- (b) to establish rules providing for and governing the participation of the public in WTO dispute settlement procedures.

### I. PARTICIPATION IN MEETINGS AND ACCESS TO DOCUMENTS

1. Subject to the terms set out below, recognized individuals and non-governmental organizations (NGOs) are eligible to participate in all official WTO meetings. This right applies to meetings at the plenary and subsidiary levels, including in committees and working groups of the WTO.

2. The right of participation granted in paragraph 1 of this section does not apply where the Members determine, pursuant to a petition for exclusion submitted by a Member, that the participation of individuals and NGOs would seriously undermine the ability of WTO officials to fulfil their responsibilities in a particular meeting. A two-thirds vote of all votes cast, which must be a majority of the WTO parties, will be needed to repudiate or in any way reduce the participation rights of individuals or NGOs.

3. In ruling on a petition for exclusion, the Members shall weigh: (i) the WTO's need to effectively carry out its duties, against (ii) the public's fundamental right to participate in democratic decision making on issues of public importance. The ruling should limit the right of

participation only to the extent necessary: if one portion of a meeting warrants exclusion of the public, the exclusion ruling should pertain solely to that portion.

4. Unless individuals and NGOs have been formally excluded from a WTO meeting, according to the process outlined in paragraphs 2 and 3 of this section, the participatory right granted in paragraph 1 shall include, but is not limited to, the entitlements enumerated below.

5. The right of participation granted in paragraph 1 of this section includes the right to receive all draft and final documents that are made available to the WTO officials and Members participating in a particular meeting, and to receive these documents at the same time as the WTO officials and Members.

a. The right to receive documents in a timely manner pursuant to paragraph 5 is subject to limitation where the Members determine, pursuant to a petition for document exclusion submitted by a Member, that restriction of a particular document is necessary to protect information that either: (i) is proprietary, or (ii) could endanger national security of a WTO member state. A two-thirds vote of all votes cast, which must be a majority of the WTO parties, will be needed to repudiate or in any way reduce the rights of individuals or NGOs to receive documents.

b. In ruling on a petition for document exclusion, the Members shall weigh: (i) the proprietary interests of individuals and entities, and the security interests of WTO members, against (ii) the public's fundamental right to fully participate in democratic decision making on issues of public importance. The ruling shall favor, whenever possible, redaction of the restricted information rather than censorship of the entire document. Any ruling that censors an entire document, or that redacts any content from the document, shall include an explanation as to why it was inconsistent with the requirements of this section to impose less censorship.

6. The right of participation granted in paragraph 1 of this section shall further include the right to make both written and verbal interventions at a particular meeting, according to the same rules, policies, and procedures that govern analogous written and verbal interventions of WTO officials and Members. This right may be limited due to severe time constraints by a vote of two-thirds of the meeting's participants.

## II. PARTICIPATION IN THE DISPUTE SETTLEMENT BODY

1. Subject to the terms set out below, recognized individuals and NGOs will be eligible to participate in all hearings of WTO dispute settlement panels and appellate review bodies.

2. The right of participation granted in paragraph 1 of this section does not apply where the Members determine, pursuant to a petition for exclusion submitted by a Member, that restriction of the right of individuals and NGOs to participate in, and/or receive distribution of certain

documents concerning WTO trade disputes is necessary to protect information that either: (i) is proprietary, or (ii) could endanger the national security of a WTO member state. A two-thirds vote of all votes cast, which must be a majority of the WTO parties, will be needed to repudiate or in any way reduce the rights of individuals or NGOs.

3. In ruling on a petition for exclusion, the Members shall weigh: (i) the need for an effective WTO dispute settlement procedure, the proprietary interests of individuals and entities, and the security interests of WTO members against (ii) the public's fundamental right to participate in democratic decision making on issues of public importance. The ruling should limit the rights of participation and access to documents only to the extent necessary. Judicial devices to ensure discretion, such as *in camera* review, should be used to the fullest extent possible.

4. Notwithstanding paragraph 1 of this section, panels and appellate bodies also have the discretion to hold private sessions for the purpose of negotiating a settlement between the parties, provided that when a settlement agreement is reached, it is filed with the panel or appellate body and promptly made available to the public.

5. Unless individuals and NGOs have been excluded from a dispute settlement procedure, pursuant to paragraphs 2 - 4 of this section, the participatory right granted in paragraph 1 shall include, but is not limited to, the entitlements enumerated below.

6. The right of participation granted in paragraph 1 of this section includes the right to receive all the pleadings and other documents filed in the WTO trade disputes, as well as the final decisions of WTO dispute settlement panels and appellate review bodies, and to receive these documents at the same time as the parties to the dispute.

7. The right of participation granted in paragraph 1 of this section includes the right to attend all hearings conducted by WTO dispute settlement panels or appellate bodies.

8. The right of participation granted in paragraph 1 of this section includes the right to submit *amicus* briefs in all hearings conducted by WTO dispute settlement panels or appellate bodies. The WTO dispute settlement body shall establish rules to govern the procedures for individual and NGO submissions of *amicus* briefs.

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1. MARRAKESH DECLARATION of 15 April, 1994, GATT Uruguay Round Negotiations Doc. MTN.TNC/45(MIN), at 25, para.

2. TRADE AND ENVIRONMENT, Decision of 14 April, 1994, GATT Uruguay Round Negotiations Doc. MTN.TNC/MIN(94)/1/Rev.1, at 5; DECLARATION ON THE FREEDOM OF EXPRESSION AND INFORMATION, Committee of Ministers, Council of Europe, Recommendations and Resolutions 1982, (adopted 29 Apr., 1982) at para. I.

The Center for International Environmental Law (CIEL) is a non-profit organization which aims to strengthen and develop environmental law, policy and management around the world. CIEL's goals are to solve environmental problems and promote sustainable societies through the use of law, to incorporate ecological principles into international law, to strengthen national environmental law systems and to educate and train public-interest-minded lawyers.

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The International Centre for Trade and Sustainable Development (ICTSD) was founded to bridge communication gaps between the communities dealing with development, environmental and international trade policies. ICTSD also aims to support the interest and activities of the non-governmental community in these areas.

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\* The evaluation of the Decision offered in this paper reflects solely the views of the authors.

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