Simon Kozlina, “WTO Dispute Settlement and the Reign of Strong States: how developing and developed states exercise influence in an international juridical institution”

Introduction

This paper examines the ways in which Developing and Developed Member States utilise the dispute settlement mechanism of the World Trade Organization. It is a study of how the characteristics of this form of juridical institution affect strong and weak states in different ways. The paper is an analysis of the changes in the practices of developing and developed member states over time at the three stages of WTO dispute settlement (notifications, panels and the Appellate Body).

This paper addresses to two inter-related problems: first, whether international dispute settlement by juridical institutions actually can assist less powerful states and second, why aspects of rules-based settlement nonetheless still favour powerful interests. The paper explores the notions of equality in access to understand the operation of the WTO’s dispute settlement system.

The recent re-emergence of a concerted engagement between international law and politics reflects a changing awareness of state practice in adopting law as a method to spread certain conceptions of globalisation. The direction of writers such as Keohane and Abbott, amongst others, (2000) in exploring the notion of ‘legalization’ provides a clear and definitive framework for examining these changes, although at the price of a possibly narrow conception of “legal” (Finnemore and Toope, 2001). The cross-current of critical or political economy writers such as Cutler (2003, see also the review by Zambusen, 2004) describe a similar shift towards ‘juridification’ in international or transnational relations, although it conveys a more contested and political conception of “legal”. This paper uses a similar framework but avoids many of the distinctions by focusing on the acts and events defined by the participants (states) themselves in order to describe the general characteristics of the WTO’s dispute settlement system and to provide a context to questions about differing access and outcomes among strong and weak states in international relations.

Dovetailing with this renewed focus on the role of law in international relations, writers such as McCall Smith (2000) examine the notion of “rational design theory” (for an overview, see Koremenos et al, 2001) to understand, from an ex ante perspective, how international dispute settlement institutions should be established for maximum effectiveness. McCall Smith’s work on regional trade agreements provides a useful template for analyzing a dispute settlement system like that found in the WTO because of its clear explanation of the differences between alternate regimes based on factors such as access, independence and enforcement. This paper adopts the same focus as these works by empirical
examination and description of international institutions through state practice and does not attempt to “umpire” between competing political perspectives on international relations but rather to provide more information from which others can draw conclusions.

There has been a slowly increasing body of work on the participation of developing member states in the WTO, including the dispute settlement system, such as Footer (2001), Bown and Hoekman (2005) and Shaffer (2003). This paper contributes to the field in several ways. First, it employs the notion of a “juridical institution” to provide a rigorous theoretical context through which to examine the institution and its participants’ activities. Second, the analysis compares data across time in more detail than previous work by examining participation in several ways, such as through an analysis of the rate of appeal and the use of cross-appeals over time. Third, the paper compares the practices of developing and developed member states at both each stage of the dispute settlement process and across the three stages in order to identify more comprehensively changes in state practice over time. Finally, as the WTO dispute settlement system has now been in operation for 12 years, the up-to-date data in this paper (current to December 2007) provide an opportunity to test earlier predictions on the operation of the system.

The paper examines the broad question of how developing and developed member states access the notification, panel and Appellate Body stages of the WTO dispute settlement system. A series of charts and tables, compiled from a database on WTO dispute settlement activity, highlight the similarities and differences in participation by developing and developed member states. These charts provide a basis for a more detailed discussion of the strategies adopted in a juridical institution by strong and weak states in order to advance their own interests.

The paper concludes with a series of findings on the nature of international juridical institutions and the implications for strong and weak states in using this form of dispute settlement. These include a focus on the importance for weak states of formalised dispute settlement procedures and an explanation of how the very nature of juridical dispute settlement as a heavily legalised method of interaction privileges those states that can commit the greatest resources to their participation.

The WTO Dispute Settlement System

The dispute settlement system of the World Trade Organization (WTO), established by the covered agreement, Understanding on Dispute Settlement (DSU) is relatively well known. Petersmann (1997) and Jackson (2000), amongst many others, explain the operation of its system of notifications, panels and appeals in more than sufficient detail. However, to summarise this institution from
the perspective of this work, the DSU establishes a compulsory jurisdiction to resolve disputes between WTO member states in the Dispute Settlement Body (DSB) and creates a formal process for states to enliven its ability to conclusively determine a dispute. This process requires member states to notify a dispute to the DSB, allows the creation of an ad hoc panel to make (effectively binding) recommendations to the DSB on how to resolve the dispute, and provides an appeal to the permanently constituted Appellate Body to resolve issues of law and interpretation. Scofflaw states may have concessions suspended by other Member States until any domestic measures are again consistent with WTO obligations.

Kwakwa’s views (2000) capture a common perception of the DSU that it provides better opportunities than the GATT for creating a fairer trading system because the most powerful actors in the system comply with the institution’s rulings (for example in the EC-Bananas disputes, and the victory of Brazil and Venezuela in US-Reformulated Gasoline). The aim of this paper is to re-examine that notion in light of 13 years of state practice.

The Role of Developing Member States in the WTO Dispute Settlement System

Ever since Hudec’s examination of the role of Developing Countries in the GATT system (1987), the similarities and differences in the treatment of developing and developed member States provided a means of assessing the claims of a legalised system for resolving international trade disputes.

A common method in studying such treatment is to narrow the focus to a particular problem with the DSU process and then to examine potential solutions. Works by Brown & Hoekman (2005), Schaffer (2003) and Footer (2001) are examples of detailed, insightful policy work on the mechanical operation of the WTO’s dispute settlement system but without a broader theoretical or empirical grounding. They represent a particularly “law” perspective on the institution and thus necessarily include un-stated normative assumptions about the significance and operation of law. While international relations scholars show increasing attention to the general question of the politics of international dispute settlement (for example McCall Smith, 2000), specific examinations of the WTO’s dispute settlement system remain limited, except from within the legalization.

From an empirical perspective, comprehensive political research in this area is limited, although recent work adds much greater depth to the field. Three major contributions are the works of Busch & Reinhardt (2002, 2003), Leitner & Lester (2004, 2005, 2006) and Horn & Mavroidis (see also Horn, Nordstrom and Mavroidis 1999).
The extensive empirical work by Busch & Reinhardt compares WTO and GATT practice to explain the significance of the WTO’s “hardened” dispute settlement process. Their conclusions emphasise the “counter-commonsense” view that the shift did not benefit developing Member States and that structural problems with the legalisation model (high demands on legal capacity and skill) continue to militate against effective participation by developing Member States.

Leitner & Lester (2004, 2005, 2006) provide annual updates of a set of charts empirically tracking state practice at various stages of the WTO dispute settlement process. The strength of this work is that it recognises the importance of a dynamic and time-based analysis of the use of the system. This allows the researcher to recognise change in the system and therefore provides an opportunity to identify the benefits and barriers of the system to different parties. A limitation is that the trends are not analysed in close detail. Their focus is a broad review of the data and it misses the significant differences that emerge amongst different users over time. This paper’s method corrects the problem by analysing the data from a more explicit theoretical perspective and by examining the data in finer detail. This paper also adopts several methodological approaches of Leitner & Lester, in particular their categorisation of Member States as “developing” or “developed” according to the views expressed in the Agreement Establishing the Advisory Centre on WTO Law. Although this differs from many other words that rely on per capita income, this method is the WTO position not to officially label Member States as “developing” or “developed” but rather to allow Member States to identify themselves as one or the other. The Agreement contains a comprehensive list of states identifying themselves as developing states. The writers adopt this classification to group states when examining who initiates disputes. While only used for a limited purpose in their work, it provides a logical, clear and consistent method for labelling states in these terms. This thesis adopts the same practice when classifying states.

Horn & Mavroidis (2006) base their analysis on comprehensive database of all WTO disputes funded by the World Bank. Horn and Mavroidis provide an overview of state practice in the WTO’s dispute settlement system but draw few implications from this. As with other research, their focus is on who uses the system and they adopt an “overall” or conglomerate approach to the data, rather than an examination of changes over time.

The writers find that the G2 (US, EC) is not the most active participant in the system. The G2 is the most active respondent, but “Industrialised Countries” have made the highest number of complaints. This is exemplified, in their findings, by the G2 appearing twice as often as a respondent to a dispute, while Industrialised Countries are twice as often a complainant. However, this method of categorisation and comparison may skew or distort the relative prevalence of member states in the dispute settlement system as the G2 only has two Member States while the Industrialised Countries have 27 members (in their classification). The problem is that the G2 is more likely to be a respondent vis a
vis Industrialised Countries because each G2 member state can only initiate one dispute at a time on a particular matter, whereas the Industrialised group may bring multiple disputes on the one matter, such as in the Steel disputes. This means that, unless the G2 find disputes with all 27 Industrialised Country members, it is much more likely that many Industrialised Countries can find one measure in dispute in a G2 member and thus initiate a dispute. This means that it is more likely that the G2 would a much heavier respondent than it is a complainant. Thus, the participation of G2 members as complainants is relatively under-estimated merely because of the categorisation method distinguishing between G2 and Industrialised Countries. This work avoids this problem by maintaining a simplified distinction between developing and developed Member States, in line with WTO practice on distinguishing between members based on status.

**Theoretical Context to Member State Practice at the WTO**

**Legalised Dispute Settlement**

As Abbott et al note, “Legalized delegation… introduces new actors and new forms of politics into interstate relations… Deciding disputes, adapting or developing rules, implementing agreed norms and responding to rule violations all engender their own type of politics, which helps to restructure traditional interstate politics.” (Abbott et al, 2004, p34)

The fundamental question is whether particular types of dispute settlement are truly objective or neutral or whether they privilege particular forms or interests. Do some types of dispute settlement systems support the interests of powerful states? In particular, does a highly legalised system (with high degrees of objectivity, independence and neutrality) treat all states equally, or are some interests privileged in this form of dispute settlement? In other words, what is the politics of international dispute settlement by juridical institutions?

In their *ex ante* design, juridical institutions appear highly legalistic in form, function and language. However, in its *ex post* operation such an institution may exhibit characteristics that are partial or bias the system in a particular direction. This may emerge from the precedential effect of practice, the experience of iterations by the institution and participants (personnel, states and non-state actors), the adoption of institution knowledge, the changing access to legal skill and expertise, changes to personnel, institutional limitations that only become apparent upon operation and the very decisions that are made by the settlement body.
Juridical Institutions

This thesis adopts the phrase ‘juridical dispute settlement’ to both identify the subject of study and to provide a concept for analysing that subject. The term allows this thesis to differentiate and incorporate two competing concerns: (1) different types of dispute settlement, and (2) different uses for law in dispute settlement. It attempts to combine the institutional focus behind liberal views in the ‘legalization’ literature and the critical perspectives on the role of law found in Cutler, Weiler and others.

The term ‘juridical’ conveys a basic notion of legality or legal system or a system that is based in law to determine legal obligation and rights. Abbott (2000) is one of the only writers on legalization theory to employ the term “juridical”, which Abbott uses in the context of the distinguishing between various legal models considered in the development of the WTO, NAFTA and the EU. 1 It conveys a notion distinct from mere institutional form or the type of law. Abbott’s use of ‘juridical’ suggests it encapsulates method for using and implementing law, as well as the process through which law is realised and applied.

The Oxford English Dictionary recognises two definitions of ‘juridical’. First, juridical is an adjective “of, related to or connected with the administration of law, or judicial proceedings; sometimes in more general sense = legal”. The second definition is “Assumed by law to exist; juristic” and is consistent with the example of the United Nations, above. In much writing on international law, it is this second definition that is adopted, in order to characterise entities that are purely legal, as opposed to material, creations. In this work, it is the first definition that is of interest. 2 Webster defines ‘juridical’ in similar terms to mean “of or relating to the administration of justice or the office of a judge; acting or used in the administration of justice; of or relating to law in general or jurisprudence”.

The label ‘juridical dispute settlement’ describes a method of dispute settlement that has become highly legalised in several way. Firstly, it uses law rather than power to resolve disputes. Secondly, it adopts the manner and form of law as the method for resolving the dispute. Third, it privileges legal reasoning and interpretation over other factors in resolving a dispute. Fourth, it adopts the legal

1 Abbott notes that “[t]hough the negotiators of the NAFTA, WTO and the EU agreements adopted somewhat different institutional and juridical models, they each preferred hard law to soft law.” (2000, at p135-6).
2 The relevance of the term is captured in the usages referred to in the Oxford English Dictionary: 1759, JOHNSON, Idler, No. 54 ¶ 1, l.. present you with the case.. in as juridical a manner as I am capable; 1839 JAMES, Louis XIV, II, 51 That trial.. as far as Juridical decision went, was a mere farce. The two examples emphasise the procedural notions conveyed by the term “administration of justice”. Johnson’s quote captures that aspect of ‘juridical’ that suggests the use of legal argument and form. James’ quote highlights that ‘juridical’ conveys certain notions of what a trial, or the judicial process, should be imbued with.
processes of law (such as a trial or appeal). Fifth, it necessarily conveys a high
degree of finality in its decisions.  

The problem with the use of the label ‘judicial’ rather than ‘juridical’ is that the
term ‘judicial’ is so strongly wedded to notions of sovereignty and state-based
authority. It fails to capture the unusual and strangely autonomous nature of
international or supranational dispute settlement that adopts heavily legalised
procedures and structures. The benefit of ‘juridical’ is that it focuses the analysis
on the procedures, actors and rhetoric but without the domestic, municipal or
nation-state elements of sovereignty. It provides a useful corrective to the flaws
inherent in applying the domestic analogy to international legal systems.

A rival appellation could be “quasi-judicial”, which also conveys the legal or
judicial aspects of the institution but with the obvious “quasi” qualification.
However, the challenge with this label is that “quasi” is necessarily ambiguous. It
is unclear from the term what aspect of the judicial function has been “quasied”.
Is it the process, the authority of the judge, the participants, its binding nature?
‘Juridical’ captures the procedural, rhetorical and hierarchical aspects of the
institution while at the same time qualifying its scope.

Equality of Opportunity and Access to the Dispute
Settlement System

In assessing the nature and fairness of a juridical institution, one measure is the
extent to which the institution achieves “equality” between participants with
different degrees of power. This notion of equality is similar to the idea of the
“rule of law” and includes three forms of equality – equality of opportunity,
equality of treatment and equality of outcome. This section examines “equality of
opportunity”, which is defined to mean the extent to which parties of different
relative power are able to access the various stages of the WTO dispute
settlement process (notifications, panels and the Appellate Body). “Access” in
this context means a party uses or enlivens that stage of the dispute settlement
process. An “equality of opportunity” exists if strong and weak states “access” or
use each stage of the process in the same way or at the same rate. Differences
in use or access may suggest an inequality of opportunity and thus a lack of
fairness in the institution. An awareness of each stage’s fairness reveals
important characteristics of this type of institution.

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3 In this sense, international juridical institutions need not be courts with judges
that embody the extension of a sovereign’s power. Rather, it is the ideals,
methods and nature of the institution’s decision-making that determines the
characterisation as “juridical”.

This section examines the dispute settlement process in a “chronological” order, that is, in the sequential steps followed by a party using the system. It concludes with a comparison of state practice and access at all stages.

**Notifications**

The notification stage of WTO dispute settlement fulfils two functions – first, it provides a basis for the parties to clarify the nature of the dispute in order to negotiate a settlement, and second, it discharges the requirements to proceed to the panel stage for a binding determination. Notifications represent the first opportunity to perceive differences in state practice between developing and developed member states. As examined below, the changes since 1995 in who uses the WTO dispute settlement system shows that, by 2007, all parties can and do access the system. A system that started as overwhelmingly dominated by the actions of developed member states now exhibits a much more heterogenous or even mix of participants.

As shown in Chart 1.1 (below), for the first five years, developed member states brought the vast majority of new disputes every year. Developing member states were clearly in the minority. The year 2000 represents a break from the practice of previous years – developed and developing member states each initiated around half of all disputes in that year. The following year (the year of the Doha round was launched), most action is by developing members. In the following four years, there has been broadly equal participation by developed and developing member states in notifying disputes.

Chart 1.1 Percentage of All Notifications per year by Status of Complainant 1995-2007
The chart and data show a clear change in state practice from 2000 onwards. The early years highlight the traditional power arrangements of international relations. Strong states are the major users of the system, reflecting their relative power position. The later years show a system in which there is little difference in the practice of developed and developing members, suggesting the diminution of the significance of relative power at the stage of initiating disputes.

The significance of this change is that it shows developing members states could access the system in similar ways to developed states, as seen in the significant change from the early practice (1995-1999) to later practice (2000-2007). In other words, the system was able to provide the opportunity for developing member states to use the dispute settlement system in a similar manner to developed member states.

What this highlights is that for the last eight years, there was an equality of opportunity for all WTO member states through the early stages of a juridical dispute settlement system. In ten years, development status had become irrelevant in identifying who were the initiators of disputes in the WTO’s dispute settlement system. These initial findings suggest that strong states did not exercise influence through the use of the initial stage of dispute settlement and that entry into the juridical system was equally beneficial for strong and weak states.

However, equality of access is limited if power is still relevant in determining against whom a complaint will be made. Chart 1.2 (below) reflects this concern.
and illustrates the development status of both parties to a dispute notification every year from 1995 to 2007. The top two segments in each year are the number of complaints brought by developed member states in that year, while the bottom two segments are complaints by developing member states. Within this, the first segment is disputes initiated against developed by developed states and the second segment is disputes against developing member states.

In examining this chart, the assumption that all member states participate equally in the system would mean that there would be four equal segments in each bar. The reality is that it is only in the most recent years (2006-2007) that this holds true. In prior years, the chart reveals a system in which participation is far from equal and that the degree of participation by different states has changed substantially over time.

The bar chart shows the system clearly shifts from a process run overwhelmingly by developed member states up to the year 2000 to one in which both types of countries participate. Importantly, it shows that developed member state notifications brought most notifications against other developed member states. In addition, the chart shows a significant share of complaints by developed Member States were against developing Member States in the early years, especially 1996 and 1997. After this period, there is a fall in the relative number of disputes initiated against developing member states, with a significant drop in 2001 and 2002. This continues until 2005 when complaints by developed Member States stabilise against developing Member States. In other words and in relative terms, strong states evolved to use the dispute settlement system against other strong states and away from using it against weaker states.

Chart 1.2 Percentage of all Disputes (Notifications) by Respondent – Complainant 1995-2007
Perhaps even more significantly for questions of access, the practice of developing member states shows a shift towards notifications against developed member states from 2001 onwards. Prior to 2001, there is a slight preference for notifications against other developing member states by developing Member States. This is seen in the chart by the prevalence of dark blue bars over light blue bars in the early years of the system. However, after this point, developing member states initiate disputes against all member states, whether developing or developed, although with a slight bias towards disputes against developed Member States.

To place this observation in context, overall, the single largest type of complaint is disputes initiated by developed member states against other developed member states. However, once actively engaged in the dispute settlement process (2000), developing member states initiate disputes against all other parties, almost regardless of the defendant’s status as developing or developed.

The significance of this is that developing member states make more of the opportunity presented by the dispute settlement system to initiate disputes, over time. The practice of developing member states suggests that relative power becomes less and less relevant in deciding whether to initiate disputes through the dispute settlement system. This is seen in the equanimity of practice by
developing states and emphasises the equality of opportunity provided by the system over time.

A limitation with the preceding analysis is that it utilises percentages and proportions rather than absolute figures in identifying trends and differences in notification practice. The benefit of that approach is that it allows a greater focus on the relative changes in practice amongst participants, notwithstanding overall changes in the use of the system. The complete picture of state practice emerges when the total number of disputes each year is examined. Chart 1.3 (below) shows the overall pattern in dispute notifications and reveals that the overall number of notifications has generally decreased each year after an early peak in 1997.

Chart 1.3 Total Disputes (Notifications) Initiated per Year by Status of Complainant (1995-2007)

The top line is the overall number of dispute notifications and it shows an early rise in notifications to 1997 followed by a general decline to 2007 (apart from a peak in 2002 for the US steel disputes). The other lines indicate the divergent practices of developing and developed member states in bringing disputes against other member states over the same period of time.
The overall trend supports the initial conclusion that developed member states dominated the early years of the institution. Developed member states initiated a growing number of disputes every year from 1995 to 1998 against all other members [light blue and pink lines]. The chart also shows that complaints by developed member states against other developed member states [light blue line] are the single most common disputes overall and has remained so, as the trend of this line closely tracks the overall trend for most of the period.

The overall trend also emphasises the change in practice by developed member states against developing member states over time [pink line]. The first three years (1995-1997) show very similar levels of notifications by developed member states against developed and developing member states – the scale and trend are very similar. However from 1998 onwards, the practices diverge, and other than 2000, there is a markedly lower level of notifications by developed member states against developing member states than other member states. In fact, for five of the last seven years, notifications by developed member states in disputes against developing member states were below the number of dispute notifications against developed member states.

The significance of this practice is seen by comparing this with the practice of developing member states in which disputes are brought against all other members. While developing member states are engaging with the system, developed member states are declining to use the system to resolve disputes with developing member states. The chart highlights the extent to which practices have diverged over time. Considering Charts 1.2 and 1.3 together, the difference in practice between developed and developing member states is quite stark.

These trends suggest that developed member states rely on the dispute settlement system in disputes against “equals”, but eschew it for disputes with “lesser powers”. It emphasises the point that this form of institution reduces the advantages of the powerful, at least in the early stages of the process and only after several years of practice. This explanation is compelling because it is consistent with the changes in practice by both strong and weak states over time.

**Panel Reports**

While notifications reveal decisions by member states to access the dispute settlement system, they do not reveal actual use of the dispute settlement mechanisms – especially hearings of the dispute by an independent panel. As the panel stage represents the shift from conciliation to arbitration in the use of a juridical institution, it is the clearest moment for understanding the dynamics of states adopting triadic or third party solutions to resolving disputes. Every panel report represents two key features of the system in operation: the choice by a
party to seek a resolution through legalised means and the resolution of that stage in a decision or verdict by the juridical body. The practice and changes in the issuance of reports displays the changing dynamics of the institution over time.

As shown in Chart 1.4 (below), there are two very distinct phases in the degree of developed and developing member state participation at the panel stage of WTO dispute settlement. In the first phase, apart from the first year of panel reports, developed member states initiated the vast majority of disputes subject to panel reports from 1997 to 2001. However, since 2002, a significant change occurs in the ratio of panel report in disputes initiated by developing and developed member states. Despite some oscillation, the practice of developing and developed member states is broadly the same from 2002 to 2007. In these latter years, around half of all panel reports in each year are in disputes initiated by developed member states and half developing member states.

Chart 1.4 Percentage of all Dispute Panel Reports per Year by Status of the Complainant (1995-2007)

The significance of this trend is that the developing country participation in this stage evolved in a similar way to their engagement in the notification stage of dispute settlement. In other words, a shift occurred in the practice of states at

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4 Due to the fixed timetable for dispute settlement in the DSU, there were no dispute reports in the first year of the WTO – 1995.
both the notification and panel stages. The change saw developing member states adopt a similar practice to developed member states by 2002 and continue that practice to 2007.

This highlights a key feature of the way in which juridical institutions operate as a legalised, triadic dispute settlement system. While ostensibly “equal” in the formal sense that all states have the right to take disputes to a panel, it was developed member states that were able to act on that right. In this context, it was developed member states who were the main participants or drivers in the system’s initial years. This established certain expectations about how and when the system would be used. After a period of time, developing member states adopted a similar practice, as seen in the chart from 2002 onwards.

Thus, the answer to the question on who takes disputes to the panel stage, reveals two characteristics of juridical dispute settlement. First, the opportunity to adopt juridical dispute settlement cannot be realised or fulfilled by all member states immediately but rather privileges strong states, who may have the capacity and resources to utilise the system, especially in the early years. Second, the practice of strong states provides an example for weak states to follow over time.

Chart 1.5 (below) depicts and reinforces the notion that the system changed from one overwhelming used by developed member states to one that is used by a mix of protagonists. Again, apart from a high degree of participation by developing member states in 1996, the vast majority of panel reports until 2002 were in disputes brought by developed member states against another developed member states. However, since 2002 developing member state participation has significantly increased, in particular in bringing disputes against developed member states.

Chart 1.5 – Percentage of Panel Reports by Year and Status 1995-2007
Early, dominant action by Strong States

These trends are seen in two ways. First, from 1997 to 2002, the majority of panel reports are brought by developed member states (pink segment, red segment). Of these, the most common report is in disputes against other developed member states. However, there is also a significant number of reports in disputes against developing member states in this time. It emphasises the importance of developed member states in establishing the expectations and operation of the institution through their conduct as both complainants and respondents. It also suggests that the experience of developing member states was driven by their position as respondent in a significant number of disputes over this time. It underlines how it is the ability of strong states to quickly utilise the system to pursue their interests that provides them with an immediate benefit.

The Rise of Weak States

The second way in which the chart shows changes in the system is in the strong re-appearance of reports in disputes brought by developing member states against developed member states (light blue segments), from 2002 to 2007. In this period, developing member states drove the system through both the number of disputes in which they were involved and, in particular, their role as a complainant in those disputes. It represents a fundamental change from the practice in the early years of the system. A rise in participation at this stage of the dispute settlement process reflects weak states choosing to take strong states to
an independent and heavily legalised arbiter. It means weak states recognised over time an opportunity to further their interests through following this path.

This suggests that, over time, the driving force behind the WTO DSU has shifted from strong states towards a more even balance of strong and weak states. This reflects the nature of the opportunities provided by legal institutions and the limitations to those opportunities. Developing member states shifted from having a minor role in the system (largely as a respondent) to an active player in the system (frequently as a complainant). The shift highlights that access to a juridical system can change over time in ways that improves access and therefore the fairness of the system. It underlines the notion that a juridical institution provides another avenue for strong states to exercise power (at least initially) but that the institution provides opportunities for weak states to deploy the system for their own ends, after a period of time.

**Limited Action by Strong States Against Weak States**

The other key observation from Chart 1.5 (above) is the intermittent number of panel reports in disputes initiated by developed Member States against developing Member States (dark red segments) There are none of these disputes in 1996, 2002-2003, and 2006. In the years in which there are such panel reports, there are generally far fewer reports than in disputes between two developed Member States (except in 1998 and 2007). If this span of time is divided into the two periods identified above (1996-2001; 2002-2007), then it can be seen that the second period represents a marked drop in the relative use of the system by developed member states against developing member states. The total absence of reports in three of these years, and the relatively small numbers in other years, shows that developed member states changed their practice in a significant manner such that they had relatively disengaged with the system.

It means that strong states recognised the limitations for them in adopting juridical dispute settlement against weaker states. It highlights that strong states still participated extensively in the system, but that the focus of their institutional action was other strong states, not all states, and especially not weak states. It emphasises the limited nature of the “opportunity” created by a juridical institution for states. A heavily legalised dispute settlement system ostensibly creates opportunities for all states, regardless of relative power, but those opportunities are only realised in quite specific and limited circumstances.

Another feature of this chart is the limited, yet persistent presence of panel reports in disputes between developing Member States (dark blue segments). They are by far the least significant of the four classes of disputes in the chart and their prevalence has not increased substantially over time. This does suggest that juridical dispute settlement presents some opportunities weak states
when confronting other weak states, but that there is only limited incentive to utilise this form of dispute settlement. This is clearly seen through how weak states adopted a higher and higher relative presence in disputes against developed states over the same time period.

The final observation of this chart is that the vast majority of the panel reports in disputes initiated by developing Member States are against developed member states. In other words, the most likely time for developing member states to adopt juridical dispute settlement is in disputes against a developed member state. This finding supports the general viewpoint that weak states adopt a legalised dispute settlement process to overcome differences in power with other disputants.

The significance of this is that the vast bulk of disputes in the six years from 2002 to 2007 involved disputes either between two developed Member States or complaints by developing Member States against developed Member States. In other words, the shift from a system overwhelming driven by developed Member States to one used by all Member States, (Chart 1.4) resulted in a very narrow type of case that proceeds to panels. It means that, over time, the preponderance of cases has changed from one in which strong states drive and dominate the system in all its aspects to one in which only two types of battles are fought: the strong against the strong, and the weak taking on the strong.

This is not a radical conclusion given the nature of a juridical institution. However, two observations are important. First, it took time for that pattern to emerge. Second, it suggests an aspect of a juridical institution in which the dominance of strong states is reduced or at least a counter-balance is applied.

The significance of this is it shows that participation in this stage of dispute settlement is similar to that seen at the notification stage. It again suggests that, over time, developing member states have been able to access to the system. The growing representation of panel reports in disputes brought by developing member states identifies a fair access to the system by all member states, regardless of status.

Remembering that the overarching question concerns the characteristics of juridical institutions, as revealed through their treatment of different participants, the key focus for this section is what state practice highlights about this form of dispute settlement.

The relative proportion of panel reports must be balanced against the overall number of panel reports released since 1996. Two key questions arise, firstly,
how do these trends differ based on the status of the participating parties and secondly, how do these trends differ from the overall trend for notifications.

At one level, Chart 1.6 (below) shows an overall ambiguous trend over time. Apart from an overall peak in 2000, and a level in 2005 that is higher than 1995, the number of panel reports each year has oscillated greatly. This still shows the same rise, fall then rise as for notifications.

Chart 1.6 Total Panel Reports By Year and Status 1995-2007

However, the overall trend hides a marked difference in two key areas when broken down by the status of the disputants. First, panel reports in disputes initiated by developing members against developed member states generally trend upwards after 2001, whereas notifications fell over the same period. Second, there are few, if any, panel reports in disputes initiated by developing member states against other developing member states. This differs from notifications, which gradually rose up to 2001, then fell back.

The significance of this is that it highlights the growing and strategic role of developing member states in the dispute settlement system. It suggests that juridical institutions encourage participation by weak states over time. It
underlines the fact that weak states favour the third party independent triadic aspect of this institution when dealing with strong states. It also suggests that weak states favour the formalised and institutionalised nature of dispute settlement in a juridical institution when dealing with other weak states, rather than the independent triadic decision-making. In other words, with other weak states, it is the opportunities presented by international institutions that weak states seek rather than the ability to seek third party arbitration.

Further on the point that developing member states now drive the dispute settlement system, disputes in which the developing member state is complainant and the developed member state the respondent was the most common panel report in three of the six years up to the end of 2007. This is a significant change as developed member states initiated the most common disputes every year until 2002.

The importance of this is that it suggests weak states can adopt a dominant role in a juridical institution. It emphasises the fact that juridical institutions can provide an equality of opportunity to states accessing the system, regardless of status.

This needs to be placed in its overall context. Most panel reports since 1995 are in disputes initiated by developed member states and of these disputes, most are against other developed member states. In other words, strong states were and remain a fundamental part of system. A juridical system has not reduced or minimised the role of influence of strong states. However, it does restrict or redirect the use of power by strong states. Power in this context is exercised by the capacity to launch disputes or maintain several disputes at the same time. It reflects the ability to deal with the costs of a dispute that may stretch out for several years with resolution or compensation.

Within this context, developed member states exhibited a different practice before and after 2001 in progressing disputes against developing member states to the panel stage. For this category of dispute, developed member states took far more disputes to the panel stage before 2001 than after that year. In fact, since 2001, there has been a very significant drop in the number of panel reports in this type of dispute – in three of the last six years, there were no panel reports at all.

The significance of this is that it suggests strong states appreciated the limited benefits to taking weak states to the panel stage of the juridical institution. The equality of opportunity presented by juridical institutions provides too much of an opportunity for weak states to limit or avoid the claims of strong states. This
underlines the importance of a juridical institution in providing mechanisms for weak states to participate equally with strong states.

It needs to be emphasised that this change in practice by developed member states occurred while their practice against other developed member states remained largely the same. It suggests that there was a clearly chosen difference in treatment and that there was not a general disengagement with the dispute settlement system by developed member states.

The overall trend suggests that the dispute settlement system has increased its level of access over time. Member states have displayed an acceptance of the system as evidenced by its increased use over the period. This by itself suggests that access to the system is possible and participation has been encouraged as experience of the system grows.

This positive image of the dispute settlement system is coloured by the clear preference for developed member states to use the system against other developed member states, rather than against developing member states. The emerging practice of developed member states suggests an appreciation of the benefits and disadvantages of panels for strong states. The changes in practice over the period 1995-2007 suggest developed states recognised limitations in the use of panels against weak states.

The basis of this may be two-fold. First, the panel process itself may be difficult to instigate the system against developing member states for practical and technical reasons – low level of benefits, high cost of litigation, delays, imprecision of implementation to rectify WTO-inconsistent measures. Second, the legalised process limits the ability of politically and economically more powerful states to apply that power to achieve its interests. Strong states have changed practice in response to the perceived in-effectiveness of a heavily legalised dispute settlement process in comparison with more power-oriented methods for resolving disputes. In a contrary manner, developing member states limit action against other equal powers through the juridical institution. Further, they deploy this form of institution to respond to unequal disputes against developed member states.

The underlying logic of this practice though is the same as for developed member states. The important factor is that the choice to use a legalised dispute settlement is a response to power. It is a tactic that changes the relationship between powers, both strong and weak. Strong states see the benefit of counter-acting another strong state through a legalised process. Weak states see the advantage to engaging with a strong state in a legalised process rather than direct bilateral negotiation. Similarly, strong states recognise the limits such a process places on exercising their power against weaker states. Weak states see the significant costs of a legalised process and balance those costs against the
benefits of using such a process, thus concluding that there are better alternatives to resolve disputes.

The significance of this divergence is that it emphasises both the difference between notifications and panels and the possible advantages to developing member states of an equal opportunity to participate in legalised dispute settlement. It also highlights the dominate role of developed member states in the dispute settlement process but also how that role was both a product a certain type of engagement and itself produced a response by developing member states.

The overall trend also shows that developing member states exhibit a growing need to take developed member states to triadic dispute settlement. The significance of this is underlined by the fact that the trend for such panel reports actually diverges markedly from the trend for similar notifications. At a time when both overall notifications and notifications by developing member states against developed member states has been falling for at least three years, the number of panels in disputes between developing and developed member states markedly increased. If it is remembered that this category of dispute was the single largest category of panel report in 2005 and has remained the case in 2007 (Chart 1.6 above), this trend highlights that the greatest awareness of the opportunity provided by the WTO’s international juridical dispute settlement system is displayed by the less powerful developing member states when resolving disputes with more powerful developed member states. This difference is practice is a clear indicator of how a legalised dispute settlement system provides an equality of opportunity, which has been realised and utilised by developing member states.

Chart 1.6 also emphasises the practice of developed member states identified in the notifications. In the same manner as notifications, the number and trend of panel reports in disputes initiated by developed member states was similar against developed and developing member states in the early years, followed by a noticeable drop in activity against developing member states. Signal is the total absence of any reports in 2002 and 2003 in disputes initiated by developed member states against developing member states. To an extent, this reflects the flow-on from the drop in notifications in 2001 and 2002. However, it is also consistent with a change in engagement through a reflection of what the dispute settlement system can and cannot provide powerful interests.

**Appeals**
The study of the parties to Appellate Body reports since 1996 suggests a diverse range of participants have utilised the WTO’s appeal process, as seen in Chart 1.7 (below). Disputes initiated by both developing and developed member states made their way to the Appellate Body. However, a heavy preponderance of action in appeals is between developed member states. Also, it is immediately noticeable that there is a change of practice after 2001 in terms of who brings appeal and in what circumstances.

Chart 1.7 Appellate Body Reports by Status of Parties 1995-2007

Overwhelmingly, disputes between developed member states have predominated, being the most common appeal in all but three years (1997, 1999, 2005). The central role of developed member states is underlined by recognising that, of those three years, developed member states were still heavily involved – in one year as the most frequent initiator of disputes against developing member states and in two years as the most common respondent in disputes by developing member states. This practice is brought out further by the minimal number of appeals in disputes between developing member states, to an extent even more marked than for notifications and panel reports.

The significance of these points is that, just in terms of disputes brought before the Appellate Body, developed member states play a critical role in determining how and when the appeal process is used. In this sense, the practice of the WTO reveals that strong states appear in appeal cases far more often than weak states. It emphasises the point that, in practice, it is strong states, not weak states, that most often deploy the protections in procedure and law provided by a juridical institution.
Similarly, developing member states seem to be signally absent from this important stage in the juridical process. Without further consideration, this suggests that strong states have a much greater opportunity to develop expertise and experience of this stage than developing member states, which may lead to advantages over time.

One further point is relevant when considering the state practices pictured in Chart 1.7. An important difference exists in the practice of developed and developing member states against each other before and after 2001. The change in practice in 2001 occurred in two directions. First, disputes between developed and developing member states, in which the developed member state was the complainant, virtually disappear from the data. After being the most common form of appeal in 1999, these disputes only appear again in two reports in 2002, which in fact determined together (DS161 and 169) and only one dispute in 2005, 2006 and 2007. There are no appeals in these disputes in 2001, 2003 or 2004. Second, disputes between developed member states and developing member states as the respondent rose sharply, becoming the most common form of appeal in 2005.

This suggests that, while overall practice highlights the ongoing role importance of developed states, the relationship between developing and developed member states changed in the dispute settlement process. It suggests greater involvement by weak states even at this stage of the process over time. However, this idea requires further examination of who actually brought the appeals, as examined below.

Analysis of Appellate Body practice requires a more detailed appraisal because a simple count of reports fails to reveal which party initiated the appeal. At earlier stages of the WTO dispute settlement process, collating data is straight forward as there is a direct relationship between the incident and the actor; every notification and panel report reflects the decision and practice of the complaining state. However, Appellate Body reports may indicate a decision by either the initial complainant or respondent. It is important to distinguish between these situations as this may hide when parties decide to use the appellate system voluntarily or are forced into the process. These points require several further levels of information on WTO Appellate Body reports: (1) who was the appellant? (2) what was the status of the appellant? (3) what was the status of the other party to the appellant?

First, respondents bring nearly all appeals. Chart 1.8 (below) highlights the extent to which respondents at panel hearings drive the appeal system. In all but three years (1997, 2006, 2007), the respondent in the dispute initiated at least 80% of all appeals in each year. The very high number of complaints upheld by panels
against respondents influences this result to a significant extent. It emphasises the reality that the appeal system is a “losers’ process” – overwhelmingly driven by parties challenging adverse findings at the panel stage. 

Chart 1.8 Appellate Body Reports by Appellant (1995-2007)

Second, since 2000, developed member states brought the vast majority of appeals each year (see Chart 1.9, below). The record of the first four years reveals a mixed appeal practice, with both developing and developed member states participating in similar ways. However, from 2000 this practice clearly changes such that developing member states become a minor, and in 2004 non-existent, instigator of the appeal process.

Chart 1.9 – Status of appellants in all Appellate Body Reports 1995-2007
This signifies that the appeal system is largely a product of action by developed member states. While developing member states utilised the opportunity to consider appeals in the WTO’s early years, their curtailed participation in the later stages suggests a limit on their ability to avail themselves of the chance to appeal a panel report and test the panel’s legality and interpretations. The importance of this is that it highlights a difference in practice between developed and developing member states and undermines the notion that developed and developing member states can access the dispute settlement system equally.

It highlights a critical aspect of the juridical institution and the way in which strong states exercise influence through such “legalised” processes. Strong states exercise the opportunity to appeal in greater numbers than weak states. It means that strong states develop the benefits of participating in the appeal process – in particular through experience and shaping the types of issues considered by the appeal court. This means that the issues related to strong states may receive greater clarity or useful jurisprudence than other issues.

Third, when depicted as a percentage of all Appellate Body Reports per year (Chart 1.10, below), the appellant practice of developing member states is markedly different to a similar graph on their practice for notifications (see Chart 1.1, above). Appellate practice is almost the reverse of the notification practice as the appellate level sees an even mix of appeals by developing and developed member states in the early years then a shift in the later years towards the majority of appeals being brought by developed member states. The last three years (2005-2007) reveal a move back towards some form of even participation but developed member states still initiate the majority of appeals.
It emphasises the earlier point that developed member states heavily influence and drive the appeal system. In particular, this chart shows that this special role was not present in the early years of the institution. It suggests that, initially, developing member states sought to pursue their appeal rights in a similar way to developed member states but that this changed.

This emphasises the fundamental advantage for strong states over time in juridical institutions. The aspects of the institution that add the greatest degree of legality, such as an appeal process, are in fact the elements that strong states use most often and to a greater extent than weak states.

Chart 1.10 Percentage of Appellate Body Reports per Year by Status of Appellant 1996-2007

By contrast, notification practice in Chart 1.1 showed a high degree of participation by developed member states in early years followed by a more even participation from 2001 onwards. The significance of this compounds the effect of high engagement by strong states in the appeal process of an international juridical institution. It emphasises a significant divergence in state practice over time, in a manner that suggests a lack of access. Of concern, the effluxion of time has reduced appellate participation, which is contrary to the experience with notifications over time in which a more equal participation developed over time. This is particularly important because it counters the notion that experience, by itself, improves access to a juridical process over time.

The “equality of opportunity” provided by an appeal process that is available to all litigants becomes pointless to the extent that this costly and time-consuming
process is only employed by strong states. To complete this analysis, it is necessary though to consider against whom appeals are brought, not just the appellant, which is examined below.

The division of appellants into developed and developing member states does not reveal the circumstances in which member states actually lodge an appeal. In this context, the concern is when appeals are launched – in particular, when parties are complainants or not, and the status of the other party in the dispute. Chart 1.11 identifies when developing and developed member states notify appeals in cases, divided into when they are the complainant and the respondent. The chart clearly describes that the most common and predominant appellant in the WTO dispute settlement system are developed member states acting as the respondent. Especially since 2003, these states are the overwhelming user of the WTO's appeal mechanism. The chart also reveals that the next most common user has been developing states acting as a respondent. It emphasises the very limited role of complainants of either status in initiating appeals.

Chart 1.11 Appellants by Status and Applicant 1996-2007

The relevance of this is that it is the most powerful states when defending their domestic measures that take the legalised dispute settlement system to its final point most often. The significance of this may be that, while the existence of an appeal mechanism enhances the juridical aspects of the system, the appellate process’s heavy utilisation by one type of participant blurs its overall effect. The appeal mechanism provides a rhetorical justification and legitimacy for the binding nature of WTO dispute settlement because it provides all states with the opportunity to have their disputes determined in accordance with law. It suggests that, in reality, it is overwhelmingly utilised by strong states. This pattern of usage highlights an important characteristic of international juridical institutions.
The very nature of a heavily legalised dispute settlement system privileges the party that has the capacity, skills and experience to mobilise the legal characteristics of the system, such as an appeal. Strong states have the resources to mobilise these elements more effectively, particularly in the early years of a juridical institution. The participation of strong and weak states in the appeal stage of the WTO dispute settlement system highlights this characteristic. The marked difference in state practice between the notification and appeal stages also emphasises this feature.

The longer-term significance is that this type of one-sided use of the dispute settlement system may sway the system towards the interests of one group over others. The issues of developed member states may become the areas in which the clearest or most contentious judicial interpretations come to be developed. In this context, there is an empirical basis to the concerns, as seen in the incredibly high percentage of appeals by developed member state defendants. The remarkably low level of engagement with appeals by developing member states magnifies this effect.

Cross-Appeals

One factor that may counter the view that developing member states do not initiate appeals is the possible use of “cross-appeals”. It may be that developing member states tend to notify appeals only when the other party to the dispute initiates an appeal. However, further analysis of this point suggests this is not the case.

Table 1.1 addresses this possibility by tabulating the number of cross appeals and the status of appellants and cross-appellants for all disputes from 1995 to 2007. The analysis reveals that developing member states only initiated 17 cross-appeals in the thirteen years of the WTO under study. The vast majority of these (14) were in disputes with a developed member state when the developed member state was the respondent. By comparison, developed member states initiated cross appeals in 36 disputes over the same time. Of these, nearly all cross appeals were in disputes against other developed member states (32) or when the other side was respondent (28).

Table 1.1 All Appeals by Appellant, Cross-Appeal and Status of Parties

<table>
<thead>
<tr>
<th>Appellant</th>
<th>Cross-Appeal?</th>
<th>Status of Appellant</th>
<th>Status of Cross-Appellant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant</td>
<td>Yes</td>
<td>10 Developed</td>
<td>8 Developed 7</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 Developing</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2 Developing 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 Developing</td>
</tr>
<tr>
<td>No</td>
<td></td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Respondent</td>
<td>Yes</td>
<td>43 Developed</td>
<td>39 Developed 25</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>14 Developing</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3 Developed</td>
</tr>
</tbody>
</table>
This suggests that there was not a significant level of participation by developing member states at the Appellate Body stage through cross-appeals, when compared with the degree of participation by developed member states. In other words, the appeal process – even when measured by cross-appeals – is still overwhelmingly driven by developed member states. Rather than providing an alternate explanation of state practice by weak states, it emphasises the very limited role weak states have at the appellate stage of a juridical institution.

This conclusion is supported by considering that developing member states have only initiated 28 appeals to the end of 2007 in 236 disputes involving developing member states as a party. The addition of a further 17 cross-appeals does not significantly change this low level of participation at the appeal stage.

**Appeal Ratio Analysis**

One limitation of the conclusion that the appellate system is overwhelmingly used by respondent developed member states is that it may only reflect the higher number of complaints overall that concern developed member states as respondents rather than a difference in practice between strong and weak states. In other words, it could be that the activity of developed member states on appeal merely reflects the broader trend of all respondents appealing unfavourable outcomes and not something special to developed member states. One method to resolve this ambiguity is to consider how often member states appeal, as a ratio of all their disputes.

If the number of appeals brought by respondents is compared with the number of panel reports, a guide or ratio can be calculated for how often member states appeal when acting as a respondent (see Table 2 below). It provides a way to look beyond the numerically superior number of appeals involving developed member states.

Table 1.2 – All Panel Reports and Appeals by Status of Respondent (1996-2007)

<table>
<thead>
<tr>
<th>Status of Respondent</th>
<th>Total Panel Reports</th>
<th>Total Appeals</th>
<th>Appeal Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Developed Member State</td>
<td>100</td>
<td>57</td>
<td>0.57</td>
</tr>
<tr>
<td>Developing Member State</td>
<td>41</td>
<td>21</td>
<td>0.51</td>
</tr>
<tr>
<td>All respondents</td>
<td>141</td>
<td>78</td>
<td>0.55</td>
</tr>
</tbody>
</table>

The “Appeal Ratio” allows for the difference in the overall number of disputes and reveals the change in practice between developed and developing member states.
states in the second period. The Appeal Ratio shows that developed member states appealed more frequently than developing member states, however the difference is not as great as might be expected. The table clearly shows that, overall, respondents appealed in about half of all disputes. However, there is a difference between the ratios of developed and developing member states in this analysis, with the Appeal Ratio of developed member states being above that of developing member states. Given the combination of both a larger number of overall appeals and the difference in appeal ratio, it supports the earlier contention that developed member states are more highly engaged in the appellate process than developing member states. However, it also suggests that developing member states do engage to a fair extent, as least to the extent limited by the lower number of disputes against them.

A limit with this conclusion, which shows a relatively high degree of engagement by developing member states, is that it is based on an "overall" analysis that counts all WTO disputes. Because it does not account for changes over time, it may over-emphasise current engagement by developing member states. As noted above, developing member state practice changed over time, which was high in the early years, but dropped in recent years. By analysing the change in the Appeal Ratio over time, a more accurate portrayal of state practice is achieved than by merely considering the overall Appeal Ratio. This allows a clearer analysis of the politics and influences of the system. One method of analysis to check for this would be to calculate the appeal ratio for respondent developing member states in each year. However, given the very small number of appeals each year by developing member states, this analysis would be very volatile and thus unreliable. One method of remedying this is to consider WTO appellate practice in a series of equal time periods to collate reports in order to see if there is any change over time. Table 1.3 (below) is based on the same disputes as Table 1.2 (above) however the reports and appeals were grouped into three four-year periods (there were no Appellate Body reports in 1995) and the Appeal Ratio determined.

Table 1.3 – All Panel Reports and Appeals by Status of Respondent (1996-2007; grouped by three four-year periods)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Panel Reports (respondent)</td>
<td>Developed</td>
<td>30</td>
<td>42</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>Developing</td>
<td>18</td>
<td>14</td>
<td>9</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>48</td>
<td>56</td>
<td>37</td>
</tr>
</tbody>
</table>
This data clarifies that the Appeal Ratio for developed and developing member states changed over time. This result is consistent with the overall trends analysed earlier. The Appeal Ratios show that the overall frequency of appeals dropped over time, regardless of the party’s status. It also reveals that the appeal patterns of developing and developed member states diverged significantly over time and in two important ways. First, developing member states actually appealed at a high rate than developed member states in the first four-year period (1996-1999). Second, developing member states appealed at a much lower rate than developed member states in the final four-year period (2004-2007). It emphasises the fact that, over time, developing and developing member states have developed contrary notions of the advantages of the appellate system.

These findings reinforce the earlier argument that developing member states naively interacted with the WTO dispute settlement system in its early years by assuming an overly legalistic model of state participation. This is seen in the fact that developing member states appealed two thirds of all panel reports when a respondent in that first four-year period. This rate was relatively high compared to both developed member state practice at the time and the overall appeal practice in subsequent years. It means that developing member states initially expected the appeal process to be a beneficial aspect to dispute settlement.

The change in appellate practice by developing member states by the third four-year period highlights their understanding of the limits of the appeal procedures for weak states. The effective halving of their Appeal Ratio (as respondents), from appealing in two thirds of disputes to only one third of disputes, is evidence that developing member states perceived limited opportunities in proceeding through the entire dispute settlement process. This point is strengthened by the fact that the Appeal Ratio of developed member states did not significantly change over this same time period.
The significance of this is two-fold. First, it emphasises the limitations of a juridical dispute settlement system in overcoming substantive inequality between participants. Also, it reinforces the continuing significance of strong states at all stages of dispute settlement in a juridical institution. Implicit in this is the recognition that strong states see advantages in participating in the process in this way.

**Overall Trends**

All through this paper, the question is whether a juridical system provides an equality of opportunity to both strong and weak states through access to and use of highly legalised dispute settlement procedures. In the context of the WTO dispute settlement system, the ways in which developing and developed member states change their practices over time provides indications of the characteristics of this form of institution. These changes and characteristics highlight the ways in which strong states exert influence over time.

The final section of this paper examines overall dispute settlement practice by comparing state practice at all three stages of the WTO process. By considering the similarities and differences in state practice at all three stages, the analysis highlights the benefits and limitations of each stage for strong and weak states. Charts 1.12A-C depict the overall level of notifications, panel reports and appellate body reports by year for all states, with separate charts and sections for developing and developed member states. This section concludes with a direct comparison between the practices of developing and developed member states in order to explain how influence is exercised in this form of institution.

The most telling aspect of the trends across all stages of WTO dispute settlement is that there has been a significant divergence between state practice at the notification stage and subsequent stages. As depicted in Chart 1.12A (below), while all stages of WTO dispute settlement saw an early rise in usage, notifications of new disputes experienced a significant decline, especially since 2002. This contrasts sharply with the steady number of panel and Appellate Body reports. This trend is underlined by the fact that total notifications are now lower than they were when the WTO process was first established, even though panel and Appellate Body reports have remained relatively constant. In addition, Appellate Body reports have closely tracked the level and trend of panel reports for the entire period.

**Chart 1.12A Overall Dispute Settlement Activity by Status and Year (1995-2007)**
This chart suggests states have adapted very different practices for notifications and other stages of the dispute settlement process. The differences and changes suggest that member states recognise, over time, the most valuable aspects for them of this type of institution. These aspects appear to be the use of independent third parties at the panel and Appellate Body stages to resolve disputes with some degree of finality. The information-sharing aspect of the notification stage has revealed fewer opportunities than were expected.

However, as with other practices, the tallies of overall practice elide differences in the practices of strong and weak states, which are examined separately below.

**Developed Member State Trends**

The most significant change in the practice of developed member states over time has been the collapse of notifications and the consistent use of Appellate Body procedures over the 10 years from 1995 to 2005. As can be seen in Chart 1.12B (below), while notifications fell rapidly after a high in 1997, panel reports continued to rise until 2000 – well beyond what might be expected by the timetable for disputes to progress through the system.

Charts 1.12B Overall Dispute Settlement Activity by Status and Year (1995-2007)
Since 2001, developed member states have been much less engaged with the notification stage of the dispute settlement system. Yet, despite this, Appellate Body practice has remained at similar levels of engagement for the entire decade. In particular, there had not been a noticeable reduction in Appellate Body participation by developed member states until 2006.

The significance of these trends is that it suggests developed member states reduced their reliance on or their expectations of the dispute settlement system as their experience of the system developed. It also suggests that developed member states recognised an advantage in taking disputes to appeal. The fact that this practice emerged and then did not significantly change over time suggests that this was the result of deliberate choices recognising the benefits of this approach. These trends highlight the diminished importance for strong states of the consultation or conciliation phase of juridical dispute settlement. This means that, after the first few years of WTO experience, there was a strong expectation that disputes notified by strong states would continue to the later stages of the dispute settlement system. In other words, strong states saw the main benefit of the juridical institution to be the extensive use of the independent third party law-based decision-maker.

At the same time, it is significant that there is a change from an initial divergence between panel and appellate practice (in which panel reports were more common than appeals) to a situation in recent years where panel and appellate
reports are at similar levels. In other words, although there were fewer disputes brought to the system by developed states, they were more likely to continue through all stages of the system. It again suggests that it is the juridical features of the appellate level that best describe the advantages for strong states in juridical institutions.

**Developing Member States**

Developing state practice in Chart 1.12C (below) reveals significant differences between the various stages of the dispute settlement process. While participation by developing member states at all stages changed over time, the trend in appeals is perhaps the most significant indication of how developing states perceived the advantages and disadvantages of the juridical institution.

Charts 1.12C Overall Dispute Settlement Activity by Status and Year (1995-2007)

As shown in Chart 1.12C (above) panel reports in disputes initiated by developing member states have gradually risen over time. This indicates a growing recognition of the value of panel reports in achieving the interests of weak states. In comparison, state practice by developing member states on notifications started relatively low, experienced a few years of high activity (2000-2003) then it has fallen away again to pre-2000 levels. The change reflects learning by member states of the advantages and disadvantages of notifying disputes at the WTO and highlight the differences for developing states between proceedings at a panel and before the Appellate Body.
Contrasting with its panel practice, but in some ways similar to the practice with notifications, developing member states engaged in mixed practices at the Appellate Body. They exhibited a fair degree of participation in appeals to the Appellate Body up to 1999, followed by a marked drop in participation from that time onwards. The contrast suggests a very different appraisal by developing member states about the advantages and disadvantages of Appellate Body procedures as compared to other stages of the dispute settlement process.

This analysis suggests that it is at the panel stage of the dispute settlement process that states exhibit as the most important element of the process. Despite initial enthusiasm displayed in high levels of notifications and appeals, it is only panel reports that have consistently grown over the decade of the DSU. This trend emphasises the importance of the independent arbitration function of the WTO to weak states. However, it also underlines that the most overt “legality” of the process, found at the Appellate Body level, is not beneficial to weak states.

Comparison of State Practice

The central question is how changes in practice at all three stages of the WTO dispute settlement process differ between developed and developing member states. These changes help to identify the characteristics of a juridical institution and to assess the overall fairness and legality of the WTO dispute settlement system. It should highlight the different ways in which strong and weak states take advantage of the system.

In comparing the overall practice of developed member states with developing member states, the most striking element is the difference in practice on notifications. Significantly, the highest number of notifications in a single year for developing and developed member states is at very different points in time. If the period 1995-2007 is conceived of as three four-year periods, 1995-1999\(^5\), 2000-2003 and 2004-2007 (as depicted in the charts below), then it can be seen that the peaks and lows for developed and developing member states at each stage of the juridical process appear in different and sequential periods. There is a peak for developed member states in notifications during the first period, but the peak for developing member states is in the second period. In the third period, their practice for notifications is remarkably similar. This suggests the groups

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\(^5\) Note: The first period nominally covers four years of data for Panel and Appellate Body reports (which only commenced in 1996). However, it also includes one additional year of notifications, which commenced in 1995. Given the need to compare practice across the slightly different in timescales between the sets, including the “additional” year of notifications (1995) in the earliest period seemed the least distorting manipulation of the data.
perceived very different interests in lodging dispute notifications and that these perceived interests changed over time.

Developed member states clearly perceived in the early years of the WTO that making notifications would be an advantage to them, which is demonstrated by
the early peak in notifications. Developing member states exhibit only later in the second period the same awareness of the benefits of notifications in the second period. However, in the third period, developing and developed member states display similar expectations of the benefit of notifications and exhibit a low level of notifications per year at the same time. This pattern again suggests that developing and developed member states have structured and changed their practice over time in response to the perceived preferences and politics of the dispute settlement system.

Of course, the launch of the Doha round in 2001 is an important external factor that affected state action and interests in 2001 and the previous year. Also, the number of notifications by developing member states in most years is well below that of developed member states. However, neither of these factors detract from the overall trends displayed in these charts. In fact, the remarkable feature of these graphs is that the trends at all levels for developing and developed member states are almost a reverse-mirror image of each other. Developed member states peaked panel reports in the first period, developing member stats in the second period. And, again, developing member states appellate body reports peaked at the end of the first four-year period and developed member states at the end of the second four-year period.

**Conclusion**

Access to the different levels of a juridical institution is the significant factor for competing participants of different relative power. Access to the notification system is clearly beneficial for developing member states while developed member states perceived limitations in the utility of the initial stage of WTO dispute settlement. However, developed member states saw a clear advantage in utilising the subsequent stages of the process, especially appeals. In stark contrast, developing member states saw limited opportunities in pursuing their interests by continuing a dispute into the appeal stages.

Thus, strong states exercise influence in juridical institutions through their ability to pursue matters through all stages of the dispute settlement process. Weak states are presented with an opportunity by juridical institutions because of the role of an independent arbiter at the panel stage, however this is undermined by the use of a further heavily legalised and protracted appeal procedure.

In other words, juridical models of dispute settlement are actually best used against strong states. It represents a paradox in juridical dispute settlement for strong states. Strong states are able to exercise influence through their use of all stages of the dispute settlement system, however the system also provides the best opportunities for other states to compete with a strong state, whether that other state is strong or weak.

Also, developing member states appear to have a naïve expectation of the dispute settlement system at its commencement. This is seen in the initial level of dispute notifications, panel and appellate body reports. This very quickly changed as the reality of the requirements of the dispute settlement process became
apparent, as witnessed by the relative decrease in DSU activity by developing member states. Then, expectations changed for a third phase of interaction by developing member states during which time they participate in very similar ways to developed member states.

The analysis in this paper emphasises that a juridical institution provides varied opportunities for strong and weak states in resolving disputes. Juridical institutions provide limited opportunities or benefits for all states to resolve disputes before reaching a third-party panel. Juridical institutions provide good opportunities for weak states at the trial or panel stage against stronger states. Juridical institutions with an appeal mechanism limit the opportunities for weak states to utilise the system against other strong states. Appeal mechanisms provide an excellent opportunity for strong states to resolve disputes favourably (either because of the dispute itself or for placating domestic interest groups).

So, in answering the research question, there is an equality of opportunity at the notification stage (in that both strong and weak states are provided with limited opportunities at that stage). The panel stage also provides an equality of opportunity to all states but, in relative terms, privileges weak states by granting them a benefit (access to a binding third party decision-maker). The appeal stage does not provide an equality of opportunity because it privileges strong states over weak states.

Thus, the fairness of this institutional form varies at each stage of the process. Strong states exercise influence through juridical institutions because of the very nature of the legal process, in which the multi-stage and extended nature of that process privileges states that have the capacity to endure it. Further, given that the appeal stage is the most “legalistic” of the stages in a juridical institution, it suggests limited opportunities are provided to weak states in such heavily law-based institutions.

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