COMMENT ON SHAFFER AND GAO

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Professors Shaffer and Gao, in their thoroughly researched article, challenge an assumption common in the early years of the new World Trade Organization ("WTO") dispute settlement system: that the legalization of dispute settlement in the transformation of the General Agreement of Tariffs and Trade into the WTO would disadvantage states without strong traditions of domestic or international adversarial litigation.[1] This was of particular concern because the legalization appeared to benefit, for example, the United States, the European Union, and Canada—all countries with considerable resources in international economic law and litigation, including resources "in house" within the government.[2] As Shaffer and Gao show in their article through the example of China, it is entirely possible to play catch-up and evolve in capacity but also through an effective, winning strategy in WTO litigation.[3] In a different study (with a different co-author) Shaffer has told a similar story concerning Brazil.[4]

The question that will obviously be asked is whether states—particularly in the developing world—would fare as well in a concerted effort to build capacity for WTO litigation. Specifically at issue are states that are not as big and rich as China or that are lacking a political system that give the states powerful levers, as Shaffer and Gao indicate is the case with China, to align the behavior of diverse agents with goals of the state.[5] The comparative work of Liao may be a helpful beginning point in addressing this question.[6] Lao compares Chi-

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1. *See generally* Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115 [hereinafter Shaffer & Gao].

2. GREGORY SHAFFER, DEVELOPING COUNTRY USE OF THE WTO DISPUTE SETTLEMENT SYSTEM: WHY IT MATTERS, THE BARRIERS POSED, AND ITS IMPACT ON BARGAINING 3 (2005), https://www.ictsd.org/downloads/2008/05/shaffer_1.pdf [hereinafter SHAFFER, WTO].

3. Shaffer & Gao, *supra* note 1, at 182–84.

4. *See generally* SHAFFER, WTO, *supra* note 2.

5. *See* Shaffer & Gao, *supra* note 1, at 119.

6. *See generally* Jessica Chia-yueh Liao, *The Legacy of a Developmental State: China's Reservation in Using the WTO Dispute Settlement System*, in DEVELOPMENTAL STATES AND BUSINESS ACTIVISM (2016).

na's WTO litigation strategy with those of Korea and Taiwan.[7] There is of course the possibility of extending the comparative work further.

Shaffer and Gao make several claims concerning the success of China's WTO litigation strategy. Many of these are stated in terms of numbers—how many cases China has won and the value in terms of the trade at stake in those disputes.[8] At first glance, the numbers appear impressive and persuasive. But, they beg a bigger question which goes far beyond the question of China's participation in the dispute settlement system: how much does the quality of advocacy influence outcomes in WTO disputes? The panelists are (still) often non-lawyers and extremely rarely are they individuals who are themselves experienced in trial advocacy.[9] Many of the issues that concern evidence and procedure are handled in rather simplistic or flexible ways in WTO litigation, even in comparison to investor-state dispute settlement.[10] The WTO Secretariat remains influential in the drafting of reports, though less aggressive than in the past.[11] Gao and Shaffer characterize China as a "country with an anti-legalist, Confucian tradition not known for lawyering."[12] Yet China has a strong tradition of rational, learned bureaucracy and diplomacy. After initially being shy about entering what it might have perceived from the outside as a purely legalist game, China may have discovered that the WTO is still a state-to-state institution, where legalistic dispute settlement functions in an institutional context of diplomacy. Anyone who sits in on a WTO hearing, especially at the panel level, and expects courtroom drama in the style of North American television is likely to be deeply disappointed. It is really the Appellate Body ("A.B.") that has introduced strong habits of legalism in the system.[13] And yet even the A.B., and especially in the cases on "rules,"[14], there is a strong "formalist" streak in the A.B.'s reasoning that is more akin, in some ways, to administrative rationality—applying a code—than to tropes of common law constitutionalism that would indeed be alien to Chinese traditions.[15]

To fathom all of this, we need much more qualitative (as opposed to quantitative) analysis of China's participation in the WTO dispute settlement

7. *See id.* at 32–78. Admittedly, Korea and Taiwan are high-income developing states.

8. *See* Shaffer & Gao, *supra* note 1, at 136–37.

9. *See* Dispute Settlement Body, *Indicative List of Governmental and Non-Governmental Panelists*, WTO Doc. WT/DSB/44/Rev.39 (Aug. 22, 2017).

10. *See* Shaffer & Gao, *supra* note 1, at 157 (mentioning investor-state dispute settlements in the NAFTA and WTO contexts).

11. *See WTO Bodies Involved in the Dispute Settlement Process: 3.2 The Director-General and the WTO Secretariat*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s2p1_e.htm (last visited Apr. 18, 2018).

12. Shaffer & Gao, *supra* note 1, at 137.

13. *See WTO Bodies Involved in the Dispute Settlement Process: 3.4 Appellate Body*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm (last visited Apr. 18, 2018).

14. By rules, I refer to WTO norms constraining contingent protection, such as anti-dumping and counter-vailing duties.

15. *See generally* Joseph A. Conti, *Legitimacy Chains: Legitimation of Compliance with International Courts Across Social Fields*, 50 LAW & SOC'Y REV. 154 (2016).

system. Shaffer and Gao are impressive in their canvassing of all the elements of China's strategy, but which ones most account for its success? Smart and extensive use of major law firms in the "rules" cases might have been the most important ingredient of success there, arguably. Or, was it the openness of the A.B. to China's often formalist interpretation of the WTO codes? China was unsuccessful in two very important cases that concern the management of natural resources for its domestic economic development: *Raw Materials* and *Rare Earths*.[16] These cases involved public-policy-oriented exceptions or limitations in respect to WTO obligations in litigation. My own impression of China's submissions, as presented in the panel and A.B. reports, was that China was not skilled at making legal arguments that verge into policy-based justification. While, on the facts, the results in those cases are understandable, it seems that China could have presented a much more robust case.

China's political system does not really accept the legitimacy of Non-Governmental Organizations ("NGO"), while civil society as an independent and autonomous force does. In the *EC-Seals* dispute, the E.U. was able to effectively cooperate with some NGOs that provided considerable information and important evidence to prove the case that by imposing a seal-products ban, the E.U. was directly responding to extraordinary animal cruelty in the Canadian seal hunt.[17] The Chinese approach to national interest diplomacy does not seem to allow for much coordination of legal positions in and around the WTO with other states that might have an interest in similar readings of WTO law.[18]

In any event, this is something, as far as I can see, that Shaffer and Gao do not touch on. Shaffer and Gao mention the *Electronic Payment Services* case.[19] My understanding was that this dispute ultimately resulted in settlement. A fuller picture of China's participation in the WTO dispute system would need to look at cases that settle at some point between a WTO issue being raised in some way and a final dispute ruling of the A.B. The authors note that in the first years of WTO Membership China settled all complaints against it.[20] While it is clear from the article that China is now much more willing to litigate than to settle,[21] understanding the settlements it now makes in the shadow of its reputation as a formidable participant in litigation would be of considerable importance to overall judgment of the success of China's strategy, although this data may be very hard to come by.

16. *See generally* Request for Consultations by the European Communities, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS395/1 (June 25, 2009); Requests for Consultations by Japan, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS433/1 (Mar. 15, 2012).

17. Request for Consultations by Canada, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/1 (Nov. 4, 2009).

18. For example, Brazil and African countries in the *US—Cotton* dispute. *See* Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (adopted Mar. 21, 2005).

19. Shaffer & Gao, *supra* note 1, at 163.

20. *Id.* at 134.

21. *See id.* at 135–37.

Finally, one of the ways that a repeat-player litigant can influence jurisprudence, at least in theory, is through making arguments as a third party at the panel level or as a third participant at the A.B. level. China seems to have pulled back on third party and participant involvement in WTO disputes.[22] But, is China effective in using that status to shape the case law? Is any state? Again, here, a meaningful analysis would require qualitative research, evaluation of third party submissions, and an explanation of how elements of them might be reflected in the reasoning of panel or A.B. reports.

22. *Cf. id.* at 135.