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China's Coming Of Age in The WTO War

Tina Wang, 04.20.09, 10:00 PM ET

HONG KONG -- Gone are the days when China shied away from launching suits against other countries before the World Trade Organization's top court. Facing a distressed export sector and rising protectionism amid the global economic crisis, the Chinese government will get more comfortable and aggressive about lodging WTO complaints against the U.S., scholars and lawyers say.

This entailed a massive attitude shift for Beijing, from seeing WTO disputes as a failure of bilateral diplomacy to wielding the WTO dispute settlement mechanism as an extremely useful, and necessary, instrument of foreign trade policy. For Beijing, a more mature role as WTO plaintiff is also part and parcel of its growing assertiveness in the global economic order this year.

"It looks as if China's WTO trade disputes are becoming a healthy part of its foreign trade policy," said Chin Leng Lim, an international law professor and associate dean at the University of Hong Kong. "If I were Claire Reade [the chief counsel for China trade enforcement at the U.S. Trade Representative's Office], I'd be pretty worried, because China's now the one doing the suing too."

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On Friday, China filed a WTO complaint against the U.S. for effectively blocking chicken imports from China on health concerns. In January, the WTO, for the first time ever, created an expert panel to decide a suit that was initiated by China, which accused the U.S. of illegally levying duties against Chinese steel pipes, off-road tires and laminated woven sacks. "The Chinese government is becoming increasingly confident in handling WTO-related disputes," said Wang Jiangyu, a legal and trade scholar at the Chinese University of Hong Kong.

For Beijing, this is no small shift in both mentality and strategy. For years after China joined the WTO in 2001, the government preferred foreign diplomacy and bilateral negotiation over starting a legal dispute, said Liu Jingdong, vice-director of international economic law at the government think tank Chinese Academy of Social Sciences. Taking

the extraordinary step of suing another country meant that its diplomacy was a failure, said Liu, who has worked closely with the Ministry of Commerce and other government officials on global trade matters.

"It takes a cultural switch for an East Asian country to conduct diplomacy by going to court," Lim said. "By and large, East Asian countries don't like to sue other countries. It is a massive effort for them to switch that mode of thinking."

In the early years, China caved quickly when it found itself threatened with a lawsuit by the U.S. and E.U., researchers say. For example, in 2004, China immediately settled a WTO complaint by the U.S. that China illegally helped domestic semiconductor makers by taxing imports of integrated circuits. That was the first WTO dispute that China had to fend off. China then settled in two other major cases, involving its coke exports to the E.U. and Chinese anti-dumping duties on U.S. kraft linerboard, from 2004 to 2006. "People were getting the impression that China simply didn't want to litigate," Lim said.

The government was facing the WTO's "power to review our internal affairs, our statutes," Liu said. And that made Beijing "very unhappy" with trade complaints initiated against China, to which it responded with radical rhetoric, rather than legal engagement, Wang said. Beijing's attitude was, "this is all just absurd. We're not going to mess with it," said Steven Dickinson, a Qingdao-based partner at Harris Moure who has worked in Chinese law for 30 years.

But a turning point came with the crucial auto-parts case, which China lost in September to the U.S., E.U. and Canada, observers say. That was China's first major defeat. The WTO ruled that China illegally taxed foreign imports of car parts for automakers assembling vehicles in China. "People were wondering why this case was being fought to the bitter end," Lim said. China did not settle during the formal consultation period, in which countries negotiate and try to resolve the matter, that occurs after parties lodge a trade complaint with the WTO. China lost the case when the WTO created an expert panel to make a ruling. China then appealed to the WTO's top court, the appellate body that rotates judges from member countries, and lost as well.

China also fought hard in intellectual property rights. It vigorously defended against the U.S. anti-piracy complaint, which charged that Chinese law was not harsh enough on counterfeiting. In January, the WTO eventually handed out a mixed decision: It agreed with the U.S. that China must protect copyrighted content banned by state censors and had to provide criminal penalties on piracy. But it sided with China, saying that China's criminal penalties for piracy were not too weak. China has switched from taking a radical tune to making more confident arguments based on the rhetoric of WTO rules, Wang said.

Why has China made this about-face? There are various speculations. Beijing's cultural attitude may have changed, as a new generation of government officials saw the WTO dispute resolution process as a technical instrument, rather than a hegemony of the Western legal system. China may have needed time to become more comfortable with using WTO suits to its economic advantage, realizing that it should not give up on cases where a

lot is at stake, particularly amid the global demand slump. "China has gotten a lot of benefits from the WTO system," and it should press its legal rights before the WTO as well, said Liu. "Especially in the environment of economic crisis, if we fail to use them, we incur a great loss."

"China's thinking, 'wait a second, it can go both ways. Instead of purely defending against claims against us, we can make our own claims.' That's a new attitude, and a proper attitude," Dickinson said. Another export powerhouse, Japan, went through a similar experience in the 1980s. Its exports faced barriers all around the world, and it had to learn how to litigate, Lim and Dickinson added.

As evidenced by its assertiveness in the G-20 summit, China also wants to show that it is a leader within the international economic order, that it will play by the existing rules and institutions, and that it can play it well.

Facing plunging exports, powerful state-owned companies, too, are putting strong pressure on Beijing to advance their interests or voice their trade complaints. It is no coincidence that the first WTO suit launched by China this year to reach a WTO expert panel protects the country's giant steelmakers, which have been squeezed by the global economic crisis.

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Next part in the series: With the U.S. and China plunging headlong into massive stimulus measures that affect export sectors, both sides will have plenty of bones to pick with each other. Facing more WTO disputes on the horizon, Chinese legal capacity is not as strong or experienced at the laborious, costly WTO cases as are the powerful Washington law firms. For now, Beijing has settled for hiring foreign lawyers to work with its own, but China's law firms are racing to build up their WTO practices. And Chinese lawyers are racing to advise the country's industries and local governments on WTO cases and issues that will impact them.