

Pentagon Must ‘Buy American,’ Barring Chinese Solar Panels

By KEITH BRADSHER

HONG KONG — The military authorization law signed by President Obama on Friday contains a little-noticed “Buy American” provision for the Defense Department purchases of solar panels — a provision that is likely to dismay Chinese officials as President Hu Jintao prepares to visit the United States next week.

Although there are many big issues to discuss, including concerns about North Korea, trade and economic matters are certain to be high on the agenda. And while both sides are aiming to keep the discussion positive — the United States is the world’s largest importer and China the largest exporter of goods — simmering resentments over trade in green-energy technologies could be a distraction.

China has emerged as the world’s dominant producer of solar panels in the last two years. It accounted for at least half the world’s production last year, and its market share is rising rapidly. The United States accounts for \$1.6 billion of the world’s \$29 billion market for solar panels; market analyses typically have not broken out military sales separately.

The perception that Beijing unfairly subsidizes the Chinese solar industry to the detriment of American companies and other foreign competitors has drawn concern in Congress. The issue of clean-energy subsidies is also at the heart of a trade investigation under way by the Obama administration, which plans to bring a case against China before the World Trade Organization.

The new Buy American provision, created mainly by House and Senate conferees during a flurry of activity at the end of the lame-duck session of Congress, prevents the Defense Department from buying Chinese-made solar panels.

The American military is a rapidly growing consumer of renewable energy products, because it is extremely expensive and frequently dangerous to ship large quantities of fuel into remote areas of Iraq and Afghanistan.

The solar panel provision is carefully written to help it comply with the free trade rules of the World Trade Organization, which would make it hard for China to ask a W.T.O. tribunal to overturn the provision, trade lawyers said.

Chinese leaders have strongly criticized such provisions in the past, particularly one in President Obama's economic stimulus package in early 2009 that applied to government procurement of steel and construction materials.

But China required in the late spring of 2009 that virtually all of its \$600 billion economic stimulus be spent within China, not just for construction materials.

Chinese officials in Beijing and Washington did not respond on Saturday or Sunday to requests for comment on the solar panel provision.

While the United States and Europe have focused on subsidizing buyers of solar panels, China has emphasized subsidies for solar panel manufacturers. It then exports virtually all of its panels to the United States and Europe, often helped by the American and European consumer subsidies.

The solar panel provision in the defense appropriations law comes as President Obama has ordered a broad investigation into whether Chinese export subsidies, local content requirements and other rules have violated W.T.O. rules. As a result of the investigation, the United States started a W.T.O. case on Dec. 22 against what it said were Chinese wind turbine manufacturing subsidies.

American trade officials said then that they were still examining other Chinese clean-energy subsidy policies to decide whether to file additional W.T.O. cases.

The solar panel provision was part of the initial defense appropriations bill passed by the House. The House version had a simple requirement that the Defense Department buy solar panels made in the United States.

The Senate, which has been more leery of interfering with free trade, had no comparable provision, however, and many people in the solar panel industry did not expect the final law to have such a provision.

But the conference of House and Senate leaders ended up retaining the House provision and modifying it, by adding legal language to require that it also comply with previous American trade legislation.

Representative Maurice Hinchey, Democrat of New York, said he had fought for the provision to be included in the bill.

“We’ve had a lot of money taken out of this country and invested in other places around the world, particularly China, and particularly in alternative energies,” he said in an interview by phone. “For them to be producing alternative energy, that’s great, but we need to do it ourselves, and as much of it as possible.”

Mr. Hinchey said he did not think the provision would jeopardize relations with the Chinese ahead of Mr. Hu’s visit. “We have provided them with a lot of economic growth there,” he said. “A lot of money has gone out of this country and into China, and a lot of manufacturing operations, particularly alternative energy, has also gone into China.”

Mr. Hinchey had praised the Obama administration in November for starting a broad investigation into Chinese subsidies for solar and wind energy exports, saying then that these subsidies had put a company in his district, Prism Solar Technologies of Highland, N.Y., at a competitive disadvantage.

Two prominent trade lawyers said in e-mails over the weekend that the law’s language meant that in practice, the Defense Department must buy solar panels from any country that signs the W.T.O.’s side agreement on government procurement. Earlier American trade laws require compliance with that agreement.

Virtually all industrialized countries have signed the side agreement, which requires free trade in government purchases. China vowed to sign it as soon as possible when it joined the W.T.O. in November 2001, but still has not done so.

The two trade lawyers said that the United States was within its rights to discriminate against Chinese solar panels in military procurement.

“The W.T.O. Government Procurement Agreement allows signatory countries, including the United States in its Defense Department contracts, to favor goods from countries that have signed that agreement over countries that have not,” said Carolyn B. Gleason, a partner at McDermott Will & Emery in Washington who is one of the best-known litigators of W.T.O. cases.

Alan Wolff, a former senior American trade official who is now the chairman of the trade practice at the law firm Dewey & LeBoeuf in Washington, said that it was hard to

understand China’s resistance to signing the agreement. “There would be a clear benefit both for it and its trading partners,” he said.

Solar panels are technologically complex to manufacture, and are made almost entirely in industrialized countries that have signed the W.T.O. side agreement — or in China.

Inland Chinese provinces and cities have strongly lobbied Beijing not to sign the agreement because they want to retain the legal right to continue steering government contracts to local companies, said a trade policy adviser to the Chinese government who insisted on anonymity because of the political sensitivity of the issue.

The Buy American provision in the 2009 economic stimulus legislation also has a little-known clause allowing purchases from other countries that have signed the Government Procurement Agreement, and not just from American suppliers.

Ocean Yuan, the chief executive and president of Grape Solar, a company based in Eugene, Ore., that distributes mostly mainland Chinese solar panels but also American, Japanese and Taiwanese panels, said that imported panels typically cost 20 percent less than American-made panels.

Mr. Yuan predicted that the new legislation would have a big effect on the American solar panel market, by encouraging Chinese solar panel manufacturers to establish factories in the United States. “This policy will certainly have a negative impact on the imported solar panels from China, which have lower cost over all due to lower labor and overhead costs,” he said.

Grape Solar sold \$500,000 worth of Chinese-made solar panels to the American military shortly before Christmas, Mr. Yuan said, adding that he expected future contracts to specify American-made panels.

The legislative provision was welcomed by SolarWorld, a German company that is one of the biggest manufacturers of solar panels in the United States and which has not followed the example of most manufacturers in moving production to China.

“As a long-standing and still-expanding American manufacturer of solar technology, SolarWorld is heartened that the U.S. government and military clearly grasp the critical role of domestically produced solar technology in the country’s national-security future,” said Bob Beisner, managing director of the company’s American subsidiary in Hillsboro,

Ore., which is already installing American-made solar panels at United States military facilities at Pearl Harbor, Hawaii.

The defense appropriations bill **has another provision related to China. It requires that the military conduct *an immediate review of its needs for rare earth metals***, which are mined elements increasingly crucial in sophisticated technologies. About 95 percent of the world's supply comes from China.

The bill also requires the department to establish “an assured source of supply” for rare earth metals by 2015 and to consider setting up a stockpile.

Rare earths are essential for a wide range of military hardware, be it missiles or sonar. The Defense Department has been studying its contractors' reliance on Chinese supplies for more than a year. A draft report shared with Congressional aides last fall had a preliminary conclusion that rare earths were very important but suggested that the department's contractors continue to be allowed to buy them from any source.