Solar Company Seeks Stiff U.S. Tariffs to Deter Chinese Spying

SolarWorld Americas Says Hackers in China Stole Documents

By DIANE CARDWELL  SEP. 1, 2014

In the daunting battle against corporate online espionage worldwide, one major solar company wants to deploy a powerful and novel weapon: higher tariffs.

SolarWorld Americas, the largest manufacturer of solar panels in the United States, has asked the Commerce Department to investigate claims that Chinese military personnel broke into the company’s computers and stole documents important to its business and its long-running trade dispute with China.

The company’s request followed the Justice Department’s decision to prosecute five members of the People’s Liberation Army, accusing them in May of stealing online files from a group of American companies, most of which had engaged in trade disputes with China.

SolarWorld says the new prosecution underscores the sophisticated ways that Chinese companies are retaliating against trade obstacles, especially the use of cyberwarfare.

As a deterrent, the company is proposing that the administration should use tariffs to crack down on such retribution.

“We think it is critically important that the Commerce Department set a precedent here and take a strong stand that it will not tolerate cyberhacking of U.S. companies that file trade cases,” said Timothy C. Brightbill, a lawyer representing SolarWorld.

While acknowledging that the Justice Department is unlikely to compel the suspects to appear in a United States courtroom, he said the federal government could impose additional steep tariffs on imports of Chinese solar panels. “This is a way that the U.S. could actually make it hurt,” Mr. Brightbill said.

A broader investigation by the Commerce Department into the costs of solar panels divided the industry from its start. Domestic solar farm developers and
installers of solar systems, whose businesses had benefited from an abundance of cheap imported equipment, worried that the passed-on costs of tariffs would slow solar adoption among consumers.

And American companies exporting polysilicon, the main raw material for solar products, to China feared that tariffs would make it harder for them to do business there. Indeed, China imposed steep duties on American polysilicon at the beginning of this year and recently tightened import policies on the material.

Still, many executives and officials have been frustrated in trying to hold Chinese companies accountable for what they see as unfair or unscrupulous business practices. A federal judge recently found a state-controlled Chinese drywall manufacturer, Taishan Gypsum Company, in criminal and civil contempt after it abruptly abandoned court proceedings five years into a case that found it liable for contaminated drywall used in the homes of seven Virginia families.

Senator Bill Nelson, Democrat of Florida, said he believed the implications of the case went far beyond drywall.

“It poses a defining moment for the Chinese government and its companies, which raises grave questions as to the risk of doing business with the Chinese,” Senator Nelson said in July on the Senate floor. “Will the Chinese government and its companies honor their moral and legal obligations under this or any other commercial contract?”

In the case of online crime, corporations across many industries are frequently reluctant to cooperate with prosecutions, said Shawn Henry, president of CrowdStrike Services, a security technology and services company, and a former executive assistant director of the F.B.I. They worry that publicizing security breaches risks their reputation and erodes competitive advantages, as well as opening the door to lawsuits.

The threat of trade sanctions, Mr. Henry said, could offer the government a rare way to thwart hacking schemes before they happen.

“The value to the Chinese government and the companies that are benefiting from these thefts of intellectual property is in the billions of dollars, and the penalties or the risk is almost zero,” he said. “There aren’t any mechanisms to hold anyone accountable.”

It is not clear how or if the Commerce Department will proceed; officials there declined to comment beyond saying that they were reviewing the request. Also uncertain is whether the White House, which is struggling to balance promoting the spread of green energy and protecting domestic manufacturing, would support...
the use of tariffs in such cases. A Justice Department spokesman, Marc Raimondi, said that the administration “embraces an all-tools approach to these types of crimes.”

“It’s not just a criminal justice solution,” Mr. Raimondi said. “There are a number of different tools that can be used to target this type of criminal activity.”

Trade officials would first have to open an inquiry into how SolarWorld had been harmed and how the Chinese-owned solar companies — unnamed in the Justice Department indictment — had benefited, in order to impose additional duties on imports from those companies. If the Chinese government or companies decline to respond to information requests, the department can use other facts, including those presented by the other side in making a determination, trade lawyers said.

Even if the Commerce Department does not open an investigation, trade experts say, the SolarWorld request and the Justice Department indictment are bringing needed attention to a government that is more aggressive than others have been in trying to promote its industries.

“The Chinese have taken their efforts on behalf of their economy — and a lot of them are state-owned enterprises, a lot of them are state-supported — to a level that I think most people within the trade area haven’t seen,” said Paul C. Rosenthal, a lawyer at Kelley Drye in Washington. “It needs to be addressed, and there need to be better remedies available to address it.”

SolarWorld Americas, the Oregon-based subsidiary of a German company, originally brought its trade case in 2011 as a flood of cheap solar panels from China was pushing several domestic manufacturers to the edge of bankruptcy and beyond. After the Commerce Department found that the Chinese companies had benefited from unfair subsidies from their government and were selling equipment below the cost of manufacture, it began imposing stiff tariffs on Chinese imports in May 2012.

According to the Justice Department, that is when a Chinese soldier sometimes known online as WinXYHappy and at least one co-conspirator began a series of break-ins into SolarWorld’s computers to steal emails and attachments. Those included cash-flow records indicating SolarWorld’s ability to survive financial strain, detailed information on proprietary technology and production costs and methods, as well as strategic discussions about the trade case with its lawyers.

But even though the duties cut into China’s solar business, that first
Commerce Department decision applied only to panels made from Chinese solar cells, the final major parts that are assembled into finished modules. Many companies were able to avoid the duties by assembling panels from cells produced elsewhere, especially in Taiwan, so last year SolarWorld brought a new case to close the loophole. Preliminary decisions have gone in the company’s favor, and the United States started collecting amended tariffs on imports ranging from roughly 19 to 55 percent this summer.

The trade case is not yet final, but the new tariffs have begun reshaping the solar panel industry, helping SolarWorld and other manufacturers based outside China while also raising prices of equipment.

But trade relations between the two countries have frayed even further. Foreign companies trying to do business in China have been facing new challenges as regulators and local government officials — apparently eager to impress the Communist Party leadership — appear to be aggressively enforcing the country’s antimonopoly law.

The Chinese foreign and defense ministries have denied any wrongdoing and have accused the United States of cybertheft and spying activities of its own, pointing to revelations from Edward J. Snowden about National Security Agency activities around the world.

“The problem for the United States is that it’s trying to promote this norm against industrial espionage — cybertheft of intellectual property — as distinct from traditional political or military espionage,” said Adam Segal, a senior fellow for China studies and director of the digital and cyberspace policy program at the Council on Foreign Relations. “It’s not an argument that many people bought even before Snowden, and now it’s even harder to make.”

Some analysts say that the issues facing the two countries require a political and economic, rather than legal, solution and are calling for a settlement between governments. China recently asked for a suspension of the tariffs along with talks toward an agreement, but that has not yet moved forward.

“Everyone’s just going back and forth, tit-for-tat, on this,” said Scott Kennedy, director of the Research Center for Chinese Politics and Business at Indiana University. “There needs to be some type of negotiation amongst all the parties and basically have a truce in the legal war and figure out what are the new rules of the game.”

Aaron Kessler contributed reporting.

A version of this article appears in print on September 2, 2014, on page B1 of the New York edition with the headline: Solar Company Seeks Stiff U.S. Tariffs to Deter Chinese Spying.