In one of the more high-profile trade secret dispute cases, LG Chemical and SK Innovation have been battling before the U.S. International Trade Commission (ITC) since April 2019 on matters relating to SK Innovation’s alleged misappropriation of LG Chemical’s trade secrets. Both companies are chemical subsidiaries of the two largest South Korean conglomerates that lead the global electric vehicle (EV) battery space.

LG Chemical alleges that SK Innovation unlawfully exploited its trade secrets by hiring 77 of its former employees from its lithium ion (Li-ion) battery division. This division developed the world’s first commercial “pouch-type” automobile batteries. LG Chemical’s forensic investigation into its internal communications affirmed that some of its employees explicitly revealed key technical information on their resumes, while some downloaded 400 to 1,900 confidential documents before joining SK Innovation.

Coincidentally, from the end of 2016 (when the move of the 77 employees began) to the beginning of 2019, SK Innovation’s aggregated EV battery supply contract increased by more than fourteen times. It also secured a lucrative multi-billion dollar battery supply contract with Volkswagen, one of LG Chemical’s major clients, which further escalated the trade secret feud between these two companies.

Under 18 U.S.C § 1839, the Defend Trade Secrets Act (DTSA) broadly defines the term “trade secret.” Virtually any confidential business information may be classified as trade secret by meeting the following criteria:

1. The owner has taken reasonable measures to keep the information secret;
2. The information derives independent economic value from not being generally known.

Generally, to satisfy the “reasonable measure” requirement to maintain secrecy, the company must maintain robust employment agreements and policies including, but not limited to, non-disclosure and non-compete agreements to prevent both accidental and intentional public disclosure. Given that LG Chemical had been implementing these instruments, there is no doubt that the DTSA will provide protection to the disputed trade secrets in question.

It is important to note that patents have historically provided stronger protection and enforcement mechanisms when compared to trade secrets. Unlike patents, trade secrets are not exclusive rights and are susceptible to reverse engineering risks. It has only been after a series of structural legal changes, such as the introduction of the DTSA of 2016, as well as the America Invents Act of 2011, that the risks of choosing secrecy have been effectively reduced, whilst new ways to challenge patents in administrative proceedings have increased the burden of enforcement. As a result, corporations have become more selective about what they choose to patent, with ever more technical information instead kept as trade secrets.
The increasing number of trade secrets, nonetheless, has simultaneously increased the amount of trade secret theft, also raising the importance of the ITC. Although the ITC is primarily known as a forum for patent infringement claims, it has gained increasing popularity as a venue to address trade secret disputes.

The ITC may initiate a “Section 337 Investigation” into products that infringe valid and enforceable U.S. intellectual property. If the investigation is successful, the ITC may issue an exclusion order to the U.S. Customs and Border Protection agency under 19 U.S.C § 1337 to ban the importation of infringing products into the U.S, even if the alleged misappropriation occurred in another country. As such, LG Chemical seeking injunctive relief from the ITC means that SK Innovation may no longer be able to supply EV batteries, and possibly other related downstream products, from entering the United States, which will inevitably disrupt the EV supply chain.

According to the Wall Street Journal article, “Why the Global Auto Industry Is Worried About a Korea Feud,” the escalating legal battle between these EV battery manufacturers could potentially cost thousands of American jobs and the integrity of the EV supply chain in the United States.

Given that the integrity of the global EV supply chain is at risk against the need for strict trade secret enforcement, LG Chem v. SK Innovation will be a tough balancing exercise for the ITC, which has to make a momentous decision with far-reaching consequences.