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How A Trade Dispute Between 2 Korean Firms Could Jam Biden's Electric Car Plans

Trade lawyers call it "the nuclear option." South Korea's prime minister called it "embarrassing." The question now is whether Biden will call it unacceptable.

By Alexander C. Kaufman

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President Joe Biden has vowed to convert the federal government's entire fleet of motor vehicles — some 645,047 at last count — to electric. That includes thousands of Ford F-150 pickups, the country's perennial best-selling automobile since 1981 and a popular ride for everyone from federal police to national park rangers.

But a dispute between two South Korean battery manufacturers has spilled over into U.S. trade courts and could derail the new administration's plans. The feud could also take a political toll in Georgia, which in addition to helping secure Biden's victory and his party's Senate majority is the prospective home for the defendant's major new manufacturing plant.

The U.S. International Trade Commission is set to rule this week on a complaint from battery giant LG Chem that alleges its rival SK Innovation hired away former employees who brought trade secrets with them and then shredded documents containing evidence.

If the ITC rules in LG's favor, SK Innovation could be barred from importing the raw materials needed to run the sprawling pair of facilities it's building in

Jackson County, Georgia, that would produce batteries for both the F-150 and Volkswagen's signature crossover models.

LG has argued that if the ITC fails to enforce its intellectual property rights, the U.S. will lose credibility in its own cases against China, for example. But experts say the demand for electric vehicle batteries that Biden's policies will create far outstrips production capacity in the U.S. Ford and Volkswagen both told the ITC that reworking their plans without SK Innovation would take years. In other words, if SK Innovation doesn't get its new factory online, the U.S. battery boom might not happen.

"You're talking about mothballing a $2.6 billion investment," said Carol Browner, who served as Environmental Protection Agency administrator under President Bill Clinton and a climate adviser to President Barack Obama, and who testified as an expert witness on SK Innovation's behalf. "The electrification of vehicles like the F-150 and VW crossover are tipping points in this effort to address greenhouse gases and other pollutants from vehicles."

ITC spokeswoman Peg O'Laughlin declined to comment but said the commission would announce its determination at 5 p.m. Eastern Time on Wednesday.

An Overseas Fight Spills Over

The conflict between the two companies started in 2017, when LG accused former employees who had joined SK Innovation of breaching its noncompete contracts. LG ultimately prevailed in the South Korean courts after more than a year of appeals, forcing SK Innovation to delay the start date for its new hires. The case, notably, did not accuse SK Innovation of trade secret theft.

But in 2019, LG, which supplies electric vehicle batteries to Tesla and General Motors, made a new complaint to the ITC, accusing SK Innovation of stealing trade secrets and seeking to block its rival from importing the materials needed to open and operate a battery plant in the U.S.

ITC Judge Cameron Elliot made a preliminary ruling in favor of LG in February 2020, finding that SK Innovation had destroyed documents in South Korea

related to the case. SK Innovation said the country's laws requiring companies to retain documents don't mirror those in the U.S., and insisted it has since recovered some of the files in question.

"They alleged that the documents pertained to their secret sauce and if they had been turned over they would have shown that employees who left LG Chem took confidential information," said Sturgis Sobin, a lawyer at the firm Covington & Burling who is representing SK Innovation. "What we're confident we could demonstrate, if we had gotten a trial, is that SK Innovation batteries have a completely different formulation than the formulation LG Chem uses."

Neither LG nor its battery spinoff LG Energy Solution responded to repeated requests for comment before this story published. But shortly afterward, the company's lawyer said in an interview that SK Innovation stole "billions and billions of dollars' worth of research and development" that took its scientists more than 15 years to complete.

"They not only short-circuited the amount of time they needed to become competitive, they short-circuited the money they needed to spend to get competitive," said David Callahan, LG's lawyer at the firm Latham & Watkins. "This is the absolute classic case of profoundly unfair competition."

Last month the company told The Korea Times it was "on track to settle the case before the U.S. ITC's planned final ruling." But Callahan said SK Innovation was "not serious about settling" and that his opponents "forced themselves into a situation by stealing."

There are significant differences in the way each company is making batteries, said James Frith, an analyst at the energy research firm BloombergNEF, with each one targeting either greater mileage range per charge or a longer overall lifespan.

The cathodes in LG's batteries generally use a material known by the abbreviation NMCA, which stands for the minerals nickel, manganese, cobalt and aluminum — a blend that increases the number of times a battery can be charged over the course of its lifespan. SK Innovation, on the other hand, is using what's known as NMC9.5.5, which stands for nickel, manganese and

cobalt, and designates the ratio of each mineral by number. That mix translates to more miles per charge of each battery, Frith said.

Dueling Over A Market With Room For Both — And Need For More

Both companies have grand designs on the U.S. market.

LG completed its first lithium-ion battery plant in Holland, Michigan, in 2013 and expanded it in 2017.

At that point, the market for electric vehicles was small and stunted as the Trump administration rolled back federal climate regulations. Still, worsening climate projections and the growth of the electric vehicle market in China and Europe spurred automakers to ramp up production in the U.S.

Buoyed by deals to supply Ford with batteries for the F-150 and Volkswagen with batteries for its Tennessee assembly plant, SK Innovation broke ground in Georgia in March 2019. By the following May, the company announced plans to open a second facility, promising to hire thousands of workers and invest $2.6 billion in the area just northwest of Athens.

That same month, LG began construction on its own second battery plant, a $2.3 billion joint venture with General Motors in Lordstown, Ohio.

The projects represent the largest build-out of domestic battery-making capacity to date. Tesla's Gigafactory in Nevada remains the largest production facility, making roughly 35 gigawatt-hours of batteries per year. But it only supplies batteries for the company's own electric cars. By contrast, LG's Midwest projects will produce roughly 30 gigawatt-hours per year when fully operational, Frith said, while SK Innovation's Georgia plants will manufacture a combined 22 gigawatt-hours. A handful of other smaller battery manufacturers make up the rest of the U.S. market.

"There hasn't been the certainty that there is going to be a market in the U.S., as automakers have been publicly flip-flopping on whether they're doing electric vehicles," Frith said. "So the capacity that's being built is being built in order to fulfill order books."

If the ITC effectively halts SK Innovation's Georgia plans, LG likely couldn't make up the difference with its own factories. And that says nothing of the fact that Ford and Volkswagen designed their products around the SK Innovation battery.

In a filing to the ITC, Ford said "with every new electric vehicle, the EV battery supplier must be selected approximately four years (and sometimes more) before the launch."

"EV batteries are not commodity products, but are manufactured according to technical specifications developed specifically for the electric vehicle into which they will be assembled," the company's lawyers wrote in the document. "Consequently, EV batteries cannot be manufactured in isolation but are an integral aspect of the design plan for the electric vehicle and its other components."

Volkswagen warned in its own filing that an ITC ruling preventing it from using SK Innovation batteries "at this late stage will require restarting the process of finding another domestically-manufactured battery option" and said "creating new capacity for a specific electric vehicle contract … typically takes years."

The ITC could pursue a range of options in its ruling short of barring all the imports needed for SK Innovation's factory, including limiting certain components.

Regardless of how the ITC rules, "the outcome is likely to hurt the already struggling supply of EV battery packs in the U.S.," said Ram Chandrasekaran, an analyst at the energy consultancy Wood Mackenzie.

What Biden Can Do

The case shows how "so-called trade law has gotten so infested with non-trade corporate interests," said Lori Wallach, a lawyer and trade expert at the consumer watchdog Public Citizen.

Under Section 337 of the Tariff Act of 1930, the provision LG Chem cited in its complaint, foreign companies enjoy sweeping powers to halt a rival's imports

at the border over intellectual property disputes, but those powers are out of reach for civic-minded advocates seeking to limit overseas abuses.

“It’s a pretty stark contrast to the tools available with respect to violations of human rights, labor rights and environmental agreements, where it is fairly hard for a private party to be able to take private action,” Wallach said.

The electrification of vehicles like the F-150 and VW crossover are tipping points in this effort to address greenhouse gases and other pollutants from vehicles. Former EPA Administrator Carol Browner

Pursuing Section 337 cases through the ITC is known among trade lawyers as the “nuclear option” in part because it leaves no room for monetary resolution through settlements or a federal court. The use of the legal strategy here has drawn criticism from some of South Korea’s top governing officials.

“I told them to resolve the issue sometime soon,” South Korean Prime Minister Chung Sye-kyun said at an industry forum in January. “This is simply embarrassing.”

There is, however, a trump card: a presidential veto. Under Section 337, the president has 60 days to review the ITC’s decision and possibly nullify the ruling for “policy reasons.” Obama was the last president to use the power, in 2013, when he vetoed an ITC decision in Samsung’s favor that would have blocked the import of some Apple iPhone and iPad products. Ronald Reagan deployed the presidential veto a record four times in the early 1980s to block decisions including those that would have impacted domestic paper manufacturers and, coincidentally, battery companies.

The White House did not return a request for comment on Tuesday.

As companies like General Motors make a splash with their abrupt U-turn on climate-friendly vehicles, flipping from supporting the Trump administration’s measures to cut fuel efficiency to launching a flashy Super Bowl commercial on Sunday advertising GM’s electric vehicle ambitions, a real test of their seriousness will be domestic investments in more battery production, said

Daniel Becker, director of the Center for Biological Diversity's Safe Climate Transport Campaign.

"If we're going to have a lot of electric vehicles, companies are going to have to make them, and part of making them is making batteries for them," he said. "The only one I've heard about that wants to actually make its batteries is Tesla."

Things are starting to move in the right direction, he said, but added that a dispute between companies in South Korea could mess that up — emphasizing his point with a different four-letter word.

Wallach spelled the stakes out equally bluntly: "The president's basic climate agenda is at the mercy of two Korean companies."