

Trade Secrecy as an Instrument of National Security? Rethinking the Foundations of Economic Espionage

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Economic espionage—the misappropriation of trade secrets to benefit a foreign government—is rightly regarded as a national security problem. The national security dimension of trade secret misappropriation arises through an externality. To maintain their rights under trade secret law, trade secret holders must take reasonable measures to protect their secrets; but these measures may not extend to protecting information from highly sophisticated adversaries who wish to use it in markets that the owner has no interest in entering. Repeated over time and in strategically important industries, however, the large-scale misappropriation of trade secrets may facilitate the cheap and rapid development of infrastructure to such an extent that it diminishes U.S. technological advantages and economic security. Pervasive weaknesses in computer and network security, and the continuing development of cyber attacks that support economic espionage, add further to the potential for harm.

The U.S. response to this problem has been a mixture of law enforcement, based on the economic espionage statute, and counterintelligence. Despite a handful of prosecutions and some evidence of coordination among law enforcement and intelligence agencies, there are few signs that the United States has developed an effective response to protecting the national security interest in trade secrets. Specifically, the approaches the United States has taken do not alter the basic asymmetry present in economic espionage: other countries have much to gain from supporting it but little exposure to retaliation or other sanctions.

This article sets forth ways to change this dynamic by understanding the basic, intertwined domestic and international elements of economic espionage. Domestically, a combination of statutory reform and administrative efforts could encourage trade secret holders to invest in more effective information security measures as well as the sharing of threat information between trade secret holders and the government. But these efforts are likely to be futile without international norms that discourage economic espionage. Appealing to parallels between traditional and economic espionage, this article argues that informal diplomatic efforts could be helpful in managing economic espionage risks.