

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. To individual trade secret holders, such misappropriations may not register as much of a loss. Repeated over time and in strategically important industries, however, state-coordinated use of misappropriated trade secrets may facilitate the cheap and rapid development of infrastructure to such an extent that it alters U.S. technological advantages and economic security. Unlike traditional espionage, there are effectively no internationally observed legal or normative constraints on economic espionage.

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.

This article argues that this failure is due to policymakers' neglect of 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.