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Teoman M. Hagemeyer-Witzleb

# The International Law of Economic Warfare

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Economic Law

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Teoman M. Hagemeyer-Witzleb

# The International Law of Economic Warfare

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# Abbreviations<sup>1</sup>

1970 Declaration	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations
1974 Charter	Charter of Economic Rights and Duties of States
2001 Hydrocarbons Law	2001 Venezuelan Organic Law of Hydrocarbons
Aixtron	Aixtron SE
Antidumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Antidumping Code	1979 Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade
ASCM	Agreement on Subsidies and Countervailing Measures
AT	Amtlicher Teil (Official Section)
AWG	Außenwirtschaftsgesetz (German Foreign Trade and Payments Act)
AWV	Außenwirtschaftsverordnung (German Trade and Payments Ordinance)
BAnz	Bundesanzeiger (German Federal Gazette)
BGBI.	Bundesgesetzblatt (German Federal Law Gazette)
BIT	Bilateral investment treaty
Blocking Regulation	Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom
BMWi	Bundesministerium für Wirtschaft und Energie
BRI	Belt and Road Initiative
CETA	Comprehensive Economic and Trade Agreement

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<sup>1</sup>States are generally referred to with abbreviated, not official names.

CFIUS, Committee Ch.	Committee on Foreign Investment in the United States Chapter
CJEU	Court of Justice of the European Union
CNY	Chinese yuan
Commission	European Commission
CPTPP	Comprehensive and Progressive Agreement for Trans- Pacific Partnership
DAX	Deutscher Aktienindex
DPRK	Democratic People's Republic of Korea
Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
DSU	Understanding on the Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ECHR	European Convention on Human Rights
EFTA	European Free Trade Association
FDI	Foreign direct investment
FET	Fair and equitable treatment
FINSA	Foreign Investment and National Security Act of 2007
FIRRMA	Foreign Investment Risk Review Modernization Act of 2018
fn.	Footnote/s
Fr	French (used in footnotes to indicate the quoted text's original is in French)
FR	Federal Register
FTA	Free trade agreement
Fujian Grand Chip	Chinese Fujian Grand Chip Investment Fund LP
GAPP	Generally Accepted Principles and Practices for Sovereign Wealth Funds (Santiago Principles)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Ger	German (used in footnotes to indicate the quoted text's original is in German)
GPA	Government Procurement Agreement
H.R.	House of Representatives bill
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Disputes between States and Nationals of Other States
IIA	International investment agreement
ILC	International Law Commission

IMF	International Monetary Fund
ISCM	Investment screening and control mechanism
IT	Information technology
KORUS	Free Trade Agreement between the Republic of Korea and the United States of America
L.N.T.S.	League of Nations Treaty Series
MERICs	Mercator Institute for China Studies
NAFTA	North American Free Trade Agreement
OAPEC	Organization of Arab Petroleum Exporting Countries
OAS	Organization of American States
OBOR	One Belt One Road
OECD Code	OECD Code of Liberalisation of Capital Movements
OECD Convention	Convention on the Organisation for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Recipient Country Investment Policies Relating to National Security
OJ	Official Journal
OPEC	Organization of Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
PDVSA	Petróleos de Venezuela, S.A.
PRC	People's Republic of China
PTA	Preferential trade agreement
Pub. L.	Public Law
RMB	Renminbi
RTAs	Regional trade agreements
Screening Regulation	Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union
SDR	Special drawing rights
Sec.	Section
Sixth Committee	Sixth Committee of the UN General Assembly
SOE	State-owned enterprise
Stat.	United States Statutes at Large
SWF	Sovereign wealth fund
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TRIMs	Agreement on Trade-Related Investment Measures
U.N.T.S.	United Nations Treaty Series
U.S.C.	United States Code

UN	United Nations
UN Charter	Charter of the United Nations
UNCTAD	United Nations Conference on Trade and Development
USD	United States dollar
USITC	United States International Trade Commission
USMCA	Agreement between the United States of America, the United Mexican States, and Canada
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WCO	World Customs Organization
World Bank Guidelines	Guidelines on the Treatment of Foreign Direct Investment
WTO Agreement	Agreement Establishing the World Trade Organization

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# Chapter 1

## Introduction



### Contents

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Today's world is one of economic altercations not only between private market actors but also between states. Such altercations are no unusual phenomenon in the competitive framework characteristic of the world economy, in which states use their economies, market and non-market, and its participants to pursue their economic and political interests, domestic and abroad.<sup>1</sup> With war and other forms of resort to armed force<sup>2</sup> as a formerly paramount means to pursue state interests ostracized, the use of economic might has become more and more important for states. The limitations placed on the use of military means and the reality of competition point states to pursue their interests in other than violent form, especially with economic power. But is this pursuit of interests unconstrained by international law? Is there no difference between competition and coercion? Both the idea of competition and the international community's handling of armed conflict suggest otherwise, since competition is a rules-based concept (ensuring a level playing field in terms of market conditions) and war knows and, even prior to its banning, knew certain rules of engagement. If it is accepted that altercations in general require and are

<sup>1</sup>Cf. Menzel (2011), p. 278; McDougal and Feliciano (1958), pp. 792, 794.

<sup>2</sup>In this first chapter, the term war is used not in its technical sense according to international law (see Green 1957, pp. 394–402 and Chap. 7 fn. 4 below), but in a way also to include other forms of recourse to armed force.

subject to certain rules,<sup>3</sup> it would be odd to reason that there are none for economic conflict.<sup>4</sup>

With economic conflict this work refers to a certain type of interaction taking place mainly (but not exclusively) between states. Since the relationships of states are governed by international law,<sup>5</sup> this system of laws is likely to contain rules for economic conflict. This work explores the universe of international law in search of rules for a segment of non-violent economic conflict that it defines as economic warfare (used synonymously with economic war) (below Sect. 2.2). Driven also by academic endeavor and increasing topicality of economic warfare, the primary motivation for this work is to address the apparent lack of systematic study of such rules, which have the potential to prevent, contain, and moderate economic conflict that is costly, harmful, and prone to escalation.

The following sections intend to sketch that, while armed conflict (which includes war as a sub-category) is today subject to numerous rules of international law, which have been studied extensively, economic warfare—with a history almost as long and vivid as that of traditional warfare—has received considerably less attention (below Sect. 1.1). Thereafter, the heightened role of economic warfare in international relations is discussed (below Sect. 1.2). The motivations for this work thereby laid out, this first chapter closes with an overview of what is to follow and some notes on how this study is conducted (below Sect. 1.3).

## 1.1 Economic Warfare: Overlooked?

Wars are ugly but persistent events in the history of mankind.<sup>6</sup> Omnipresent, they have been addressed in the course of history by ancient custom and numerous international instruments to lessen their inherent cruelties (and, recently, to prevent

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<sup>3</sup>Cf. Neff (2005), pp. 22–25; Henderson (2018), p. 10.

<sup>4</sup>Cf. Leonard (2015); the Deputy Director-General of the WTO in a keynote address held on 29 June 2018 (Wolff 2018): “[. . .] That civilization is necessarily based on the rule of law is demonstrated by the serried rows of Qin dynasty terra cotta warriors unearthed in Xian; the Code of Hammurabi; the Bible; the Koran; the teachings of Solon; Pax Romana; the U.S. and British Constitutions; the Code of Napoleon; the Treaty of Rome of the European Union; and for the sphere of current international commerce, the GATT and other WTO agreements. Whether autocracy or democracy, whether through the application of force or freely determined consensus, legal systems are created under which peoples live. Wherever one looks, wherever there is society, there are rules. The alternative is chaos. [. . .] The presence of law does not suggest that there will be no conflicts. To the contrary, law exists because there will always will be differences that are not automatically reconcilable. This is as true for the rules needed for traffic entering a round-about as for international commerce. Interests and perceived interests clash. In the world of geopolitics as well as of trade, given that there will always be conflicts, the question is how they will be managed. [. . .]”

<sup>5</sup>Posner and Sykes (2013), p. 6.

<sup>6</sup>See already Kaltenborn (1847), pp. 315–316.

them as such).<sup>7</sup> But it was not until after the end of the Second World War that the international community began to genuinely outlaw and ostracize the use of military force and war as—in von Clausewitz’ words—“a true political instrument, a continuation of political intercourse executed by other means”,<sup>8</sup> i.e. a way to pursue national interests.<sup>9</sup> This effort was made not only under the impression of the unprecedented devastation lying behind but also in face of the finality of looming thermonuclear annihilation.<sup>10</sup>

Due to these efforts, military conflict in pursuit of national interests is today publicly despised and in many instances a violation of international law so that it is fair to state that “[t]raditional large-scale inter-state conflicts remain uncommon [...]”.<sup>11</sup> Nonetheless, military conflict is no thing of the past:<sup>12</sup> Since 1945, many inter-state and intra-state conflicts have occurred and are occurring at the cost of millions of lives.<sup>13</sup> However, most states do not openly declare that the wars they wage serve their national self-interest.<sup>14</sup> Different pretexts now form the justification for war.<sup>15</sup> The face of war has also changed. Certainly not its atrocities and the suffering it inflicts. However, the way of waging war has moved to a blur of (mis)information, “hybrid” tactics, and employment of modern technology,<sup>16</sup> making it growingly difficult to fit today’s wars (if they can be called so) into yesterday’s legal concepts thereof. Whatever the challenges may be, there *is* a fairly comprehensive regime in place that draws the lines for when resort to force or war is permissible (*jus ad bellum* or *jus contra bellum*) and how it should be fought (*jus in bello*).<sup>17</sup> Although not always easily applied, contentious in many aspects, and difficult to enforce in practice, there exists a legal regime regulating what constitutes armed aggression, force, self-defense, and so forth—and what does not. The same can be said about hostilities which are legal in a war—and those which are not.

If one imagines a scale of means to pursue interests internationally, where on the left are legal means (such as voluntary co-operation) and on the right are illegal

<sup>7</sup>Cf. Henderson (2018), pp. 10–16; Neff (2005), pp. 73–75, 111–115; Posner and Sykes (2013), p. 191. The 1648 Peace of Westphalia is viewed by many to mark the birth of modern international law, see for instance Shaw (2017), p. 19; Peters (2016), p. 4 (para. 1).

<sup>8</sup>Clausewitz (1832), p. 28 (Ger) (all translations were made by the author with the help of DeepL (<https://www.deepl.com/translator>) (accessed 12 January 2021)); his often-cited aphorism “war is a mere continuation of policy by other means” is actually the title to the quote in the main text.

<sup>9</sup>Cf. Brownlie (1968), pp. 51 et seqq.; Dinstein (2011), pp. 65 et seqq., 85–88; Neff (2005), pp. 314 et seqq.; Green (1957), p. 415; Henderson (2018), pp. 10–16; Hathaway and Shapiro (2017); see also Blum (1977), p. 6; Lillich (1975), p. 360; Brosche (1974), p. 16.

<sup>10</sup>Buchheit (1974), p. 989.

<sup>11</sup>Gray (2018), p. 1 (square brackets added by the author here and in the following).

<sup>12</sup>Dinstein (2011), p. 75 (para. 200).

<sup>13</sup>Correlates of War Project (2017).

<sup>14</sup>Cf. Buchheit (1974), p. 989.

<sup>15</sup>Cf. Posner and Sykes (2013), p. 175.

<sup>16</sup>See The Economist (2018ee); Blank and Kim (2016), pp. 4–5.

<sup>17</sup>Cf. Shaw (2017), p. 891; Bothe (2016b), pp. 596, 599–600 (paras 2, 9).

means (such as the threat or use of force), a natural questioning is directed towards the legal fate of the “in-betweens”.<sup>18</sup> Intervention by ideological means (such as propaganda) and other influences short of force are subject to a less clear regime.<sup>19</sup> And so is, as will be shown by this study, influence by economic means, especially economic warfare.

Economic war is a term even more elusive than war, but war and economy are intertwined by a simple logic: War is an expensive affair and the ability to afford it usually depends on economic output of the belligerent.<sup>20</sup> Economic warfare can be understood—again, borrowing from the soldier von Clausewitz—as “an act of violence to compel our opponent to fulfil our will”,<sup>21</sup> with the addition that the “violence” can either be effected by or directed against economic means. In this wide sense, economic war has been used (mainly) to supplement violent war efforts almost ever since mankind has engaged in such.<sup>22</sup> In his extensive work on the world history of economic warfare, Laïdi cites from prehistoric incidents, the Crusades, colonization, the Opium Wars, the First and Second World War, and of course the Cold War confrontation, all of which were also fought with and against economic means.<sup>23</sup> The clearer it became for belligerents that inflicting economic harm diminishes the ability to wage war, the higher the importance of economic warfare rose—the fact that the United Kingdom had a Minister of Economic Warfare during the Second World War is telling.<sup>24</sup> And yet, as will become clear in the course of this study, has economic warfare been subjected hardly to any rules *expressis verbis*, which is all the more surprising vis-à-vis its historical presence and significance in international relations.<sup>25</sup> This finding applies all the more to the non-violent forms of economic warfare addressed in this study (see below Sect. 2.2).

## 1.2 Economic Warfare: An Instrument of Growing Importance

With war (and other forms of forcible aggression including *violent* forms of economic warfare) principally forbidden, states increasingly (had to) resort to other instruments of persuasion. One of these instruments is *non-violent* economic warfare, which has become very relevant in the dealings between states. This section

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<sup>18</sup>Cf. Farer (1985), p. 405.

<sup>19</sup>Buchheit (1974), p. 989.

<sup>20</sup>Cf. David and Suissa (2009), pp. 28–29; Huissoud (2009), p. 99.

<sup>21</sup>Clausewitz (1832), p. 4 (Ger).

<sup>22</sup>Lowe and Tzanakopoulos (2018), para. 3.

<sup>23</sup>Cf. Laïdi (2016), pp. 19 et seqq.; see also David and Suissa (2009), pp. 22–28.

<sup>24</sup>Bettati (2016), pp. 200–202.

<sup>25</sup>Held (1962), p. 861 underscores the absence of a “law of economic war” or regulation of measures of economic warfare.

briefly introduces two reasons for the growing importance of economic warfare in international relationships: Its maturation into a substitute for actual war (below Sect. 1.2.1) and reinvigorated nationalism (below Sect. 1.2.2). Results of the discussion are summarized and subjected to a caveat afterwards (below Sect. 1.2.3). Before proceeding, it should be emphasized that what follows are debatable concepts and opinions whose persuasiveness and even application by states is pointed out here merely in order to explain the rise of economic warfare but with no intent to pass judgement on either validity or truthfulness.

### 1.2.1 *A Partial Substitute for War*

A narrative of the post-bloc world order holds that economic warfare has become the substitute for war, at least between certain states. Briefly summarized, the narrative rests on two pillars:<sup>26</sup>

First, the collapse of the bipolar world order, ending bloc allegiance and setting the stage for changing alliances. After the end of the East-West conflict, whose nuclear extinction logic tied together the economies of the blocs, capitalism became a global (and “hypercompetitive”<sup>27</sup>) phenomenon and with it, conflict moved from geopolitics to a pursuit of (mainly but not exclusively) economic interests of states, which were freed from the shackles of ideological or historical alliances. The (monogamous and faithful) bloc confrontation was substituted by a (polygamous and philandering) trade and economic struggle, in which even former allies colluded against one another in an ever-changing choreography of temporary and subject-related coalitions. In one word, political scientists and historians argue about whether a new age of *geo-economics* has dawned.<sup>28</sup> The concept of *geo-economics* is best described in the words of its creator Luttwak, who is known for his contentious and provocative reasoning:

[Goeconomics is] the admixture of the logic of conflict with the methods of commerce – or, as Clausewitz would have written, **the logic of war in the grammar of commerce.**<sup>29</sup>

In a *geo-economic* setting, states have certain goals: They seek to change the conditions of competition to the benefit of their private market actors; to preserve jobs in the domestic job market; to secure “their” firms’ technological edge; to secure access to (scarce) natural resources and raw materials (for instance: rare earths, oil and gas, and, soon enough, freshwater); and some states seek to secure their

<sup>26</sup>Luttwak (1990), p. 20; Munier (2009d), pp. 49, 57, 60, 69; see also David and Suissa (2009), p. 31; Huissoud (2009), p. 109 and the references in Chap. 2 fn. 18 to 23 below.

<sup>27</sup>Delbecque and Harbulot (2012), p. 19 compares the world of business to the Wild West.

<sup>28</sup>See Roberts et al. (2019).

<sup>29</sup>Luttwak (1990), p. 19 (emphasis added).

dominance and influence.<sup>30</sup> To this end, they do not only play the claviature of politics, but also mingle with private economic actors by pampering or wooing them. Different from mercantilism, in geoeconomics, both causes and methods of war are necessarily economic; recourse to armed force is not an option.<sup>31</sup>

Second, the growing alignment of interests of private economic actors and their home states: The well-being and power of a state is measured primarily by the health of its economy, which means the well-being of companies becomes state interest.<sup>32</sup>

According to geoeconomics, large economies and states, such as the EU, United States, China, and Japan, engage in economic warfare instead of actual warfare in pursuit of their goals.<sup>33</sup> This amounts to at least a partial substitution of war by economic warfare.<sup>34</sup>

As will be seen below, geoeconomic reasoning has received its fair share of criticism, especially from economists (below Sect. 2.2.2.1). Nonetheless, even critics concede that the concept appears to have fallen on good soil with some state leaders and their advisers.<sup>35</sup>

### 1.2.2 *Reinvigorated Nationalism and Rise of Economic Nationalism*

At the time of writing, it is safe to say that nationalist conceptions are, once again, on the rise. This is also true for economic nationalism, a concept that is not only hard to grasp for the rational-minded but also so closely linked to ethnic nationalism that its discussion lies too far beyond this work's agenda.<sup>36</sup> Two words incomparably embodying the simplicity of economic nationalism describe the concept sufficiently

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<sup>30</sup>Luttwak (1990), p. 20; Munier (2009d), pp. 50–53; Huissoud (2009), pp. 112–113; Roberts et al. (2019), p. 659 emphasize the “shift in focus from absolute gains [...] to relative gains”.

<sup>31</sup>Luttwak (1990), pp. 20–21.

<sup>32</sup>Munier (2009d), p. 66.

<sup>33</sup>Cable (1995), p. 307.

<sup>34</sup>Bosserelle (2011), pp. 178–179, 184 stresses that war (though not between major nuclear powers) is still very much present on the international plane; it will also not disappear (see pp. 176–177).

<sup>35</sup>See Roberts et al. (2019), p. 676; Arnaudo (2017), pp. 7–11; Leonard (2015); The Economist (2017a); Mattoo and Staiger (2019) interpret trade wars as shift from rules-based to power-based tariff bargaining which is to a certain degree logical from the perspective of a declining hegemon—the United States. Remarkably, France is home to a school of economic warfare (*Ecole de guerre économique*), founded in 1997 by Christian Harbulot and Jean Pichot-Duclos, see <https://www.ege.fr/> (accessed 29 December 2019) and Bosserelle (2011), p. 172; mention of the British Minister of Economic Warfare has already been made (fn. 24 above).

<sup>36</sup>For a discussion see, for instance, Gilpin (1971); Gilpin and Gilpin (1987), pp. 180 et seqq.; Etges (1999), pp. 17–32; and Neff (1990b), pp. 5–8, the latter of which views the economic debate between “economic nationalism” versus “free trade” as a microcosm of the wider controversy between nationalism and cosmopolitanism.

for the present purposes: “America First”.<sup>37</sup> Neff offers a noteworthy description and explanation for the persuasiveness of economic nationalism embodied in this aphorism:

**Economic nationalism reflects, as it always has, a deep-seated concern for the solidarity of the local community and the integrity of the social bonds that unite it.** Ideas of social welfare and cooperation come naturally to it, as they do not to liberalism, with its atomistic and competitive ethos. It is hardly to be wondered at—save by those of an abstract turn of mind—that the masses of mankind (and their rulers) show an instinctive preference for the bonds of the family, community and nation over the prospect of arms-length contractual ties with total strangers from faraway parts of the globe.<sup>38</sup>

If newspapers give some indication of *Zeitgeist*, economic nationalism most recently resurrected during the financial crisis of 2007 and 2008, when the siren calls of “keep[ing] jobs and capital at home” resonated with some affected states.<sup>39</sup> Of course, the idea of economic nationalism has a longer history and is a recurring theme in times of crisis and uncertainty.<sup>40</sup>

This said, quite intuitively, economic nationalism is a catalyst for economic warfare, because states prioritize national over international solutions and because relentless, antagonistic pursuit of interests leads to confrontation. Naturally, economic nationalism is no greenhouse for multilateral institutions.<sup>41</sup>

The examples presented in this work will show that even institutions such as the EU, otherwise ill-famed for technocratic obedience to liberal<sup>42</sup> ideals, are not immune to the temptations of economic nationalism, to the fears of foreign capital, ownership, and control, or to a general feeling of unfairness.<sup>43</sup> These illustrations will also show that neither is the law, which is used as “‘legal rearmament’ in view of safeguarding essential economic interests”.<sup>44</sup>

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<sup>37</sup>The White House (2017).

<sup>38</sup>Neff (1990b), p. 177 (emphasis added) (see also p. 152).

<sup>39</sup>The Economist (2009), p. 11; see Cable (1995), p. 312 for earlier developments.

<sup>40</sup>Etges (1999), pp. 43 et seqq. for a history of economic nationalism in Germany and the United States from 1815 to 1914. See also Neff (1990b), pp. 20–28, 69–71, 92–97.

<sup>41</sup>Munier (2009d), p. 61.

<sup>42</sup>With liberalism, this work refers to the broader traditional notion rooted in the philosophy of early economists rather than the more recent American understanding of a left political movement (see Reeve 2018).

<sup>43</sup>For a concise summary and further references see Sandrock (2010), p. 307; Heinemann (2011), pp. 101–102; Truman (2010), pp. 65–66; see also below Sect. 4.1.1.4.2.3.

<sup>44</sup>Arnaudo (2017), p. 11.



### 1.2.3 Summary

While the right of states to control foreign trade (as well as other economic channels) has frequently been utilized for political purposes,<sup>45</sup> the emerging sense for economic war as substitute for war and *passe-partout* for the pursuit of state interests in combination with a recently reinvigorated economic nationalism ascribe renewed importance to the practice of economic warfare.

It should be noted that the ideas of geoeconomics and economic nationalism face elaborate and firm criticism.<sup>46</sup> Yet, for the purpose of this work, it is sufficient to take note of the discussions in the fields of political science and history. This is because the mere fact that states show an (if irrational) inclination towards economic warfare and that economic nationalism is propagated invites a thorough inquiry into the rules of international law governing economic warfare.

## 1.3 Aim, Scope, and Limitations of This Work

Any legal study dedicated to the exploration of the phenomenon of economic war has to cope with at least two issues: First, economic warfare is an elusive and broad subject vehemently resisting proper delineation. Too many parties have mingled with the construction of the term: politicians, journalists, and scholars of many fields. Second, the body of law relevant for economic warfare stretches out in countless dimensions, domestic and international, ranging from international investment agreements over human rights treaties to WTO law. In other words, there is a lot of ground to cover and restrictions to be made in order to establish a properly delineated research object to be addressed by this work.

While the task of delineation and definition of the research object warrants a chapter of its own (below Sect. 2.2), this section gives an overview of what this study intends to achieve (research goals) and how it will proceed (methodology) (below Sect. 1.3.1). Thereafter, the limits to the extent of the research conducted are set (below Sect. 1.3.2).

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<sup>45</sup>Muir (1974), pp. 189, 192; Whang (2019), pp. 581 et seqq.; similarly Menzel (2011), p. 278.

<sup>46</sup>For instance by Krugman (1996) (below Sect. 2.2.2.1); Cable (1995), p. 312; see Vihma (2018), pp. 5–13 for further references.

### 1.3.1 Research Goals and How to Reach Them

Legal theoretical and doctrinal research “asks what the law is in a particular area”.<sup>47</sup> This work asks what international law governs economic warfare. This broader research question is divided into three research goals. The first goal is to identify, collect, systemize, and unravel pertinent international law regulating economic warfare. Its second goal is to deduce from the so identified strictures of international law *under which circumstances* resort to economic warfare is permissible as well as *what means* of economic warfare are permissible, thereby creating at least two categories of economic warfare: permissible (legal) and impermissible (illegal).<sup>48</sup> With its third goal, this work aims to hypothesize from the identified *selective* set of rules of international law on *particular* instances and measures of economic warfare, the *principal* stance of international law toward economic warfare *in general*.

Accomplishing the *first* research goal faces methodological challenges: If a legal scholar asks “what are the rules of international law governing economic warfare?” she or he has to be certain (at least) on a subset of three questions in order to provide a satisfactory answer: First, what is *international law*? Second, what is *economic warfare*? And third, how can international law *governing* economic warfare be identified?

While the *first* sub-question is so central to scholarly writings on and practice of international law that this work can draw on existing research to attain the certainty required,<sup>49</sup> it is obvious from the second and third sub-questions that no small part of accomplishing the first research goal demands efforts reaching beyond the application of rules to a given set of facts.<sup>50</sup> This creates a methodological challenge insofar as the jurist is handed a methodology of her or his own only regarding the application of rules.<sup>51</sup> When reaching beyond the application of rules, jurists are forced to

<sup>47</sup>Dobinson and Johns (2017), pp. 20–21 citing Glanville Williams with similar words (“the task of ascertaining the precise state of the law on a particular point”).

<sup>48</sup>Critical of such binarity is Luhmann (1993), pp. 60 et seqq.

<sup>49</sup>Based on the much-quoted (procedural and neither constitutive nor conclusive) provision Art. 38 (1) of the Statute of the International Court of Justice (ICJ Statute), a researcher in the field of international law has a fairly well-defined scheme to identify international law, see Hall (2017), pp. 254–275 and Bos (1984), pp. 11 et seqq.

<sup>50</sup>Larenz and Canaris (1995), p. 17; Larenz (1991), p. 5.

<sup>51</sup>*Rechtswissenschaft*, *ciencia jurídica* or *science juridique* (all of which literally mean “legal science”) are terms that reflect a (perhaps futile Larenz 1991, p. 6; Larenz and Canaris 1995, p. 126) aspiration of legal scholarship in some European countries: being as precise and exact as a (natural) science or mathematics (cf. Adrian 2010, p. 526). It seems as though this is a quixotic endeavor vis-à-vis the not objectifiable and not isolable universe of law (cf. Dobinson and Johns 2017, p. 25), on whose many contentious issues there is rarely only one or even the correct legal *opinion* (although this is the premise of *Rechtswissenschaft* as is critically observed by Steinhilber 2018, pp. 88–98, 103). Perhaps with a view to the impossibility of attaining this degree of precision, *jurisprudence* is the customary term used in the tradition of many other countries’ legal schools. Jurisprudence, however, is to most *Rechtswissenschaft* traditions but a subdiscipline, viz. the one which is concerned with the application of specific law to a concrete set of facts. And while

borrow from other disciplines or fantasize, and this includes even the process of identifying applicable rules. In other words, the jurist is faced with the difficulty that the methodology of *Rechtswissenschaft* or jurisprudence is of no avail in some aspects of her or his work.

Regarding the *second* sub-question, this work copes with this methodological challenge by devising the Working Definition of economic warfare, which is at the same time proposed as a legal concept for future research. The process of devising the Working Definition cannot, as could legal practice, draw on a code of procedure to determine what the facts of the case are,<sup>52</sup> i.e. what economic warfare is. It can also not be derived from a clearly defined legal concept. The process of forging a Working Definition of economic warfare can only rely on the rules of logic, which are used to delineate the research object (below Chap. 2). This process is underpinned by a literature review, which is certainly no methodology in itself but serves as basis for arriving at the concept of economic warfare employed in and proposed by this work.<sup>53</sup> The abstract definition of economic warfare is filled with life by review of a number of case studies representing concrete instances of economic warfare (below Chaps. 3–6). However, the main purpose of these case studies pertains to the third sub-question, as will be explained in the next paragraph.

Regarding the *third* sub-question, this work will identify the rules applicable to economic warfare by evaluating examples taken from (historical) world affairs, i.e. by conducting case studies. Selection and report of the case studies form a descriptive process, which is supposed to display pertinent, exemplary facts and reveal the rules applied thereto (below Chaps. 3–6). Thereby, rules regulating economic warfare will be identified and collected. Systemization of these rules is achieved by conducting case studies in four proposed categories of economic warfare. Neither selection nor recount of events relies on a specific (statistical, sociological, or historical) methodology, injecting a high degree of subjectivity in the sense that the author has chosen the examples and narrated them in such way as

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jurisprudence offers a canon of doctrinal methods (most prominently, interpretation by letter, system, spirit, and history of the law as proposed and developed by von Savigny and von Jhering) (see Larenz and Canaris 1995, pp. 141 et seqq.), *Rechtswissenschaft* and its other subdisciplines in general struggle to explain their “scientific” approach and usually borrow from other disciplines (*sociology* of law, legal *history*, legal *philosophy*, law and *economics*, etc.) (Adrian 2009, p. 41).

<sup>52</sup>Larenz and Canaris (1995), p. 127.

<sup>53</sup>Cf. Dobinson and Johns (2017), pp. 25–35. The literature review has been conducted using databases (Academic Search Ultimate (via EBSCOhost), Beck Online, google scholar, HeinOnline, JSTOR, juris, LexisNexis, Nexis Uni, primo (of the Free University Berlin), primus (of the Humboldt University Berlin), stabikat+ (of the Staatsbibliothek zu Berlin), Westlaw, Wiley Online Library) as well as numerous (other) library catalogues and cross-referencing from footnotes. While the former step included search for the keywords (also in German, French, Spanish, and Turkish and also with the words “investment”, “currency”, and “trade” instead of “economic”) “economic aggression”, “economic altercation”, “economic coercion”, “economic compulsion”, “economic conflict”, “economic force”, “economic intervention”, “economic pressure”, “economic sanction”, “economic war”, “economic warfare”, and “war with economic means”, the latter part of the process does not seem to be reproduceable.

viewed instrumental to the accomplishment of the first research goal.<sup>54</sup> It would certainly be possible to produce more cases and to dwell in greater detail on the legal issues raised, but in the author's view the selection of cases convey a reasonably representative image of the main international law rules of economic warfare along its main frontlines.

The *second* research goal is achieved by deducing from the case studies in which instances resort to economic warfare has been regarded (im)permissible or which measures of economic warfare have been regarded (im)permissible. To this end, each case study includes a literature review, i.e. a look at the contemporary (and later) legal discourse (if any) of the cases, followed by a discussion of the application of the rules whose identification and collection was achieved as first research goal.<sup>55</sup> It is only in the last step of application of rules that the methodology of *Rechtswissenschaft* or jurisprudence comes to bear.

In order to accomplish its *third* and final research goal, this work by way of induction from the rules identified and collected (first research goal) and legal classification of particular instances of resort to and measures of economic warfare (second research goal), formulates its hypothesis on the legal *status quo* of economic warfare under international law in general (below Chaps. 7 and 8).<sup>56</sup> Thereby, this work attempts to conceptualize the status of economic warfare under international law under the headings of *jus ad bellum oeconomicum* and *jus in bello oeconomico*.

### 1.3.2 What Will Not Be Addressed Here

This work is limited to its own concept of economic warfare, whose definition excludes all violent forms of economic warfare (below Sect. 2.2.3). The military variants of economic warfare are excluded as they follow a different set of rules of international law, which shall not be addressed here, and because the absence of violent interactions between major economies is assumed to be the rule of international relations, not the exception. Results of this work cannot be extended and generalized into different, especially wider, concepts of economic warfare without establishing congruence of the concepts being compared. This work will exclusively consider public international law (abbreviated as “international law”); domestic law considerations only play a role in the case studies, but it is not the yardstick for

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<sup>54</sup>On this approach cf. Guzman (2008), p. 21. No further explanation can be offered as to why these and not other cases were selected.

<sup>55</sup>The process of identifying applicable law should, according to the *Rechtswissenschaft* ideal (cf. fn. 51 above), be conducted methodologically. A methodology would require eliminating bias and selectivity as well as making the process of research transparent and reproducible for other researchers (cf. Dobinson and Johns 2017, pp. 25–26). However, no standard methodology to identify applicable rules meeting these criteria is discernable.

<sup>56</sup>On the approach of induction see Möllers (2019), p. 108, who refers to the second step (that is to hypothesize) as “deduction”. See also Popper (2005), pp. 3–6, 249–251.

economic warfare in this work. Special provisions for developing states contained in many international agreements are not taken into account here; these will have to be addressed in a different study. Lastly, it should be noted that this is a study about how international law deals with economic warfare; it is no technical publication within the many fields of international law that concern economic warfare. Thus, it refers to pertinent specialist literature where technical questions lie beyond its scope of research.

# Chapter 2

## Key Terms, Concepts, and Course of Inquiry



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Fundamental both to the research goals set by this work as well as to the case studies employed to accomplish them is a clear delineation of the research object, i.e. of what is meant by "economic warfare" (above Sect. 1.3.1). Prior to analyzing the legality of measures of economic warfare, it is necessary to conceptualize the term. To this end, this chapter establishes the Working Definition of economic warfare, which is also proposed as a legal concept for future study of the phenomenon in