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2016

## Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market

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### Recommended Citation

Damjan Kukovec, *Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market*, 38 MICH. J. INT'L L. 1 (2016).  
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## ARTICLES

# ECONOMIC LAW, INEQUALITY, AND HIDDEN HIERARCHIES ON THE EU INTERNAL MARKET

*Damjan Kukovec\**

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\* LL.M., S.J.D. (Harvard). The author would like to thank Duncan Kennedy, Gráinne de Búrca, Mark Tushnet, Lewis Sargentich, Roberto Unger, Oren Bar-Gill, Einer R. Elhauge, William Alford, Catherine MacKinnon, David Wilkins, Lucy White, Samuli Sepänen, Jan Fiala, Peter Gordon, Joanne Scott, Martti Koskenniemi, Horatia Muir Watt, Miguel Maduro, Mark Wu, Daniela Caruso, Dimitry Kochenov, and Peter Lindseth for their comments, critiques, and advice. The original version of this thinking was presented as “Whose Social Europe?” at the conference “Developing Europe: Regional Policy and Free Markets in European Legal Discourse” at Harvard Law School on April 16, 2010 and at the conference “The European Legal Project: New Approaches” at Harvard Law School on

## INTRODUCTION

The divergence in wealth distribution is occurring on a national and global scale. There is growing inequality in the world and, particularly in the United States, there is a resentment about the concentration of income and economic power in the hands of the one-percent.<sup>1</sup> President Obama has made reducing wealth inequality the signature issue of his second term<sup>2</sup> and the topic is shaping up as a potentially defining focal point for the 2016 Presidential election.<sup>3</sup>

The U.S. economy has begun to recover from the Great Recession since mid-2009, but the rising tide has not lifted all boats. To the contrary, median income and wealth both declined in real terms between 2010 and 2013.<sup>4</sup> Over essentially the same period, the real income of the top one percent grew by 31.4 percent.<sup>5</sup> Yet, there has been political malaise about antitrust enforcement in the United States,<sup>6</sup> the purpose of which is also to counter the concentration of power and wealth in society.<sup>7</sup>

Several authors have called on antitrust policy to play its role in the combat of inequality in the world. Joseph Stiglitz has called for “stronger and more effectively enforced competition laws” to help address inequality.<sup>8</sup> Luigi Zingales has argued that “the most powerful argument for anti-

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April 13, 2012. It also reflects the author’s unpublished manuscript on hold with Duncan Kennedy, David Kennedy, Gráinne de Búrca, and Daniela Caruso, (December 26, 2012) and his doctoral dissertation “Hierarchies as Law” (Harvard Law School, Winter 2014/2015). Several versions of this work were presented at conferences and workshops at Vienna Law School in May 2011, at Harvard Law School in April 2010, in June 2013 in December 2014 and March 2015, at Yale Law School in December 2012, at Oxford University in May 2013, and at London School of Economics in June 2015. The author would like to thank the participants of these conferences and workshops for their critiques, comments, and advice.

1. See J.M.F. & A.C.M., *The Purse of The One Percent*, ECONOMIST: DAILY CHART (Oct. 14, 2014 3:55 PM), <http://www.economist.com/blogs/graphicdetail/2014/10/daily-chart-8>.

2. See, e.g., WHITE HOUSE OFFICE OF THE PRESS SEC’Y, REMARKS BY THE PRESIDENT IN STATE OF THE UNION ADDRESS (Jan. 25, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>; WHITE HOUSE OFFICE OF THE PRESS SEC’Y, REMARKS BY THE PRESIDENT ON ECONOMIC MOBILITY, (Dec. 4, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility>.

3. See, e.g., David Lauter, *Income Inequality Emerges as Key Issue in 2016 Presidential Campaign*, L.A. TIMES (Feb. 5, 2015), <http://www.latimes.com/nation/la-na-campaign-income-20150205story.html#page=1>; Stiglitz: *Inequality a “Key Issue” for US Election 2016*, BBC (Apr. 25, 2015), <http://www.bbc.com/news/world-us-canada-32459519>.

4. Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 1 (2015).

5. *Id.*

6. See *id.* at 1-28; see also Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2178 (2013).

7. See RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 21 (2008).

8. JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 338 (2012).

trust law” is that “it reduces the political power of firms.”<sup>9</sup> Paul Krugman<sup>10</sup> and Anthony Atkinson<sup>11</sup> have also claimed that monopoly and anticompetitive market conditions are among the root causes of wealth inequality. Sandeep Vanessaan has argued that consumer-oriented antitrust enforcement can promote more progressive wealth distribution<sup>12</sup> and that the lack of competition in many sectors of the U.S. economy is a powerful driver of economic disparity.<sup>13</sup>

Today’s antitrust law is global antitrust law. While there are important differences between models of antitrust in various jurisdictions, these differences no longer have as much to do with different values as with different presumptions about how to resolve theoretical or empirical ambiguities raised by a common framework of antitrust economics.<sup>14</sup> Modern antitrust analysis reflects the dominance of the economic model of analyzing antitrust policy. Both in the United States and in the European Union, legal models have embraced an economic methodology based on maximizing consumer or total welfare<sup>15</sup> and have done so in a way that is common to the diverging political viewpoints in several jurisdictions.<sup>16</sup> Trade law analysis is likewise based on the interplay of maximization of welfare and fairness or justice considerations.<sup>17</sup>

I will argue that the tools of global antitrust and international trade law can play a role in social transformation and can be systematically used for particular purposes of social transformation, but based on three propositions. First, the complex hierarchical structure of production of goods, services, knowledge, authority, and prestige in global society that gives analytic clarity about its construction<sup>18</sup> should be the starting point of legal and economic analysis. Second, lawyers should articulate targeted resistance to particular hierarchical structures rather than pursue abstract goals

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9. LUIGI ZINGALES, *A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY* 38 (2012).

10. See Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES (Apr. 18, 2016), <http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html>.

11. ANTHONY B. ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* 126-27 (2015).

12. Sandeep Vanessaan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 413 (2014).

13. Lina Khan & Sandeep Vaheesan, *How America Became Uncompetitive and Unequal*, WASH. POST (June 13, 2014), [https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499\\_story.html?utm\\_term=.05359a47eb46](https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html?utm_term=.05359a47eb46).

14. See EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL COMPETITION LAW AND ECONOMICS*, at v (2d ed. 2011). See generally Lawrence Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 17 BERKELEY J. INT’L L. 197, 198 (1998).

15. See Baker, *supra* note 6, at 2178.

16. See ELHAUGE & GERADIN, *supra* note 14, at v.

17. See generally Joel Trachtman, *International Linkage: Transcending “Trade and . . .”—an Institutional Perspective*, 96 AM. J. INT’L L. 77 (2002).

18. See Damjan Kukovec, *Hierarchies as Law*, 21.1 COLUM. J. EUR. L. 131, 192 (2014) [hereinafter *Hierarchies as Law*]; Damjan Kukovec, *Hierarchies as Law* (Winter 2014/2015) (unpublished SJD dissertation) (on file with the Harvard Law School library).

of equality or competition. Third, in order to articulate new tools for addressing the reproduction of wealth and power in society, some of the assumptions of global antitrust and trade law need rethinking and amending.

To support these three propositions, this Article addresses and challenges some of the assumptions of the common framework of antitrust and trade law analysis.<sup>19</sup> There is an ongoing debate in the antitrust literature on the proper goal of antitrust analysis. Some argue that consumer welfare should guide antitrust decision-making, while others favor the total welfare standard.<sup>20</sup> However, analysis based on the relationship between abstract consumers and abstract producers (the consumer and total welfare standards) fails to account for the fact that consumers and producers find themselves in diverse situations in the global production of goods, services, knowledge, and prestige, that they are positioned differently in the global value chains<sup>21</sup> and that both the consumer and total welfare standards mistakenly assume the universal benefit of low prices.

Furthermore, today's economic methodology of global antitrust is met with arguments of equity or fairness. This interplay of fairness and welfare also structures the debate in international economic law, as reflected in a plethora of "Trade and \_\_\_" analyses.<sup>22</sup> The interplay of abstract efficiency and fairness considerations, however, can restrict opportunities of restructuring antitrust policy and resistance to the reproduction of the concentration of power in global society. There are several ways of structuring competition on the merits and the existing legal structure reflects a particular understanding of social cost rather than any essential maximization of welfare.<sup>23</sup> Similarly, there are several ways of structuring equity or justice and there is no guarantee that existing perceptions of justice would not contribute to the reproduction of existing hierarchies.<sup>24</sup> A preference for either free competition or for justice does not, in itself, explain how the

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19. The term antitrust will be used broadly throughout the article. Sullivan & Fikentscher, *supra* note 14, at 197 ("Antitrust is an ambiguous term, especially in an international setting. It refers to a competition policy dealing with business structure and conduct and, more broadly, with the appropriate role of business in modern life.").

20. See generally Alan J. Meese, *Reframing the (false?) Choice Between Purchaser Welfare and Total Welfare*, 81 *FORDHAM L. REV.* 2197 (2013); John B. Kirkwood, *The Essence Of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425 (2013); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 *B.C. L. REV.* 551 (2012); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 *NOTRE DAME L. REV.* 191 (2008); Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, 3 *COMPETITION POL'Y INT'L* 205 (2007); Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 *J. ECON. PERSP.* 155 (2007).

21. See generally Gary Gereffi, John Humphrey & Timothy Sturgeon, *The Governance of Global Value Chains*, 1.12 *R. INT'L. POL. ECON.* 78 (2005).

22. See generally Trachtman, *supra* note 17.

23. See generally Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387 (1981).

24. Damjan Kukovec, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo*, in *EUROPE'S JUSTICE DEFICIT?* 324 (Dimitry Kochenov, Graine de Burca & Andrew Williams eds., 2015) [hereinafter *Taking Change Seriously*].

existing hierarchical structure of society and the concentration of wealth, power, authority, and prestige will be affected. Unjust reality can be constructed by economic theories and claims as well as by theories and claims of justice. Rather than interplay of economic and equitable considerations, the starting point of legal and economic analysis should be the hierarchical structure of society. An analytical approach that challenges the existing concentration of wealth in the world must address the privileges to harm that are allocated differently to different people in the global hierarchical structure. This disparity of the global allocation of privileges to harm may pose a more important barrier to trade for those in hierarchically unprivileged situations than national borders and the related obstacles to trade that fundamentally inform the international economic and legal analysis. From this, I will argue that the assumption of legal and economic theory that non-predatory dumping is not possible on the internal market is incorrect. It will also be argued that pricing equalization does not occur due to free market forces unleashed by the end of border controls and of related measures nor due to the prohibition of exclusive vertical agreements. The main context of my inquiry will be the European Union internal market, although the implications are worldwide.

This Article has several aims. First, the aim is to show the continuing importance and relevance of antitrust and international trade lawyers in countering the concentration of power in the hands of the few or in some geographic areas of the world, if some of the assumptions of antitrust and trade are adjusted. Second, the goal is to articulate a particular analysis from the perspective of the (European) periphery. As the recent Euro crises and the near exit of Greece from the Union show, the European prospect of development for all has not arrived. This Article will articulate the privilege of the corporations in a structurally privileged position of the European center to harm the industry of the periphery and offer one analysis and explanation for the reproduction of hierarchies and concentration of wealth in the center of the European Union. The doctrine developed on this basis is called “dumping practices of the center.” Third, the aim is to challenge the sensibility that economic thinking is the main culprit in the concentration of power and economic impoverishment of some parts or sections of the world. Rather, what needs to be challenged is the existing social understanding of injury, in economic thinking just as much as in thinking about equity or fairness. In arguing for a reversal of social understanding of harm, economic analysis can be used as an important tool for social transformation.

Section I addresses the current debate on combating inequality through antitrust law. The assumptions of the discussion do not serve transformative possibilities and I advocate for a targeted resistance to the existing hierarchical structure of society with adjusted tools of antitrust and trade law. Section II sets out a specific macro hierarchical structure—the center-periphery relationship in the European Union. Price differences form a basis for dumping practices on the EU internal market that contribute to the concentration of power, wealth, authority, and pres-

tige in the center of the European Union. Section III sets out the rationale for dumping in international trade. Section IV further explains the doctrine “dumping practices of the European center” and challenges some assumptions of antitrust and trade law. Section V explores the general arguments against the doctrine of dumping and further challenges the idea of the benefit of low prices. Section VI questions the idea of “competition on the merits” in the EU internal market.

## I. ANTITRUST AS A TOOL FOR COMBATING INEQUALITY

### A. *Resisting Market Power*

In his recent book *Inequality: What Can Be Done?*, British economist Anthony Atkinson argues that the United States has erred in shifting away from the Sherman Act’s original focus on wealth inequality towards a pure consumer welfare orientation for antitrust law.<sup>25</sup> Paul Krugman argues that “increasing business concentration could be an important factor in stagnating demand for labor, as corporations use their growing monopoly power to raise prices without passing the gains on to their employees.”<sup>26</sup>

Jonathan Baker and Steven Salop argue that while it is not possible to identify with precision the relative magnitudes of various factors contributing to growing inequality, market power likely has an effect. Relying on Thomas Piketty’s analysis, they argue that because the exercise of market power tends to raise the return to capital, it can contribute to the development and perpetuation of inequality. As market power grows more common and visible, argue Baker and Salop, an increasing public concern with inequality might be expected to call for a competition policy response.<sup>27</sup>

Baker and Salop set forth a range of possible antitrust policy adjustments that might be considered in response to market power, or inequality more generally.<sup>28</sup> According to them, concerns with inequality can implicate antitrust and competition policy in two general ways. First, a more forceful approach to antitrust implementation may perform a corrective function, assuming market power affects inequality. Second, antitrust regulatory agencies may prioritize lowering the consequences of inequality when advancing their programs.<sup>29</sup>

Baker and Salop argue that greater antitrust enforcement would generally advance the dispersal of income and wealth by decreasing the impact of market power. This would happen especially if the agencies fully embrace the consumer welfare standard.<sup>30</sup> They argue that this is because this standard prohibits conduct that works to the detriment of consumers and to the benefit of shareholders. In contrast, they argue, the aggregate

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25. ATKINSON, *supra* note 11, at 126-27.

26. Paul Krugman, *Robots and Robber Barons*, N.Y. TIMES (Dec. 9, 2012), [http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html?\\_r=0](http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html?_r=0).

27. Baker & Salop, *supra* note 4, at 13.

28. *Id.* at 14-28.

29. *Id.* at 14.

30. *Id.* at 18.

welfare standard, which takes into account the benefits to producers, can contribute to inequality. This standard can permit market behavior that leads to the creation and exercise of market power. When cost savings or other efficiencies associated with the conduct are not shared with consumers, market power increases producer surplus. The benefits accrue predominantly to shareholders and top executives, who usually are wealthier than the consumers of the products.<sup>31</sup>

Growing concern about inequality, according to Baker and Salop, that leads to the recognition of additional harms from market power, in turn would justify reconsideration of that direction in favor of adopting more interventionist antitrust rules that would recognize greater harm from market power than had previously been identified.<sup>32</sup>

In this analysis, resistance to inequality translates into almost indiscriminate resistance to “market power,” without an account as to how and why precisely accumulation of capital, wealth, and power occurs and who gains from it. Furthermore, reliance on protectionist considerations and equality in general does not assure change for the benefit of those who find themselves in structurally unprivileged positions in society.<sup>33</sup> Finding a systemic legal regime that will favor the weaker party, such as the class of consumers, is fraught with analytical difficulties. Postulating an abstraction of a “weaker party” as the underlying reality of the world and aiming to help this presumably preexisting category can lead to reproduction of several hierarchical structures.<sup>34</sup> The danger of challenging market power in the abstract, as in Baker and Salop’s proposal, without adequately addressing the complexity of the hierarchical structure of society and without developing a clearer analytical picture of concentration and reproduction of power in society leads to a discussion at a purely conceptual level without ever raising the necessary appreciation of the economic, social, and ethical issues, which the work of lawyers should engage in the pursuit of advocacy for the most vulnerable. Consequently, such reasoning may well contribute to the reproduction of the existing distribution of material and spiritual values in the world.<sup>35</sup>

The analytical weakness of Baker and Salop’s proposal is confirmed by Daniel Crane’s distributional analysis. He argues that it is far from certain that antitrust violations (including cartels, anticompetitive mergers, and abuses of dominance) systematically redirect wealth from the poor to

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31. *Id.* at 16. They do argue that application of a consumer welfare standard in principle could increase inequality in matters where consumers tend to be wealthy and the sellers are small firms owned by middle class entrepreneurs, such as hypothetical cartels among worker-owned manufacturers of luxury goods, such as fine crystal products or yachts. However, they expect those situations are rare. *Id.* at 17.

32. *Id.* at 21.

33. See Kukovec, *Taking Change Seriously*, *supra* note 24, at 324-30.

34. *Id.* at 329-30.

35. *Id.* Justice is often understood within a particular framework of interpretation, which contributes to reaffirmation of existing perceptions of social injury rather than challenging them.

the rich.<sup>36</sup> In order to sustain a showing that they do, one would have to have information about a large number of factors, including the relative wealth of producers and consumers, overcharge pass-on rates, the effects of market power on employees of the firm, the distribution of rents as between managers and shareholders, and the distribution of rents among classes of managers.

The assumption underlying the progressive claim of antitrust enforcement is that senior managers and wealthy shareholders of large companies capture the majority of the rents attributable to anticompetitive conduct, and hence outpacing the typical consumer in the accumulation of wealth. In this picture, relatively poorer consumers bear the brunt of monopoly overcharges.<sup>37</sup> But it is far from certain that CEOs and rich shareholders are “in fact capturing the lions’ share of monopoly profits.”<sup>38</sup> Monopoly rents are not captured uniformly by the owners of capital (i.e. shareholders), but are distributed in various complex ways throughout the firm, including its workers.<sup>39</sup> The monopoly labor wage premium has been observed across a variety of industries.<sup>40</sup> Blue-collar workers may be able to extract significant monopoly rents from their employers, thus counterbalancing any regressive effects caused by shareholder or senior management rent extraction.

The idea that monopoly rents end up solely in the hands of the wealthy executives resonates with the widely-held assumption in the European legal discourse that the award of a government procurement contract to a peripheral company offering the lowest price, also due to cheaper labor in the European periphery, benefits only the capitalist class of the periphery, but not workers or other interests beyond the boundaries of the

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36. Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1174 (2016). Despite some the merits of Crane’s distributional analysis, it should not be accepted at face value. For example, Crane’s analysis and conclusion as to the progressive effects of monopoly overcharges in government procurement contracts regime is inaccurate. He assumes that wealthier consumers pay more for monopoly overcharges because they pay higher taxes due to progressive taxation. Thus, he concludes, anticompetitive behavior has progressive effects. He does not, however, take into consideration the fact that poorer consumers and citizens may often be the larger recipients of budget transfers and thus carry the cost of monopoly overcharges by the fact that less services, goods, or funds are available to them due to the higher prices of goods and services paid by public authorities because of monopoly overcharges.

37. *Id.* at 1184.

38. *Id.* at 1187.

39. *Id.* at 1192 (citing Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA L. REV. 2063, 2068 (2001)).

40. See Maria Guadalupe, *Product Market Competition, Returns to Skill, and Wage Inequality*, 25 J. LABOR ECON. 439 (2007) (surveying literature); David Card, *The Impact of Deregulation on the Employment and Wages of Airline Mechanics*, 39 INDUS. & LABOR REL. REV. 527 (1986); Ana L. Revenga, *Exporting Jobs? The Impact of Import Competition on Employment and Wages in U.S. Manufacturing*, 107 Q. J. ECON. 255 (1992); George J. Borjas & Valerie A. Ramey, *Foreign Competition, Market Power, and Wage Inequality*, 110 Q. J. ECON. 1075 (1995).

firm.<sup>41</sup> A conclusion that an increase in market power of a particular company, either by monopolization or an award of a procurement contract based on low price, does not have positive consequences beyond management and shareholders cannot simply be drawn. Nor can a simple conclusion be drawn that combating abstract market power with existing tools of antitrust law will lead to reductions of inequality. A broad challenge to “market power” assumes an inaccurate picture of concentration of wealth and power in society and thus gives insufficient guidance for addressing it.

### B. *Antitrust as a Field of Competition but not Distribution*

Crane argues that there are so many unknowables in antitrust enforcement that antitrust law is not suitable for addressing wealth inequality.<sup>42</sup> In order to draw any firm conclusions regarding the net effect on wealth distribution of market power exercises and antitrust enforcement, one would need to prove the relative magnitudes of the cross-cutting effects. That is a task that, Crane claims, to his knowledge, has never been undertaken and “could not likely be done with anything approaching statistical rigor.”<sup>43</sup>

By contrast, Crane claims that the antitrust system is reasonably competent at generating consumer welfare and economic efficiency, at creating a larger pie.<sup>44</sup> He sets out that the Sherman Act rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of democratic political and social institutions.<sup>45</sup>

According to Crane, antitrust causes essentially two economic effects. First, it eliminates deadweight losses that arise from monopoly pricing and hence grows the social welfare pie; elimination of deadweight loss is asserted not to have any direct distributive effects.<sup>46</sup> Second, antitrust enforcement prevents redistribution of wealth from consumers to producers.<sup>47</sup> Thus, Crane concludes that antitrust law works best as a set of objective principles regarding “measurable economic effects” in commercial markets.<sup>48</sup>

It remains unclear, however, what these measurable economic effects are, especially if the effects of antitrust policy are so difficult to predict, as

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41. For a discussion of the European periphery, see Damjan Kukovec, *Law and the Periphery*, 21 EUR. L.J. 406 (2014); Alexander Somek, *From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination*, 18 EUR. L.J. 711, 714-15 (2012).

42. Crane, *supra* note 36, at 1228.

43. *Id.* at 1208.

44. *Id.* at 1177 n.13.

45. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

46. Crane, *supra* note 36, at 1177.

47. *Id.*

48. *Id.* at 1228.

Crane's analysis suggests.<sup>49</sup> If "the net effect on wealth distribution from general increases or decreases in overall antitrust enforcement is virtually impossible to tell,"<sup>50</sup> how can a conclusion be drawn that existing antitrust law based on existing economic assumptions maximizes consumer welfare and generates a larger pie than its alternative construction?

As Ronald Coase has argued, the goal of legal and economic analysis should be to choose the solution that yields the least costs.<sup>51</sup> However, Coase claims that cannot be achieved on the basis of theory. Instead, it "has to come from a detailed investigation of the actual results of handling the problem in different ways."<sup>52</sup> If the detailed investigation of the actual results could not likely be done with anything approaching statistical rigor, then "measurable economic effects," consumer welfare or total welfare, are just as uncertain as the distribution of wealth. In other words, calculation of the sum of individual welfare runs into the same difficulty and uncertainty as calculation of wealth distribution as Crane portrays.

The effects of antitrust enforcement seem coherent when its goal is framed in terms of aiming at "competition" or at elimination of the dead-weight loss. It is assumed that some competitors win on the market by being the most innovative, the most responsive to consumers' wishes, and by producing goods or services in the most efficient way possible. It would thus be strange, and indeed harmful, if that firm could then be condemned for being a monopolist.<sup>53</sup> However, competition itself, just as the calculation of individual welfare, can be structured in several different ways.

Louis Kaplow and Steven Shavell argue that "as a practical matter it will rarely if ever be the case that one of two policies under serious consideration will literally make everyone better off than the other."<sup>54</sup> The outcome of the standard of consumer or total welfare or consumer welfare indeed depends on the initial valuations.<sup>55</sup> The argument that will win the claim of maximization of global welfare will be a result of a decision,<sup>56</sup> and cannot be based on an abstract formula of consumer welfare defined as the excess of social valuation of product over the price actually paid or on total welfare that combines consumer and producer benefits.<sup>57</sup>

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49. *Id.*

50. *Id.* at 1174.

51. Robert H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 18-19 (1960).

52. *Id.*

53. As the Honorable Learned Hand opined in *United States v. Aluminum Co. of America*: "[A] single producer may be the survivor out of a group of active companies, merely by virtue of his superior skill, foresight and industry . . ." The successful competitor, having been urged to compete, must not be turned upon when he wins. 148 F.2d 416, 430 (2d Cir. 1945).

54. Louis Kaplow & Steven Shavell, *Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331, 336 (2003).

55. See Kennedy, *supra* note 23, at 444.

56. *Id.*

57. See *infra* Section IV.

Despite the acknowledgment of various possibilities for welfare maximization, scholars often revert to abstract reasoning in terms of maximization of production and consumption. For example, as I further explore in Section V, it is assumed in international trade that, “[p]rovided that the firm is pricing above its average variable costs, its behavior should not be considered problematic, and according to economic theory, no remedy is necessary.”<sup>58</sup>

However, economic thinking should be understood as a tool for social transformation, not a repository of ready-made solutions that could serve as normative guides and a substitute for a detailed investigation of the actual results. One thus cannot conclude, as Crane does, that antitrust is good at producing competition and consumer welfare, but cannot be used for distributive purposes. Rather, the conclusion is that both claims that antitrust law, as currently conceived, produces competition and maximizes welfare, or that it produces social equality, rest on uncertain and incoherent assumptions.

C. *Antitrust as an Inadequate Tool for Addressing Inequality – Preference for Tax and Transfer*

Likewise, we are also unable to follow Crane’s conclusion that as a matter of comparative institutional advantage, the antitrust system is far inferior to other branches of law and governmental authority in addressing wealth equality and that therefore distribution should only be addressed through tax and transfer.<sup>59</sup>

Crane’s conclusion is based on the argument that the legal system is generally inferior to the income tax and transfer system in the redistribution of wealth.<sup>60</sup> According to Kaplow and Shavell, competition law is a weak mechanism for achieving distributive outcomes since it is poorly targeted, particularly in comparison to a tax and transfer system. In contrast, a tax and transfer system can be designed to both target post-transfer equality, while being feasible.<sup>61</sup>

Thinking in terms of taxation and redistribution through the budget, however, misses, and obscures, questions of both distribution and development.<sup>62</sup> It misses the essential point of legal analysis. Identification of structural injury is important even if redistribution through the tax system is found to be more efficient than the legal system.

As will be argued in Section II, companies of the European center have a legally sanctioned privilege to harm companies of the periphery. Companies on the periphery cannot be compensated for this injury

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58. Mark Wu, *Antidumping in Asia’s Emerging Giants*, 53 HARV. INT’L L.J. 101, 111 (2012).

59. Crane, *supra* note 36, at 1225.

60. *Id.*

61. Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, in HARV. L. SCH. JOHN M. OLIN CTR. FOR LAW, ECON. & BUS. DISCUSSION PAPER SERIES (Paper 693) 4 (2011).

62. See Kennedy, *supra* note 23, at 465.

through the tax and transfer system because of EU state aid rules, which prevent any company from receiving government support since that support provides an advantage over its competitors.<sup>63</sup> In other words, if unjust injury is not articulated and not acknowledged, it cannot be determined who should be compensated either through the legal system or through tax and transfer.

In fact, the suggestion for redistribution through the budget is untargeted when we do not know who needs compensation. Redistribution through taxation could fulfill its goals on the presupposition that all the past and future injuries in a society have already been identified, and that we thus know how to remedy them through the budget transfer. However, neither social change through tax and transfer, nor through the legal system can be pursued without legal analysis that is not based on imminent meanings of competition.

Crane's assumptions about antitrust law's ability to ensure competition, but not distribution, which should be left to tax and transfer, bring us to the same conclusion as Thomas Piketty's analysis of fighting inequality—to a conclusion of combating inequality through taxation without an analysis of how this redistribution should occur.

Social processes, including competition and the process of concentration of capital and wealth, cannot be adequately depicted or addressed by economic theories or formulas.<sup>64</sup> For example, Piketty's conclusion that a rate of return on capital ( $r$ ) is greater than economic growth ( $g$ ), ( $r > g$ ), is an ex post facto rationalization of the phenomenon of accumulation of capital. While the private rate of return on capital can be significantly higher for long periods of time than the rate of growth of income and output,<sup>65</sup> this finding does not articulate the reasons for this. It does not articulate the specific injuries that could explain the phenomenon of accumulation of capital or of the concentration of wealth. It does not give us an analytical perspective of what accumulation of capital we would want to resist and what accumulation of capital we would want to honor. It suffers from the same problem of under and overinclusion as Baker and Salop's proposal to resist the concentration of "market power."<sup>66</sup> Resistance to "accumulation of capital," just as resistance to "capitalism,"<sup>67</sup> is thus unable to address structural injury that would allow reversing the repetitive structural injuries of the hierarchically privileged and significantly

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63. See, e.g., WHISH & BAILEY, *supra* note 7, at 462.

64. See Kukovec, *Hierarchies as Law*, *supra* note 18, at 165.

65. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 571 (2014).

66. See generally Baker & Salop, *supra* note 4.

67. Anti-capitalist rhetoric is frequently used as a rhetorical support for one's political preference without analytical added-value. See Damjan Kukovec, *A Critique of the Rhetoric of Common Interest in the EU Legal Discourse*, (Apr. 13, 2012) (working paper) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2178332](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178332). See also Kukovec, *Law and the Periphery*, *supra* note 41, at 410; Kukovec, *Hierarchies as Law*, *supra* note 18, at 162.

limits our options for social reimagination.<sup>68</sup> This approach calls for increased transfers through taxation without articulating resistance to select injuries.

To conclude, antitrust and trade legal analysis can serve as a tool of social transformation and of resistance to concentration of wealth and power in society. However, neither Crane's nor Baker and Salop's analysis appear to serve transformative possibilities. Lawyers need to address the existing understanding of social cost and welfare maximization in order to open up the range of social options.<sup>69</sup> Therefore, I will advocate for a targeted rearticulation of antitrust and trade analysis and propose a new doctrine in the European Union internal market as an example of such analysis.

#### D. *Addressing the Hierarchical Structure*

Despite an appeal to rethinking the current understanding of social cost and wealth maximization, a conclusion that economic thinking should be the main target of resistance to the reproduction of the concentration of wealth would be mistaken. On the contrary, economic thinking can be an important element of the challenge to the concentration of power and wealth.

Today, many ills of society are often ascribed to economic thinking or neoliberalism.<sup>70</sup> For example, the idea that there is a ubiquitous neoliberal rationality that remakes everything and everyone in the image of *homo oeconomicus* and that transposes the constituent elements of democracy into an economic register.<sup>71</sup> However, reality cannot be described solely by economic theory.

Theories are timeless abstractions, rationalizations that cannot adequately describe reality, but as a partial ex post facto rationalization. Ideology, however, is constantly fluid and changing, reflecting the hierarchies we collectively find just and unjust. It is the ideology of every moment in time that defines reality, not a theory.<sup>72</sup> Thus, resistance to economic theory or economic thinking as such cannot be understood as a recipe for challenging the reproduction of power and wealth. Instead, the existing

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68. See Kukovec, *Law and the Periphery*, *supra* note 41, at 411; Kukovec, *Hierarchies as Law*, *supra* note 18, at 192.

69. See Kukovec, *Taking Change Seriously*, *supra* note 24, at 334.

70. See, e.g., Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 203 (David M. Trubek & Alvaro Santos eds. 2006); GALIT A. SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* 15 (2012).

71. See generally WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION* (2015). For a critique, see Kukovec, *Hierarchies as Law*, *supra* note 18, at 137; Kukovec, *Law and the Periphery*, *supra* note 41, at 412; Kukovec, *Taking Change Seriously*, *supra* note 24, at 325.

72. For the critique of David Kennedy's synonym between economics and ideology, see Kukovec, *Hierarchies as Law*, *supra* note 18, at 164-65.

hierarchical structure of society and ideology and the social understanding of injury that underpins it need to be challenged.<sup>73</sup>

The starting point of my analysis is that law and governance should be understood as a constant hierarchical struggle.<sup>74</sup> In this struggle, the hierarchically privileged repeatedly injure those in a structurally subordinate position and these harms perpetuate their hierarchical position.<sup>75</sup> Hierarchies can be managed, reproduced, or reconstructed, but they are ineradicable. People have very different powers to injure others, depending on where in the global hierarchical structure they find themselves. Some harms, however, are perceived as normal. Repetition of countless uncontested injuries reproduces the existing hierarchies in society. In order to combat the existing reproduction of concentration, those injuries and the hierarchical reality need to be identified and new tools and doctrines resisting them constructed.<sup>76</sup>

In the construction of the doctrine of “dumping practices of the European center” in the next section, no particular theory of fairness or aiming at restoring a moral balance in the world is professed. A preference for equity over welfare or vice versa is not argued. The proposed distributional analysis is based on individual well-being.<sup>77</sup> It is nonetheless based on the premise that there is no single way to maximize societies’ welfare. There are, instead, many, depending on the weight attached to the welfare of a particularly situated individual, each with different distributional consequences.<sup>78</sup>

The aim of the analysis is to articulate a particular vision of hierarchical subordination. The portrayed resistance is not untargeted. Crane correctly argues that there is extreme complexity in antitrust analysis,<sup>79</sup> as there is complexity in law in general. But harms are not entirely random; repetitive hierarchical structures can be identified and contested. There are countless hierarchical structures at play in our societies that contribute to the reproduction of wealth, power, knowledge, and prestige in the world. I will address a particular macro-hierarchical structure of society, the center-periphery relationship in the European Union, in order to portray an example of the type of antitrust and trade analysis that is missed globally.

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73. *See id.*

74. *See id.* at 168.

75. *See id.*

76. *See id.*

77. Hence no weight should be accorded to independent notions of fairness, other than many purely distributive notions. *See* Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, in HARV. L. SCH. JOHN M. OLIN CTR. FOR LAW, ECON. & BUS. DISCUSSION PAPER SERIES (Paper 251) 332-35 (1999).

78. *See* Kennedy, *supra* note 23, at 389.

79. Crane, *supra* note 36, at 1224.

## II. THE EUROPEAN UNION INTERNAL MARKET

A. *The Center-Periphery Perspective*

The common intuition has been that the European Union takes in poor countries and turns them into high-income countries and that likewise, the interests “of the other” are taken into account in EU legal discourse, and that all nations are in control of the larger processes of the Union.

However, my own intuition has been that the interests and concerns of the new peripheral Member countries were difficult to express in the existing legal discourse and that this crucially influences their position in the European Union. The current Euro crisis simply brought to the fore a larger and hitherto invisible structural problem as to the relationship between the European Union’s center and its periphery.<sup>80</sup>

What is the center and what is the periphery of the European Union? The center countries or regions are those with a much higher gross domestic product (GDP) per capita than the regions of the periphery. They invest more money in research and development and have the best universities. They have more capital and more ingoing and outgoing foreign direct investment (FDI). Their actors, products, and services have more prestige. Internationally recognized brands come from the center, which give their owners significant market power. Branded firms enjoy higher margins and more loyal customers, who will also not switch to another brand despite a price increase.<sup>81</sup> The center exports final products and is the seat of powerful corporations and law firms. Countries of the center include Germany, France, the Netherlands, Austria, Sweden, Finland, and the United Kingdom.<sup>82</sup>

The periphery has a much weaker industrial sector and a less efficient agricultural sector. It has very few brands known beyond its borders. Non-branded companies typically earn lower margins and are constantly at risk of being undercut by cheaper rivals.<sup>83</sup> Some of the few famous brands of Eastern Europe have in fact been bought by established companies of the center.<sup>84</sup> Regions of the periphery have a lower GDP per capita, and the actors, products, and services from the periphery have much less prestige.

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80. See Kukovec, *Hierarchies as Law*, *supra* note 18, at 134.

81. See *Brand New: Emerging-Market Companies Are Trying to Build Global Brands*, *ECONOMIST* (Aug. 4, 2012), <http://www.economist.com/node/21559894> (“[N]on-branded companies typically earn gross margins of 3-8% and are constantly at risk of being undercut by cheaper rivals. Branded firms enjoy fatter margins (15% or more) and more loyal customers.”).

82. The United Kingdom will stay in the center of the Union no matter if it exits in the Union or not. See Kukovec, *supra* note 18 (unpublished SJD dissertation).

83. See *id.*

84. For example, the Czech car company Škoda was bought by the Volkswagen group, which is seen as a success story. See, e.g., IBS Ctr. Mgmt. Research, *Volkswagen’s Acquisition of Skoda Auto: A Central European Success Story* (2007), <http://www.icmrindia.org/casestudies/catalogue/Business%20Strategy/Volkswagen%20Acquisition%20of%20Skoda%20Auto-Business%20Strategy%20Case%20Study.htm>.

They often produce semi-final products or final products for a brand of the center. The wages are lower than in the center, and often (with the exception of the European south) the life expectancy is lower. Countries of the periphery include Hungary, Portugal, Greece, Bulgaria, Cyprus, Latvia, Poland, Slovenia, and Estonia.<sup>85</sup>

The legal discourse discussion in the European Union, as the legal discourse globally, is caught up in the universalized debate in terms of efficiency and equity, in the interplay between individualist and protectionist considerations. But this leaves the hierarchical structure of society and the privileges of some to harm others untouched.

Once the European legal structure is seen as a plethora of hierarchies among people with particular freedoms and prohibitions,<sup>86</sup> the picture of the EU's legal structure appears quite different from the imagination of a system seeking a just balance between social and free movement considerations.<sup>87</sup> In this new picture, the EU center's views concerning free movement and social considerations are strong, and are conceived of as natural or less problematic, whereas the periphery's claims are often perceived as harmful.<sup>88</sup>

Social justice is frequently addressed from the perspective of the European center.<sup>89</sup> The discussion ensuing from the *Laval*<sup>90</sup> and *Viking*<sup>91</sup>

85. For a more detailed center-periphery analysis see generally Kukovec, *Law and the Periphery*, *supra* note 41.

86. Instead, the legal system could be understood as an interplay of injuries and recognitions. See Kukovec, *Hierarchies as Law*, *supra* note 18, at 181.

87. For the idea of the balance of autonomy and protectionist considerations in EU law, see, e.g., Miguel Poiars Maduro, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, in *THE EU AND HUMAN RIGHTS 450-72* (Philip Alston ed., 1999).

88. See Kukovec, *Law and the Periphery*, *supra* note 41, at 413.

89. For a more in-depth discussion of the justice within a particular framework of interpretation, see Kukovec, *Taking Change Seriously*, *supra* note 24, at 9.

90. Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11845. For a very similar factual situation, see also Case C-346/06, *Dirk Ruffert v. Land Niedersachsen*, 2008 E.C.R. I-1989.

91. Case C-438/05, *International Transport Workers Federation, Finnish Seaman's Union v. Viking Line*, 2007 E.C.R. I-1081-15. The plaintiff Viking, a Finnish shipping company with an Estonian subsidiary, was involved in a legal action against union activities. Viking is a ferry operator, operating a ferry between Helsinki, Finland and Tallinn, Estonia.

The ferry was registered in Finland with a predominantly Finnish crew working under Finnish labor standards. The ferry was not making sufficient profit, so Viking decided to reflag the ferry in Estonia and replace the Finnish crew with an Estonian crew working under Estonian labor law, which would be far less expensive. Both the Finnish and Estonian seafarers' unions were members of the international union, which fought against the "flag of convenience" policy and attempted to defend seafarers against low wage strategies. The international union advised its members not to enter into collective negotiations with Viking and the Estonian union complied, which effectively prevented Viking from reflagging its ship in Estonia.

Kukovec, *Hierarchies as Law*, *supra* note 18, at 150.

judgments of the European Court of Justice (ECJ) highlighted the problem of “social dumping” in the European Union. Social dumping is usually understood as usage of cheaper labor in cross-border activity and it was generally prohibited by ECJ in the *Laval* case.<sup>92</sup> The facts and impact of the *Laval* case are described below:

*Laval*, a Latvian construction company, was hired through government procurement on a public works contract in Sweden. [Note that Sweden is a country of the center and Latvia a country of the periphery.] *Laval* paid its Latvian workers significantly less than Swedish workers typically would receive for similar construction jobs, making the Latvian company more competitive in this respect. A Swedish trade union took industrial action against the Latvian company because the latter refused to negotiate over wages for its Latvian workers. The Swedish union’s blockade effectively forced *Laval* out of this business. *Laval* sued the Swedish union in a Swedish court, which asked the ECJ for an interpretation of EU law on the subject of the case.

The ECJ concluded that under the facts before it, the Swedish trade union had violated *Laval*’s free provision of services. Crucially, however, the ECJ also strongly condemned “social dumping”—the use of lower labor standards to undercut competition. [Social dumping, from which the European periphery could generally benefit, is thus prohibited in the European Union.]

The ECJ’s holding depended on the fact that Sweden had not set a minimum wage by law or by some generally applicable collective agreement. This effectively narrowed the scope of peripheral workers’ freedom of movement to a set of specific and exceptional circumstances, which a state like Sweden could change relatively easily[.]

The [*Laval*] judgment represented just a small win for the periphery, but it caused an unprecedented uproar in legal academia, the media, social science, and the general public.<sup>93</sup>

The legal profession reacted fiercely to the judgment and rejected “economic” arguments of the periphery, such as the argument of comparative advantage of cheaper labor.<sup>94</sup> The legal profession particularly rejected social dumping, and the practice was also condemned by the European Court of Justice.

It will be argued, however, that goods and services dumping by the European center, on the other hand, is a widespread, EU-law-sanctioned

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92. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet* 2007 E.C.R. I-11891-92. For a very similar factual situation, see also Case C-346/06, *Dirk Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-1989.

93. Kukovec, *Hierarchies at Law*, *supra* note 18, at 142.

94. See, e.g., Somek, *supra* note 41, at 714-15. For a detailed discussion of how the theory of comparative advantage can be used to the benefit of the European periphery, see Kukovec, *supra* note 18 (unpublished SJD dissertation).

business strategy that can be used by center businesses that go unchallenged by EU competition rules.

B. *Price Difference as a Basis for Dumping Practices of  
The European Center*

There is no condemnation of internal dumping practices in European Union law, despite the fact these practices have had a significant potential to harm peripheral industry; however, producers in the periphery have complained about the extremely low pricing practices by companies of the center. For example, Slovenian producers have complained about the abnormally low prices of pork meat by Austrian producers, which significantly damage the Slovenian pork industry.<sup>95</sup> Likewise, Slovenian companies have complained about the very low prices that Austrian construction companies are able to offer on Slovenian markets to compete for work contracts in government procurement procedures.<sup>96</sup>

These concerns will now be addressed. Companies of the center today, on the internal market, have a particular, select, legally-sanctioned privilege to harm companies of the periphery that is allowed under the current interpretation of the free movement of goods and services and antitrust laws. The European Union vigorously fights goods dumping from outside of the Union.<sup>97</sup> Yet, EU legal rhetoric provides no vocabulary to articulate the problem of goods dumping, either below or above cost, on the internal market.

Companies go to considerable efforts to maintain or gain their market share and use several strategies for expansion. Selling goods at different prices in different market segments is one of the most common such strategies. Market segmentation involves dividing a broad target market into subsets of consumers who have common needs and applications for the relevant goods and services.<sup>98</sup> Depending on the specific characteristics of the product, these subsets may be divided by criteria such as age and gender, or other distinctions, like location or income. Marketing campaigns can then be designed and implemented to target these specific customer segments. This marketing strategy involves dividing a broad target market into subsets of consumers who have common needs and applications for the relevant goods and services.<sup>99</sup>

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95. See Tatjana Pihlar, *Kmetje: Klavnice se branijo naših prašičev*, DNEVNIK (May 7, 2012), <http://www.dnevnik.si/slovenija/v-ospredju/1042527722>; *Idan poziva Bogoviča k preverjanju morebitnega dampa pri svinjini*, DNEVNIK (May 3, 2012), <http://www.dnevnik.si/clanek/1042527199>.

96. See Nejc Gole & Cveto Pavlin, *Strabag postaja močan igralec, a tudi CGP*, DELO (Feb. 6, 2013), <http://www.delo.si/gospodarstvo/podjetja/strabag-postaja-mocan-igravec-a-tudi-cgp.html>.

97. See, e.g., *Antidumping*, in P. CRAIG & G. DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 51 (2002).

98. See generally MICHEL WEDEL & WAGNER A. KAMAKURA, MARKET SEGMENTATION: Conceptual and Methodological Foundations (2000).

99. MARKETING JOURNAL, <http://mittalibharti.blogspot.com/2013/10/segmenting-targeting-and-positioning.html> (last visited Oct 24, 2016) (“Depending on the specific charac-

It is no secret that many goods, not just luxury goods, are generally cheaper in Eastern Europe than in Western Europe and cheaper in the periphery than they are at the center of the Union.<sup>100</sup> The figures listed in the tables below shed some light on how market segmentation occurs on the center–periphery axis within Europe.

#### **Car price – VW Polo**

<b>Country</b>	<b>Indicative price,</b>
<b>Slovenia</b> ( <i>periphery</i> )	8014
Cyprus ( <i>periphery</i> )	8094
Greece ( <i>periphery</i> )	8231
Malta ( <i>periphery</i> )	8999
Poland ( <i>periphery</i> )	9045
Estonia ( <i>periphery</i> )	9102
Finland ( <i>center</i> )	9343
Ireland	9537
The Netherlands ( <i>center</i> )	9766
Spain	9916
France ( <i>center</i> )	9933
Belgium ( <i>center</i> )	10039
Italy	10096
Luxembourg ( <i>center</i> )	10215
Austria ( <i>center</i> )	10228
Germany ( <i>center</i> )	10315
Slovakia ( <i>periphery</i> )	—

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teristics of the product, these subsets may be divided by criteria such as age and gender, or other distinctions, like location or income.”); MIDLANDS STATE UNIVERSITY, *Market Segmentation*, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEWjXxcyNmY\\_TAhUiwYMKHa0WBvoQFggcMAA&url=http%3A%2F%2Fwww.msu.ac.zw%2Flearning%2Fmaterial%2F1314871820Market%2520segmentation%2520COPY%2520E-L.docx&usg=AFQjCNFhI7oqhS2PoABVqNQC5xWZwyERcQ&sig=2=2SsnD3yHndm4BCsnspOIJJA&cad=rja](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEWjXxcyNmY_TAhUiwYMKHa0WBvoQFggcMAA&url=http%3A%2F%2Fwww.msu.ac.zw%2Flearning%2Fmaterial%2F1314871820Market%2520segmentation%2520COPY%2520E-L.docx&usg=AFQjCNFhI7oqhS2PoABVqNQC5xWZwyERcQ&sig=2=2SsnD3yHndm4BCsnspOIJJA&cad=rja) (last visited Oct. 24, 2016)

Consumer-based market segmentation can be performed on a *product-specific* basis to provide a close match between specific products and individuals. However, a number of generic market segment systems also exist. For example, the system may provide a broad segmentation of the population of a country or territory based on statistical analysis of household and geodemographic data.

Geographic information is very often indeed fundamental in the process of planning and implementing marketing activities.

100. See European Commission, Eurostat, *Consumer Prices Research, An Experimental Analysis into the Measurement of Indicative Price Levels for Consumer Products, Fourth Pilot* (2012). In this article, I am only giving some examples of the lower prices in the periphery. Several other examples are provided in the Eurostat study. However, it should not be assumed that prices in Europe are *always* lower in the periphery. For example, the Ikea Billy Index shows that some prices in the periphery are higher than in the center. See Catherine Bosley & Kristian Siedenburg, *Ikea Keeps Lid on Billy Prices as Euro Inflation Weakens*, BLOOMBERG (Oct. 18, 2013), <http://www.bloomberg.com/news/articles/2013-10-17/ikea-keeps-lid-on-billy-prices-in-europe-as-inflation-weakens>.

**Men's blue jeans**

<b>Country</b>	<b>Indicative price,</b>
Bulgaria ( <i>periphery</i> )	29,82
Hungary ( <i>periphery</i> )	30,96
Malta ( <i>periphery</i> )	31,38
Czech Republic ( <i>periphery</i> )	37,86
Lithuania ( <i>periphery</i> )	39,28
Slovakia ( <i>periphery</i> )	46,74
Croatia ( <i>periphery</i> )	47,16
Slovenia ( <i>periphery</i> )	49,21
Cyprus ( <i>periphery</i> )	49,28
Belgium ( <i>center</i> )	56,02
Italy	61,57
Austria ( <i>center</i> )	64,91
The Netherlands ( <i>center</i> )	72,13
United Kingdom ( <i>center</i> )	—
Spain	—
Romania ( <i>periphery</i> )	—
Poland ( <i>periphery</i> )	—
Luxembourg ( <i>center</i> )	—
Latvia ( <i>periphery</i> )	—
Ireland	—
Germany ( <i>center</i> )	—
Finland ( <i>center</i> )	—
Estonia ( <i>periphery</i> )	—

**Loaf of white bread**

<b>Country</b>	<b>Indicative price,</b>
Bulgaria ( <i>periphery</i> )	0,72
Czech Republic ( <i>periphery</i> )	0,89
Hungary ( <i>periphery</i> )	0,95
Romania ( <i>periphery</i> )	1,00
Poland ( <i>periphery</i> )	1,07
Lithuania ( <i>periphery</i> )	1,61
Ireland	1,62
Croatia ( <i>periphery</i> )	1,64
The Netherlands ( <i>center</i> )	1,68
Latvia ( <i>periphery</i> )	1,68
Cyprus ( <i>periphery</i> )	1,74
Slovenia ( <i>periphery</i> )	1,85
United Kingdom ( <i>center</i> )	2,05
Malta ( <i>periphery</i> )	2,06
Belgium ( <i>center</i> )	2,76
Spain	2,79
Italy	2,86
Luxembourg ( <i>center</i> )	3,88
Finland ( <i>center</i> )	3,96
Austria ( <i>center</i> )	5,36
Germany ( <i>center</i> )	—
Estonia ( <i>periphery</i> )	—
Slovakia ( <i>periphery</i> )	—

**Fresh tomatoes**

<b>Country</b>	<b>Indicative price,</b>
Bulgaria ( <i>periphery</i> )	1,02
Romania ( <i>periphery</i> )	1,24
Cyprus ( <i>periphery</i> )	1,29
Estonia ( <i>periphery</i> )	1,39
Lithuania ( <i>periphery</i> )	1,40
Czech Republic ( <i>periphery</i> )	1,43
Malta ( <i>periphery</i> )	1,44
Poland ( <i>periphery</i> )	1,46
Hungary ( <i>periphery</i> )	1,67
Slovakia ( <i>periphery</i> )	1,68
Latvia ( <i>periphery</i> )	1,73
Slovenia ( <i>periphery</i> )	1,81
Croatia ( <i>periphery</i> )	1,81
The Netherlands ( <i>center</i> )	1,91
Belgium ( <i>center</i> )	1,93
Luxembourg ( <i>center</i> )	2,07
Finland ( <i>center</i> )	2,10
Italy	2,32
Austria ( <i>center</i> )	2,55
Germany ( <i>center</i> )	—
Spain	—
United Kingdom ( <i>center</i> )	—
Ireland	—

**Potatoes**

<b>Country</b>	<b>Indicative price,</b>
Poland ( <i>periphery</i> )	0,33
Latvia ( <i>periphery</i> )	0,40
Lithuania ( <i>periphery</i> )	0,41
Estonia ( <i>periphery</i> )	0,47
Romania ( <i>periphery</i> )	0,49
Bulgaria ( <i>periphery</i> )	0,58
Hungary ( <i>periphery</i> )	0,65
Czech Republic ( <i>periphery</i> )	0,65
Slovakia ( <i>periphery</i> )	0,69
Croatia ( <i>periphery</i> )	0,70
Malta ( <i>periphery</i> )	0,74
Cyprus ( <i>periphery</i> )	0,76
Slovenia ( <i>periphery</i> )	0,82
The Netherlands ( <i>center</i> )	1,03
Finland ( <i>center</i> )	1,04
Italy	1,11
Spain	1,14
United Kingdom ( <i>center</i> )	1,15
Belgium ( <i>center</i> )	1,26
Luxembourg ( <i>center</i> )	1,39
Austria ( <i>center</i> )	1,41
Ireland	—
Germany ( <i>center</i> )	—

**Mineral salt**

<b>Country</b>	<b>Indicative price,</b>
The Netherlands ( <i>center</i> )	2,28
Finland ( <i>center</i> )	2,35
Poland ( <i>periphery</i> )	2,47
Latvia ( <i>periphery</i> )	2,47
Bulgaria ( <i>periphery</i> )	2,47
Malta ( <i>periphery</i> )	2,53
Estonia ( <i>periphery</i> )	2,71
United Kingdom ( <i>center</i> )	2,77
Slovakia ( <i>periphery</i> )	3,12
Italy	3,13
Lithuania ( <i>periphery</i> )	3,20
Austria ( <i>center</i> )	3,24
Croatia ( <i>periphery</i> )	3,36
Slovenia ( <i>periphery</i> )	3,53
Belgium ( <i>center</i> )	3,55
Hungary ( <i>periphery</i> )	3,74
Luxembourg ( <i>center</i> )	4,84
Cyprus ( <i>periphery</i> )	4,99
Ireland	—
Romania ( <i>periphery</i> )	—
Czech Republic ( <i>periphery</i> )	—
Spain	—
Germany ( <i>center</i> )	—

**Cigarettes**

<b>Country</b>	<b>Indicative price,</b>
Bulgaria ( <i>periphery</i> )	2,45
Lithuania ( <i>periphery</i> )	2,46
Latvia ( <i>periphery</i> )	2,73
Croatia ( <i>periphery</i> )	2,73
Estonia ( <i>periphery</i> )	2,78
Czech Republic ( <i>periphery</i> )	2,89
Romania ( <i>periphery</i> )	2,93
Slovakia ( <i>periphery</i> )	3,04
Hungary ( <i>periphery</i> )	3,12
Slovenia ( <i>periphery</i> )	3,66
Cyprus ( <i>periphery</i> )	4,00
Malta ( <i>periphery</i> )	4,33
Austria ( <i>center</i> )	4,41
Luxembourg ( <i>center</i> )	4,42
Italy	4,83
Germany ( <i>center</i> )	5,14
Belgium ( <i>center</i> )	5,59
The Netherlands ( <i>center</i> )	6,14
Ireland	9,34
United Kingdom ( <i>center</i> )	9,50
Finland ( <i>center</i> )	—
Sweden ( <i>center</i> )	—
Denmark ( <i>center</i> )	—
France ( <i>center</i> )	—
Spain	—

Hungary ( <i>periphery</i> )	—
Greece ( <i>periphery</i> )	—
Poland ( <i>periphery</i> )	—
<b>Cinema ticket</b>	
<b>Country</b>	<b>Indicative price,</b>
Croatia ( <i>periphery</i> )	3,37
Bulgaria ( <i>periphery</i> )	3,89
Slovakia ( <i>periphery</i> )	3,91
Poland ( <i>periphery</i> )	4,06
Czech Republic ( <i>periphery</i> )	4,42
Lithuania ( <i>periphery</i> )	4,44
Hungary ( <i>periphery</i> )	4,62
Slovenia ( <i>periphery</i> )	5,35
Malta ( <i>periphery</i> )	5,65
Italy	7,82
Germany ( <i>center</i> )	7,83
Cyprus ( <i>periphery</i> )	8,00
Luxembourg ( <i>center</i> )	8,14
Belgium ( <i>center</i> )	8,70
Austria ( <i>center</i> )	8,76
Ireland	8,99
The Netherlands ( <i>center</i> )	9,16
Finland ( <i>center</i> )	11,26
United Kingdom ( <i>center</i> )	—
Spain	—
Romania ( <i>periphery</i> )	—
Latvia ( <i>periphery</i> )	—
Estonia ( <i>periphery</i> )	—
<b>Daily newspaper</b>	
<b>Country</b>	<b>Indicative price,</b>
Romania ( <i>periphery</i> )	0,37
Bulgaria ( <i>periphery</i> )	0,39
Slovakia ( <i>periphery</i> )	0,45
Lithuania ( <i>periphery</i> )	0,47
Hungary ( <i>periphery</i> )	0,55
Poland ( <i>periphery</i> )	0,58
Czech Republic ( <i>periphery</i> )	0,67
Malta ( <i>periphery</i> )	0,69
Croatia ( <i>periphery</i> )	0,92
Austria ( <i>center</i> )	1,00
Belgium ( <i>center</i> )	1,18
Slovenia ( <i>periphery</i> )	1,31
Italy	1,33
Luxembourg ( <i>center</i> )	1,35
The Netherlands ( <i>center</i> )	1,58
Cyprus ( <i>periphery</i> )	1,74
Latvia ( <i>periphery</i> )	1,98
Germany ( <i>center</i> )	2,11
United Kingdom ( <i>center</i> )	—
Spain	—
Ireland	—
Finland ( <i>center</i> )	—

Estonia ( <i>periphery</i> )	—
<b><u>Cup of coffee</u></b>	
<b>Country</b>	<b>Indicative price,</b>
Bulgaria ( <i>periphery</i> )	0,56
Hungary ( <i>periphery</i> )	0,84
Czech Republic ( <i>periphery</i> )	0,89
Lithuania ( <i>periphery</i> )	0,92
Italy	0,93
Slovakia ( <i>periphery</i> )	0,95
Croatia ( <i>periphery</i> )	0,98
Romania ( <i>periphery</i> )	1,01
Slovenia ( <i>periphery</i> )	1,17
Poland ( <i>periphery</i> )	1,21
Malta ( <i>periphery</i> )	1,46
Cyprus ( <i>periphery</i> )	1,88
Germany ( <i>center</i> )	1,91
Belgium ( <i>center</i> )	2,02
Finland ( <i>center</i> )	2,05
The Netherlands ( <i>center</i> )	2,19
Luxembourg ( <i>center</i> )	2,26
United Kingdom ( <i>center</i> )	2,37
Austria ( <i>center</i> )	2,61
Sweden ( <i>center</i> )	—
Spain	—
Portugal ( <i>periphery</i> )	—
Latvia ( <i>periphery</i> )	—
Ireland	—
Greece ( <i>periphery</i> )	—
France ( <i>center</i> )	—
Estonia ( <i>periphery</i> )	—
Denmark ( <i>center</i> )	—
<b><u>White sugar</u></b>	
<b>Country</b>	<b>Indicative price,</b>
Poland ( <i>periphery</i> )	0,86
Croatia ( <i>periphery</i> )	0,89
Hungary ( <i>periphery</i> )	0,93
Czech Republic ( <i>periphery</i> )	0,93
Germany ( <i>center</i> )	0,94
Spain	0,99
The Netherlands ( <i>center</i> )	1,04
Belgium ( <i>center</i> )	1,04
Estonia ( <i>periphery</i> )	1,06
Bulgaria ( <i>periphery</i> )	1,07
Slovenia ( <i>periphery</i> )	1,08
Romania ( <i>periphery</i> )	1,08
Slovakia ( <i>periphery</i> )	1,09
Lithuania ( <i>periphery</i> )	1,12
Finland ( <i>center</i> )	1,13
Latvia ( <i>periphery</i> )	1,14
United Kingdom ( <i>center</i> )	1,15
Italy	1,15
Austria ( <i>center</i> )	1,20

Luxembourg ( <i>center</i> )	1,27
Malta ( <i>periphery</i> )	1,32
Cyprus ( <i>periphery</i> )	1,32
Ireland	1,35

How can this difference in markets be exploited? The price elasticity of demand measures how much the quantity demanded of a good changes when its price changes.<sup>101</sup> The more elastic the demand curve facing the firm, the more limited the extent to which a firm can increase prices. A company might decide to use different pricing systems on the market of the center and of the periphery, raising the price in the center where the purchasing power is higher and reducing it in the periphery, increasing its profit margins. The reduction in quantity sold in the center because of the higher price is outweighed by the increased quantity a company sells in the periphery.

An increase in price is accompanied by a reduction in the level of sales. What is true for an individual consumer is true for the market as a whole; the market demand curve is the aggregation of individual demand curves. In a market with a lower purchasing power, the increased price will result in a lower demand more quickly than in a market with high purchasing power. This is the case particularly for luxury goods, but also for essential necessities. Consumers on the market with lower purchasing power have a higher elasticity of demand. They react to a change of price more radically than consumers on the market with higher purchasing power.<sup>102</sup> The quantity lost as a result of a higher price set in the center, in a market with higher purchasing power, is therefore offset by the increased quantity sold as a result of a lower price on the market with lower purchasing power. The price differences therefore can be exploited. As it will be further argued below, this enables a select privilege to harm companies of the European center with potentially devastating consequences for companies of the periphery.

### III. DUMPING IN INTERNATIONAL TRADE

To further portray the “dumping practices of the center” phenomenon in the European Union, I will first explain how dumping is understood in international trade. There is a continuing debate in international economic law as to which trade policies and practices are fair and which are to be prohibited. Dumping has been at the heart of these debates. Many countries have long feared that their industries would suffer from foreign competitors selling at low prices. Dumping has been widely recognized as an undesirable practice since the early twentieth century and multilaterally, since the General Agreement on Tariffs and Trade (GATT) Uruguay

101. See, e.g., PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, MICROECONOMICS, 64 (16th ed. 1998). Here, I am using Samuelson’s analysis of price elasticity with regard to changes in prices in certain goods with the increase in prices of certain goods and applying it to the elasticity of demand according to purchasing power of particular markets.

102. Kukovec, *Law and the Periphery*, *supra* note 41, at 410.

Round. Dumping has been considered a trade practice that leaves domestic producers defenseless and could lead to the disappearance of domestic production of the merchandise at stake.<sup>103</sup> Today, antidumping proceedings are increasing rapidly. Antidumping action was initially implemented by developed countries, such as the United States, Australia, New Zealand, and countries in the European Union, but there has also been an increased enforcement of antidumping in emerging markets, such as India, China, Turkey, Brazil, Argentina, Mexico, and South Africa.<sup>104</sup>

Dumping is an action of private firms of manufacturers, not governments.<sup>105</sup> However, it is recognized that governments enforce other market-restrictive measures that enable market segmentation, which allow exporters to maintain higher prices in their home market. Dumping is possible by market segmentation. It is considered that companies can apply different prices between domestic and export sales when their home market is not freely accessible to imports while the export markets are accessible to imported goods in question.<sup>106</sup> The profits gained in restricted markets allow companies to reduce their export prices even below (full) cost of production to gain market share and increased economies of scale.

Dumping is usually defined as “exporting at prices below those charged on the domestic market (or, if none, on a third-country market). This is called international price discrimination.”<sup>107</sup> Internationally, price discrimination may occur when demand in the export market is more elastic than it is in the domestic market (i.e., consumers are more responsive to lower prices). It has become accepted internationally that antidumping laws may also apply when an agent exports goods at prices that do not cover the cost of production. Dumping can thus also constitute selling at prices below those necessary to cover production costs (below cost sales).<sup>108</sup> This type of dumping can be beneficial to exporters “even in situations where their domestic sales are made at a loss, as long as export prices exceed variable costs. Thus, dumped exports help to reduce the exporter’s per unit cost of production.”<sup>109</sup>

#### A. *Rationale for the Prohibition of Dumping*

Important income or distributional effects result from dumping. It is assumed that dumping makes the producer in the higher-priced market

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103. See JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIALS AND TEXTS*, 684 (4th ed. 2002).

104. See Wu, *supra* note 58, at 117; see also WOLFGANG MÜLLER, NICHOLAS KHAN, & TIBOR SCHARF, *EC AND WTO ANTI-DUMPING LAW* 3 (2d ed. 2009).

105. See MÜLLER, KAHN & SCHARF, *supra* note 104, at 3; Wu, *supra* note 58, at 108.

106. Kukovec, *Law and the Periphery*, *supra* note 41, at 410 n.72.

107. *Id.* at 420.

108. *Id.*; see also JACKSON, DAVEY & SYKES, *supra* note 103, at 686.

109. Kukovec, *Law and the Periphery*, *supra* note 41, at 420 n.67.

better off and the consumers worse off.<sup>110</sup> But it is not universally assumed that the economy itself is worse off overall. The producer that operates price discrimination will likely increase its output to supply the lower-priced market. This result would usually be viewed as desirable because it offsets the undesirable supply-restricting behavior that would otherwise occur.<sup>111</sup>

However, even when price discrimination is not harmful to the world as a whole, it has important distributional consequences. It may benefit one economy and harm another one.<sup>112</sup> In economic theory, it is generally accepted that dumping does not have any significant negative effect on the exporting economy.<sup>113</sup> If dumping does harm to the exporting economy, it is because of an adverse effect on price levels in that economy. Dumping could also harm users of the dumped product who live in the exporting country. This harm may transpire only if the dumped product is a component of a final product. The users of the dumped product in the importing country will have a cost advantage because of their access to the lower-priced product.<sup>114</sup> These users may be able to sell a final product that incorporates the dumped component more cheaply, thereby gaining an advantage over competing producers in the exporting country. This advantage would be contingent on the importance of the dumped component in the cost of the ultimate product as well as on the extent of the competition among producers in both nations.<sup>115</sup>

According to Jackson, Davey, and Sykes, harm to the exporting economy is unclear, on balance. However, it is likely that the benefits to the dumping company outweigh possible losses to the consumers at home.<sup>116</sup> “Much more telling is the fact that exporting countries have generally not thought it worthwhile to control dumping, which strongly suggests that dumping does not have any significant adverse effect on the exporting country.”<sup>117</sup>

Rather, the rationale for prohibiting dumping is provided by the effect of dumping on the country where these goods are imported. It is generally agreed in economic theory that consumers in the importing country will benefit (at least in the short run) from the lower prices resulting from

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110. William J. Davey, *Antidumping Laws: A Time for Restriction*, in ENFORCING WORLD TRADE RULES: ESSAYS ON WTO DISPUTE SETTLEMENT AND GATT OBLIGATIONS 268 (2006); see also Christopher L. Erickson & Sarosh Kuruvilla, *Labor Costs and the Social Dumping Debate in the European Union*, 48 INDUS. & LAB. REL. REV. 28, 28 (1994).

111. Davey, *supra* note 110, at 268.

112. *Id.*

113. *Id.* at 271.

114. Farrukh Khan, *Dumping as an Economic Phenomenon*, at 50 (Oct. 13, 2014), <https://www.scribd.com/document/242811618/Dumping-in-Managerial-Economics>. See also JACKSON, DAVEY & SYKES, *supra* note 103, at 680.

115. Khan, *supra* note 114, at 50.

116. JACKSON, DAVEY & SYKES, *supra* note 103, at 684.

117. Davey, *supra* note 110, at 270.

dumping. It is likewise agreed that producers in the importing country who compete with the dumpers will incur harm due to the loss of market share to the dumpers.<sup>118</sup> Thus, dumping has a significant potential to harm existing or potential industry in the importing country. Moreover, goods dumping can negatively affect the investment climate in the importing market. This can happen especially in an economic downturn and in capital-intensive industry characterized by a high sunk investment and relatively low variable cost.<sup>119</sup>

### B. *Conditions for the Imposition of Antidumping Duties*

First, antidumping laws allow a country to impose temporary countervailing duties on dumped goods, dumped either as a result of price discrimination or by below-cost sales. Under the GATT rules, the unfair price is determined by the product's standard of "normal value."

According to Article VI of the GATT, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (1) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country; or
- (2) in the absence of such domestic price, is less than either:
  - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade;
  - (ii) or the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Second, dumping is deemed to be an unfair business practice when it causes injury. Article VI of the GATT authorizes the imposition of antidumping measures to offset dumping if it causes material injury to a domestic industry. However, before antidumping duties can be imposed by the aggrieved country under WTO law, the importing nation must determine that imports of dumped merchandise have caused material injury, or threatened material injury, to the domestic industry producing the like product, or that the imports are materially retarding the establishment of a domestic industry.

Indeed, the spectrum of injury by dumping practices can be quite broad. This is why countries adopt a broad definition of dumping. For instance, to impose antidumping duties under U.S. law, it is necessary that the U.S. International Trade Commission find that imports of merchandise sold at less than fair value have materially injured, or threatened to mate-

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118. *Id.* at 271. See also Erickson & Kuruvilla, *supra* note 110, at 28.

119. Kukovec, *Law and the Periphery*, *supra* note 41, at 420-21. See also MÜLLER, KHAN & SCHARF, *supra* note 104, at 9.

rially injure, a U.S. industry producing a like-product or are materially retarding the establishment of a U.S. industry that may not yet exist.

Third, the proceeding section inquires whether the unfairly traded imports cause or threaten material injury, or retard the establishment of a new industry. If injury or threat is present, its cause must be determined as the third stage of the analysis.<sup>120</sup>

#### IV. DUMPING OF THE EUROPEAN CENTER

##### A. *Effects on the Actors of the Center*

As set forth, then, dumping generally has three basic features: (1) price discrimination or below-cost sales, i.e., selling at less than a good's normal value; (2) injury to the importing economy or threat of such injury; and (3) proof that selling at less than a good's normal value causes this injury or threat of such injury. All of these features are present in the doctrine that I have termed "dumping practices of the center." I will now turn to the explanation of the benefit and injury of goods dumping on the internal market, without explicitly addressing the notion of causation, as proving causation is a matter of factual proof in any individual case.

Dumping can be clearly advantageous for an individual exporter. A profitable home market enables the exporter to operate in export markets at prices much lower than would have been possible without market segmentation. "The low export prices generate further sales, which in turn lower the costs of production—an advantage which benefits both exports and home sales."<sup>121</sup> The expansion of the center's industry to the periphery, while harming the periphery's competition, thus benefits both exports and sales at home, thus generating further sales and lower costs of production. Lower production costs also enable a company of the center to decrease its price there, which shields such companies both from competitors that may not engage in dumping to the periphery as well as from potential parallel imports into the center. In Gunnar Myrdal's language, the virtuous cycle of production of the companies of the center is thus ensured.<sup>122</sup>

An additional benefit of dumping for the exporting country's economy is that its industries develop production capacities far larger than the size of the national market. The exporting country's economy benefits from high economic growth and high production levels, even when faced with a domestic or world-wide recession.<sup>123</sup> Furthermore, it facilitates strategic targeting of key industrial sectors in important markets. This can result in a high trade surplus and possibly dominant positions in the industrial sectors concerned.

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120. See WTO Antidumping Agreement ¶ 3.5 (Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994).

121. Khan, *supra* note 114, at 49.

122. See GUNNAR MYRDAL, *ECONOMIC THEORY AND UNDER-DEVELOPED REGIONS* 26-27 (1957).

123. Khan, *supra* note 114, at 50.

Dumping can even be beneficial in situations where home market sales are made at a loss. As long as the latter cover fixed costs, export sales can be priced as low as variable cost. This allows production and employment to be maintained in a recession. It also enables considerable advantages in terms of economies of scale.<sup>124</sup> Companies with a sanctuary market can thus export recession to countries or regions with companies without such a sanctuary market, thereby destabilizing such economies.

The European Commission's report on dumping<sup>125</sup> gives an example of how a dumper retains production and employment in its home market despite falling demand or increased competition. This example depicts the ability of the companies of the center to harm, if not consistently destroy, the periphery's industries.

Dumping is profitable for exporters even where their domestic prices are made at a loss. Imagine an exporter that produces 1000 units with fixed costs of 7000 and a variable cost of 3 per unit, which would imply a breakeven price of 10.<sup>126</sup> In a period where demand and prices fall, perhaps due to a recession or increased competition, the exporter can only sell 800 units on the home market at a price of 8.75, a level that would cover fixed costs but leave a loss of 2.400. In this position, dumping abroad would permit an exporter to:

- a) maintain employment and production by selling 800 domestically at a price of 8.75 and exporting the remaining 200 at the variable cost of 3, without increasing overall loss;
- b) maintain employment and production by selling 800 domestically at a price of 8.75, export the remaining 200 units at 6, and thus reduce loss to 1.800; or
- c) create more employment by increasing production to 1600 units, sell 800 domestically at a price of 8.75, and export 800 at 6; thus, through the increased production, the breakeven level is reduced to 7.4, which makes home sales profitable to the extent that losses on export sales are offset (i.e., eliminate the overall loss).

Even if a local producer were as efficient as the exporter initially, the dumper's attack would quickly propel it into a situation of failing prices, declining sales, and increasing costs. The periphery's producers are rarely as efficient as their productivity is lower due to a number of factors, such as, less developed logistics, services, inferior education structure, and so on. Their position becomes the more difficult as the dumper may be able to sustain losses on its export business for extended periods due to its

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124. *Id.* at 49.

125. *Eleventh Annual Report by the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities*, COM (93) 516 final (Oct. 28, 1993).

126. The firm's total costs would be 7,000 plus three times 1,000, or 10,000. To break even, the firm must receive at least 10 on the 1,000 units produced to receive total revenue of 10,000 equal to its total costs.

“guaranteed” home market profits.<sup>127</sup> Furthermore, the cost increases as well as the losses could also affect the periphery industry’s position in third markets. As a result, the periphery industry’s productivity and investment capabilities are weakened.

The total cost of dumping to the importing economy must be accounted for in terms of lost capacities, lost investment, lost technology, especially in promising or strategic sectors, as well as in the shrinking industrial base, the social cost of unemployment, and the contraction or elimination of whole industries.<sup>128</sup> Failing prices, fierce and powerful competition of the (often) capital-laden and prestigious companies of the center, declining sales, and increasing costs thus together work to create a downward spiral for the periphery.

Companies in the center, on the other hand, have a platform upon which to expand, increase production, employ workers, and increase income and profits—all which contribute toward the center’s upward spiral. The options available to the exporter stem from market segmentation and the fact that fixed costs can be covered by sales at home; but, while companies of the center are established and thus able to charge high prices, companies of the periphery do not enjoy such a luxury.

The center’s dumping might be short-term, aimed to secure market entry, or longer-term, which may cause even greater injury to local production. Dumping can be cyclical. According to Jackson, Davey, and Sykes, cyclical dumping occurs in industries subject to periodic excess supply and capacity. In such industries, during the period of decreasing domestic demand, the excess production is often dumped at prices below full cost. This also leads to the export of unemployment.<sup>129</sup> Dumping can also be simply strategic. The goal of such dumping is to achieve a robust position in key export markets. This strategy seeks to increase production to benefit from economies of scale.<sup>130</sup>

The advantages derived from dumping can thus significantly outweigh disadvantages stemming from protection of the home market, in particular relatively high consumer prices. If dumping is not below cost, but is a result of mere price discrimination, the dumper, at best, incurs a relative loss. It is actually difficult to speak in terms of loss at all, but rather a smaller profit, in the short term. The smaller profit incurred by the dumper is thus in the short term easily offset by the higher price charged in the domestic, center market. In the long term, the smaller profit will be well compensated by the market share a company of the center was able to carve out in the periphery’s market.

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127. JACKSON, DAVEY & SYKES, *supra* note 103, at 680.

128. *Id.*

129. See *Eleventh Annual Report by the Commission to the European Parliament on the Community’s Anti-Dumping and Anti-Subsidy Activities*, *supra* note 125, at 9; JACKSON, DAVEY & SYKES, *supra* note 103, at 691.

130. See *Eleventh Annual Report by the Commission to the European Parliament on the Community’s Anti-Dumping and Anti-Subsidy Activities*, *supra* note 125, at 9.

### B. *Effects on the Actors of the Periphery*

A domestic industry that faces dumped imports stands in a problematic position, as it is confronted with powerful challengers selling at low prices. “[D]umping often significantly injures the periphery’s industry producing the like product,” often leading to a cease in production or slow the establishment of such industry in the periphery.<sup>131</sup>

What are the periphery companies’ possibilities to retaliate and adopt practices to keep out competition? Can they themselves engage in goods dumping? One possible reaction to a competitor’s low prices would be to sell on the center’s market at equally low prices. Companies of the periphery could do this because there are no access barriers on the internal market. However, reducing prices in a market with lower elasticity of demand and increasing them in a higher-elasticity market makes little economic sense.

So could periphery companies play the same game as companies at the center? Could they engage in similar practices of price discrimination, increasing their prices on center markets and reducing prices in the periphery? They could, but their ability to raise prices in the center’s market without losing market share is limited, and it also depends on the draw of their existing market position. Their competitiveness in the markets of the center is often not based on brand power or prestige, and they might have limited resources to engage in powerful advertising campaigns. Rather, the competitiveness of these companies is more often based on the lower prices they can offer. Once they increase their low prices in the center, their market position is weakened.

The center has a wealthy domestic sanctuary market with high purchasing power to shield its companies and allows them to reduce prices in the periphery. Center companies can also afford to charge relatively higher prices in their home markets because they are relatively well-established there. Competitive pressure certainly exists on the center’s markets; while it may not always allow significant price increases, a higher priced market at home nonetheless provides a powerful platform from which companies of the center operate.<sup>132</sup>

The periphery lacks such a profitable home market—one that would “provide a platform from which to operate in export markets at prices lower than otherwise possible without market segmentation.”<sup>133</sup> This prevents periphery companies from lowering prices indefinitely in their domestic markets. And they can rarely afford price wars, as their pockets are often not as deep as those of the companies of the center.

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131. Kukovec, *Law and the Periphery*, *supra* note 41, at 421.

132. One should note that monopoly is not at all necessarily free money to corporations, but has to be purchased. For example, Richard Posner has argued that there are costs to monopoly profits—firms invest considerable sums of money in attempting to acquire monopoly profits and once they have them to retain them. See RICHARD A. POSNER, *ANTI-TRUST: AN ECONOMIC PERSPECTIVE* 11-12 (1976).

133. JACKSON, DAVEY & SYKES, *supra* note 103, at 679.

Operating from a sanctuary market can confer on exporters an advantage that cannot be matched by their competitors in the importing country. This provides the dumper with the opportunity to maximize profits or minimize losses, which can be highly injurious for the importing country's industry.

One could argue that exporting cheaper products to the center's market by peripheral companies paying lower wages to their workers is a form of dumping already (despite the fact that this is, in the current literature and regulatory regime, not perceived as dumping, but rather as a regular practice of comparative advantage). But periphery companies, given their lower productivity, can rarely afford to pay the same wages as the center's companies. As a result, the periphery indeed sometimes, but not always, produces cheaper products because of the lower costs of labor. But lower costs of labor are a decreasing cost for many industries,<sup>134</sup> and are far from the only cost that determines a product's price. Instead, a company's competitiveness depends on a variety of factors, and often, though certainly not always, lower labor cost is the only factor in which periphery's companies have a comparative advantage.

Classical economic theory teaches us that restrictions in trade are negative, as factors of production will not be put to their most productive use. Furthermore, it teaches us that the losers will divert their production to more efficient ends. Following this logic, the lower the pricing of the center's companies, the more the companies of the periphery will divert production to a more productive use, and thus also benefit. The idea that this approach benefits companies of the periphery, as they will reorient production to a most efficient use, is based on an assumption about the future that may or may not materialize. The company might simply close down, and the unemployment of workers and disuse of other production factors would ensue. This is not just a factual observation about the possibilities of people's future reaction, which is difficult to predict, but a conceptual one. And when there is a structure requiring the reorientation of production, this logic becomes even more problematic.

According to Myrdal, an accidental change in a cause of events that is not immediately cancelled out by the stream of events produces a different reaction in a developed society than it does in an undeveloped society.<sup>135</sup> In other words, competitors and communities in a wealthy economy have a greater ability to adapt to competitive pressure than those in poorer economies. A trade loss can elicit a creative response in a more advanced economy given its higher human capital, better education, and denser clusters of firms and networks of production as compared to poorer economies. According to Roberto Unger, the erosion of the entrenched position may invite governmental, social, and private initiatives to enlarge the role of the activities people do not yet know how to repeat, broadening access to the opportunities and resources of production for more economic

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134. ROBERTO M. UNGER, *FREE TRADE REIMAGINED* 130 (2007).

135. MYRDAL, *supra* note 122, at 23-38.

agents.<sup>136</sup> Thus, a wealthy economy can be more adaptable to change and competitive pressure, which can even contribute to the upward spiral of an already more advanced economy.

On the other hand, in a less advanced economy, loss from free trade will present itself in a different key, with fewer resources and opportunities to respond through compensation, innovation, and reconstruction. Furthermore, losers in a small economy will be compensated on a smaller scale than they would be in an advanced economy. Moreover, the most important form of loss, the inhibition of change, will not be compensated even in principle. Firms and workers in the emerging economy will not enter into lines of production in which the comparatively more advanced economy maintains a solidified position. These losers do not yet exist. They are prospective, not already prevailing economic agents,<sup>137</sup> as the existing dumping discourse already recognizes.

### C. *Incoherence of the Consumer Welfare Standard*

The aim of competition law that many competition authorities have increasingly stressed is the maximization of consumer welfare. Despite differences in the approach of various regulatory jurisdictions as to how that goal should be achieved and how to address consumer welfare,<sup>138</sup> this concept has become the dominant goal of U.S., EU, and South African antitrust laws.<sup>139</sup> The relationship between competitors on the market in current antitrust law thinking is thus resolved from the standpoint of an imaginary consumer. The consumer has been reduced to someone whose welfare increases when he or she pays as little as possible for a product. This reductionism has become the benchmark according to which competition issues can be adjudicated.

Typically, price discrimination leads to lower prices for some consumers and higher prices for others. Goods dumping appears to favor the consumers and downstream producers of the periphery. They are said to pay less for products than the center's consumers and the downstream producers pay, and, in this analysis, they are likely to enjoy benefits from dumped imports through low prices. From the perspective of the periphery, goods dumping should thus be welcomed.

Indeed, some of the benefits of lower prices of goods may go to downstream producers in the periphery. The benefit to the downstream pro-

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136. UNGER, *supra* note 136, at 126.

137. *Id.* at 127.

138. WHISH & BAILEY, *supra* note 7, at 19-21. There has been a tension between two, sometimes conflicting goals in EU law. EU competition policy takes account of market integration objective as well as the need for undistorted competition. A different approach of U.S. antitrust authorities to particular cases has also sparked the critique that EU antitrust laws protect competitors rather than competition. The debate about proper antitrust goals was ignited every time the EU and U.S. competition authorities reached a different conclusion in very important antitrust issues. See generally Damjan Kukovec, *International Antitrust—What Law in Action?* 15 *IND. INT'L & COMP. L. REV.* 1 (2004).

139. See WHISH & BAILEY, *supra* note 7, at 19.

ducer is also considered by the European Commission in finally determining the measures to counteract dumping in international trade.<sup>140</sup> This is an additional criterion to be taken into consideration, and it enables the European Commission to decide not to impose antidumping measures if the overall economic interests in the EU should find such measures to be harmful. The interests of domestic industry producing the product concerned, importers, Union industries that use the imported product and would pay a higher price following antidumping measures, and the interests of the end consumer of the product are taken into consideration in this analysis.

On the internal market, dumping of the center, while having a negative impact on direct competitors, may thus have a positive impact on the downstream producers of the periphery. Nonetheless, the value of lower prices of inputs to the periphery's downstream producers can be limited, because it is more often the periphery that provides inputs for final products of the center, not vice versa, as peripheral companies generally find themselves lower on the chain of worldwide productions.

Furthermore, the analysis reveals a larger problem of the consumer welfare standard. Market economics assumes that consumers are "best off if they can make voluntary exchanges of goods and services in competitive markets."<sup>141</sup> Maximization of the consumer surplus seeks the largest net gain of consumer when buying a product. Consumer surplus refers to the difference between consumers' valuations and the price they actually pay. Producer surplus is the difference between the price producers are paid for what they sell and the cost of production. Total welfare is the sum of consumer surplus and producer surplus. When the price is elevated above marginal cost, there is a deadweight loss, the sacrifice in total surplus for units not purchased due to price elevation. From this perspective, lost consumer surplus is the sum of deadweight loss and the amount transferred from consumers to producers.

According to Herbert Hovenkamp, maximizing consumer welfare is really a policy of maximizing everyone's welfare, inasmuch as everyone is a consumer.<sup>142</sup> The benefit to consumers has been lauded as the main objective of antitrust enforcement in several jurisdictions.<sup>143</sup> The U.S. Supreme Court has also consistently held that the Sherman Act protects all victims of violations—not just the end users. The Areeda-Hovenkamp treatise commented: "Every member of society is a consumer, while not everyone is an entrepreneur, so the most 'populist' goal of all may be the one that promotes consumer welfare."<sup>144</sup> Thus, according to Areeda and Hovenkamp, "any interest group approach to antitrust is best off to recog-

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140. See European Commission, *Conditions for Imposing an Anti-Dumping Measure*, <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/conditions>.

141. HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 1 (1985).

142. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 77 (2005).

143. See WHISH & BAILEY, *supra* note 7, at 19.

144. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 100b (rev. ed. 1997).

nize ‘consumers’ as its protected class.”<sup>145</sup> Therefore, Hovenkamp argues “an antitrust policy of maximizing consumer welfare is really a policy of maximizing everyone’s welfare, at least in their capacity of consumers.”<sup>146</sup>

However, one should not focus solely on the quantitative aspect and the price of the good in measuring consumer benefit, without any regard to the quality and nature of the product. Consumers of the periphery may not necessarily be better off because domestic producers are forced to lower production as a result of goods dumping of the center, or very often, cease it altogether. Local competition and variety are thus reduced and cherished local products are wiped off the market, all of which are unlikely to serve consumer interest.

Moreover, and more importantly for the argument that consumer welfare alone cannot serve as an apt goal of antitrust and trade policy goal, each of us is a bundle of injuries and recognitions in every moment in time that sets us into a particular situation in the hierarchical structure of production of goods, services, knowledge, and so on.<sup>147</sup> They constitute us as subjects. We are injured not only as consumers, but also simultaneously as workers, or as members of a particular community. In other words, the imaginary consumer of antitrust law is the consumer who buys products, not a consumer who earns money for their work. Neither the stand-alone consumer welfare standard nor the total welfare standard take this into consideration, as they consider a consumer and producer as detached from each other. The difficulty of the analysis is not only hidden in the fact that consumers are an internally fragmented group,<sup>148</sup> but that consumer welfare analysis untenably distinguishes between a consumer and a producer.<sup>149</sup> Reliance on the maximization of common interest between an abstract class of consumers and abstract class of producers (elimination of deadweight loss) in the calculation of maximization of welfare thus does not give us a good account of the welfare we are producing.

While the consumer of the periphery benefits from lower price, he loses money simultaneously as a producer or member of a community on a downward spiral. Harm to the consumer employed by companies and living under the constraints of local budgets that lose out as a result of the structural downward spiral of their economies is missed in an understanding of antitrust or trade law focused on consumer benefit.

What does the concentration of capital, technology, productive capacity, and knowledge in the European center mean for the spiritual development and economic and personal growth of the peripheral consumer? For example, what does it mean for a young graduate unable to find suitable

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145. *Id.* ¶ 100c.

146. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 144, at 77.

147. *See* Kukovec, *Hierarchies as Law*, *supra* note 18, at 154.

148. *See* United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993). The Ivy League schools implicated were Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, the University of Pennsylvania, and Yale University. *Id.* at 662 n.1.

149. *See* Kukovec, *Taking Change Seriously*, *supra* note 24, at 329.

employment in his own region or country, or for a worker who has been made redundant, or whose salary is decreasing because he or she is paid out of the budget of a community on a vicious cycle<sup>150</sup> or for an artist unable to get funding for his work? If a particular group of consumers is structurally condemned to lower wages or unemployment because its members are consumers of a peripheral economy, the fact that they pay lower prices for products in their local shops may not necessarily favor them.

On the other hand, a consumer in the center, who is paying a higher price for products as a result of market segregation, appears to lose, but gains at the same time as a producer. Success of the company that dumps goods on the peripheral market does not only translate into the owner's benefits, but the labor force may appropriate part of the gain.<sup>151</sup> Equity interests may be owned by middle-income individual investors.<sup>152</sup> Local banks are not faced with defaulting credits when companies prosper and technology, new ideas and practices may develop as a result of corporate success.

The consumer welfare standard governs our thinking about antitrust and trade law, despite the fact that it is based on untenable assumptions and distinctions. Low consumer prices thus cannot be a sufficient indicator of people's well-being and cannot offer adequate normative guidance for our decision-making. Moreover, the cost of living in the poorest countries in the world, for those "consumers" confined to local conditions and standards, is the lowest,<sup>153</sup> but hardly anyone aspires to such a living standard.

#### D. *Predatory Pricing*

One could think of other competition policy measures, aside from international anti-dumping law per se, which might affect or restrain the described practice of dumping of the center. For example, the doctrine of predatory pricing. However, I argue that the practices I am describing are not caught by any of the existing competition policy measures, which ensure that firms and governments are not able to implement or support anticompetitive or market segmenting strategies. The doctrine of predatory pricing, a doctrine of both EU as well as U.S. antitrust law,<sup>154</sup> together with the general prohibition of other practices under the "abuse of dominant position on the market"<sup>155</sup> doctrine, is assumed to adequately address the problem of low pricing abuse on the internal market. How-

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150. MYRDAL, *supra* note 122, at 23-38.

151. Crane, *supra* note 36, at 1186.

152. *Id.* at 1187.

153. See, e.g., NUMBEO, *Cost of Living Index for Country 2016 Mid Year*, [http://www.numbeo.com/cost-of-living/rankings\\_by\\_country.jsp](http://www.numbeo.com/cost-of-living/rankings_by_country.jsp) (last visited Oct. 24, 2016).

154. See generally ELHAUGE & GERADIN, *supra* note 14; WHISH & BAILEY, *supra* note 7, at 770.

155. See e.g., WHISH & BAILEY, *supra* note 7, at 361.

ever, the prohibition of predatory pricing, specifically,<sup>156</sup> does not cover the center's goods dumping as I have described it. Even a cursory analysis reveals why. In current antitrust thinking, selling below cost or price discrimination is considered to be harmful and actionable only if it is practiced with the intention of driving domestic firms out of business and (re)establishing a dominant position on the market.<sup>157</sup> The concern about predatory pricing is that firms might strategically cut prices to unprofitable levels in the short term to eliminate or discipline rivals and then raise long-run prices to supracompetitive levels, inflicting a net long-term injury on consumers. The problem is that such harmful predatory pricing is often hard to distinguish from desirable competitive price-cutting.<sup>158</sup>

Prohibition of predatory pricing, targeting either specific below-cost or particular above-cost anticompetitive activities, prohibits abusive actions of an already dominant player on the market under Article 102 of the Treaty.<sup>159</sup> Price reduction needs to be reactive to a market entrant and usually must be below average variable cost.<sup>160</sup> Predatory pricing therefore means abusive anticompetitive activity of an already dominant player on a market, under the current understanding of dominance, who raises back the price once it has driven a competitor out of the market.<sup>161</sup>

Dumping *can* be predatory (as some instances of dumping I described above would be), but most dumping is not predatory. The practices of dumping of the center are neither necessarily of a company with a dominant position on a market, nor reactive to a new entrant to the market, nor must they involve selling below average variable cost. Nor is there any reason to think that unjustified harm of dumping occurs only when it is proven that the price was, after the competitor has left the market, increased to a higher level than its pre-predation level, as demanded by the doctrine of predatory pricing.<sup>162</sup> Dumping is not simply a predatory mechanism; it is a much more general practice that can cause harm within the

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156. I am not addressing the entire body of rules under "abuse of dominant position" under Article 102 of the Treaty nor the entire monopoly power under U.S. Antitrust Laws, as those practices are generally more remote from the problem of goods dumping that I am portraying than predatory pricing. For abuse of dominance position, see generally WHISH & BAILEY, *supra* note 7, at 361.

157. ELHAUGE & GERADIN, *supra* note 14, at 382-83.

158. *Id.* at 353.

159. *See e.g.*, Treaty on the Functioning of the European Union art. 102, Dec. 1, 2009.

160. A typical example from U.S. antitrust law would be the case *United States v. AMR Corp.* that involved the nature of permissible competitive practices in the airline industry under the antitrust rules of this country, centered around the hub and spoke system of American Airlines (AA). The AA practice was alleged to be monopolizing or attempting monopolization through predatory pricing in violation of Article 2 of the Sherman Act. However, the government did not prove the pricing below AVC, but proposed a test that would imply the price of average total cost, which the courts rejected. *See United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

161. *See ELHAUGE & GERADIN, supra* note 14, at 352.

162. *Id.*

context of the European Union, and can particularly harm the actors of the periphery.<sup>163</sup>

#### E. *Arbitrage and Corrective Mechanisms*

Provided that the companies' home market is shielded against the price drop that would neutralize price discrimination, dumping can have clear advantages for the individual exporter. "Price discrimination is possible when a seller is able to identify separate markets for its product and charge a higher price in a market that attaches a greater utility to the product."<sup>164</sup> As a general rule, companies can use price discrimination, i.e., apply different prices between domestic and export sales, "when their home market is not freely accessible to imports of the goods in question while the export markets are"<sup>165</sup>—in other words, when markets are segregated.

In international trade, a foreign producer enjoys a sanctuary home market for a variety of reasons, including:

- (a) the government's unwillingness to enforce competition laws;
- (b) excessively high tariff rates for the product, as compared to other WTO members' rates;
- (c) non-tariff barriers to entry such as abusive industry norms, standards, testing procedures, restrictions, or closed distribution systems;
- (d) the government's implicit guarantee against continuing losses; and
- (e) market-distorting industrial policy.<sup>166</sup>

How can price discrimination be possible on the internal market? It is assumed that people, goods, services, and capital circulate freely on the European internal market and that the regulatory work, including its implementation, is harmonized within the European Union. On this assumption, the dumper can only discriminate or sell below cost provided that his or her home market is shielded against arbitrage, i.e., resale or retaliation, and a consequent price drop that would neutralize discrimination. Import tariffs and measures of equivalent effect are strictly prohibited, and the Commission and the European Court of Justice vigorously fight the restrictions of parallel imports and exclusive distribution systems.<sup>167</sup>

It is assumed that an integrated market is a very hostile environment for those who attempt to make gains by sustained selling below cost. The assumption is that on the integrated market, governed by the freedom of

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163. See JACKSON, DAVEY & SYKES, *supra* note 103, at 686-87.

164. Khan, *supra* note 114, at 37. See also WILLIAM F. SAMUELSON & STEPHEN G. MARKS, *MANAGERIAL ECONOMICS* (4th ed. 2003).

165. Kukovec, *Law and the Periphery*, *supra* note 41, at 421 n.72.

166. See Wu, *supra* note 58, at 166; see also JACKSON, DAVEY & SYKES, *supra* note 103, at 691.

167. WHISH & BAILEY, *supra* note 7, at 639-41.

movement of goods, services, capital, and people, which creates a level playing field and gives maximum impact to the role of market forces, firms are compelled to price in relation to efficiency.

Based on this assumption, there is little incentive to carry out a strategy of below-cost selling or price discrimination on any other than a short-term basis, given that competitors are free to retaliate with equally low prices. Such a strategy would force prices down with no offsetting gain in terms of increased market share. With these inbuilt constraints on unfair pricing, competition rules can be restricted to maintain a level playing field, through action, for example, against cartels or abuse of dominant position.<sup>168</sup> The general assumption in legal and economic theory is that dumping is therefore not possible on the internal market.<sup>169</sup>

Under the conditions of the internal market, it is assumed that there would only be room for very limited and short-term price discrimination between different parts of the market, because this would lead to immediate arbitrage or retaliation by competitors. In other words, “there must be some barrier between the markets so that the lower-priced goods are not resold in the higher-priced market by an arbitrageur.”<sup>170</sup>

Vertical restraints are indeed designed to facilitate price discrimination against consumers.<sup>171</sup> If, for example, a supplier sells at a higher price in geographic markets where consumers are richer and willing to pay more than consumers in poorer markets, the retailer in the poorer markets who has the option of buying at a lower price can resell to the richer markets. To prevent reselling, the manufacturer could impose vertical territorial restraints to prevent reselling to the richer markets and keep the markets segmented.

Antitrust rules prohibit several vertical agreements. Prohibition of exclusive distribution agreements and parallel imports are important parts of the EU’s (or the United States’) antitrust mechanism. Exclusive distribution or exclusive dealership is a legal relationship in which a retailer is given a guarantee by the manufacturer that no other retailer within its geographic area will be supplied by that manufacturer. The supplier’s purpose in granting exclusivity may be to provide the distributor with incentives to promote the product and provide better service to customers, but it may also enable price discrimination, because it does not allow others to sell on this particular territory at a lower price.

Parallel import is the trade of products that takes place outside the official distribution system set up by a particular firm. The prohibition of parallel imports is indeed often a concomitant measure of the manufacturer toward exclusive distribution, because it ensures the exclusivity of a particular dealer, but it may also be a measure independent of an exclusive distribution agreement. Firms may charge different prices in different

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168. See JACKSON, DAVEY & SYKES, *supra* note 103, at 689.

169. See, e.g., MÜLLER, KAHN & SCHARF, *supra* note 104, at 11.

170. Khan, *supra* note 114, at 37.

171. WHISH & BAILEY, *supra* note 7, at 721 .

countries, through their distribution system, exploiting differences in the behavior of consumers.<sup>172</sup> Parallel traders buy products in countries where they are sold at lower prices to sell them in high-price countries. The flow of products thereby created is called parallel trade.<sup>173</sup>

European Union law has always been opposed to the presence in vertical agreements of territorial restrictions designed to prevent parallel trade between Member States. Parallel trade, in fact, concerns a significant amount of goods and services in certain economic sectors, such as motor vehicles or drugs.<sup>174</sup> It is stimulated by the price differences between Member States, which are due to different factors such as taxation,<sup>175</sup> labor costs, and regulatory regimes, though the latter are becoming increasingly similar under internal market rules.

In EU law, price discrimination has been viewed as causing significant harm, especially when the price discrimination is among different national markets. EU competition law has stressed the policy of creating a common market that transcends national boundaries. This is why EU competition authorities have been very strict in their evaluation of vertical agreements and may have been stricter than the authorities of other jurisdictions. As EU competition authorities are vigorously opposing such vertical agreements, the argument is that the prohibition of vertical agreements prevents price discrimination and works toward the equalization of prices in the Union.

However, the conclusion that free movement and antitrust rules lead to the equalization of prices in the Union is not borne out by the numbers. As set out in section II above, the annual price review in the European Union made by the Eurostat confirms that prices are often significantly lower in the European periphery than they are in the center.<sup>176</sup>

The prohibition of vertical agreements does not necessarily lead to price increases in the periphery and to price reduction in the center. It does not prevent companies of the center from engaging in goods dumping

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172. *Parallel Trade*, GLOSSARY OF COMPETITION TERMS <https://www.concurrences.com/en/droit-de-la-concurrence/glossary-of-competition-terms/Parallel-trade-parallel-imports> (last visited Oct. 24, 2016).

173. See WHISH & BAILEY, *supra* note 7, at 112.

174. See, e.g., *Parallel Trade in Europe*, EUR. ALLIANCE FOR ACCESS TO SAFE MEDICINES, <http://www.eaasm.eu/parallel-trade-in-europe> (last visited Oct. 24, 2016).

175. It should be noted that the price differences that can be identified along the center-periphery cannot be attributed to the differences in taxation alone. As for the VAT, it is partially harmonized. See EUR. COM'N., *VAT rates*, [http://ec.europa.eu/taxation\\_customs/taxation/vat/topics/rates\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/vat/topics/rates_en.htm) (last visited Oct. 24, 2016). The differences between VAT rates in the EU are indeed too small to explain the price differences: See EUR. COM'N., *Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015* (Apr. 4, 2016), [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/vat/how\\_vat\\_works/telecom/explanatory\\_notes\\_2015\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf).

176. The Eurostat price report gives some examples from the report. In order to inform consumers of different car prices in different EU countries, the European Commission annually issued a report on car prices. See European Commission, Eurostat, *supra* note 100.

and harming the periphery. Why do prices remain different in the center and in the periphery, or within the center and within the periphery despite the internal market and despite the prohibition of vertical restraints?

First, parallel imports, which could potentially work toward the equalization of prices, do not occur. There are various reasons for this. Consumers or entrepreneurs may not be aware of price differentials due to the lack of information. When prices are set by the state, they are made public, and more transparent, and parallel imports are likely to follow from them, as was the case in the *GlaxoSmithKline* case.<sup>177</sup> When prices are set by corporations, a greater effort is needed to discover price differences.

Furthermore, transaction costs present a large share of costs of any activity as well as those costs, including transport costs, administrative costs, and other opportunity costs, that might deter parallel trading. Viability of parallel trading also depends on the type of goods and on the existing segmentation within the markets of the center (and of the periphery). It is more difficult to imagine arbitrage for luxury goods, which are sold by licensed retailers in the center. For wealthy consumers, the option of buying luxury products from non-licensed distributors is not an appealing option as it reduces their prestige and raises doubts about quality. Outlet stores throughout the center often cater to the needs of its customers who are willing to buy from less reputed retailers at a lower price, which reduces the incentives for parallel trading. For perishable goods, parallel imports are also generally a less viable option. It may not prove to be profitable to transport perishable goods, such as Danone yogurt which is produced in France or Austria, and shipped to, for instance, Romania, and then back to France or to Sweden.

In addition, parallel importing, which could potentially work for the equalization of prices does occur, but it does not result in a significant price increase in the center. Even if parallel importing does occur, parallel importers, who decide to pursue the business, will add transaction costs to the equation, including transport and their own margin to the lower price at which they buy a product. This again reduces pressure on prices in the center. Furthermore, very often the markets of the periphery are smaller, either in terms of population or purchasing power, and, when this is the case, parallel imports would have a more limited effect on the larger markets of the center.<sup>178</sup>

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177. Case C-501/06, *GlaxoSmithKline Services Unlimited v. Commission of the European Communities*, 2009 E.C.R. 2009 I-09291.

178. The dumper's home market is further shielded against arbitrage or retaliation and a consequent price drop that could reduce discrimination by the simple size of the center's market. Periphery's markets in the European Union are generally smaller than the markets of the center, not only in terms of population, but in purchasing power. The quantities from the periphery resold on the center's markets are therefore unlikely to have an influence on the price in the center that would disable discrimination.

### F. *The Shortfall of Parallel Imports Prohibition*

The reason EU law encourages parallel trading is to allow factors of production to move to the area where they are most valued, thus improving efficiency of the allocation of resources. This is assumed to also have a positive impact on social goals such as employment, improving workers' welfare, and so on. The goal is not necessarily to equalize prices, though this is deemed to be the side effect of free movement provisions. Parallel trading would enable the movement of goods to their most efficient use to the center,<sup>179</sup> where consumers allegedly value them more because they are prepared to pay a higher price for them. This would result in a rise in prices in the periphery and would reduce prices in the center.

However, any producer who wishes to raise prices in the periphery would face an immense countervailing buyer power—the population's low purchasing power. Because purchasing power in the periphery is much lower, higher prices would result in a rapid decrease of quantity of demand—unless the goods are essential, in which case the elasticity of demand is lower.

There is indeed strong pressure for low prices in the periphery, also at the expense of quality. It is no secret that many center companies sell, under their brand, products of a lesser quality on Eastern and Southern European markets.<sup>180</sup> Some companies in the center ship second-rate goods to the periphery, or produce them at lower standards in the periphery, under a brand of the center. Because some of these products are sold under known brands—given that these companies have deep pockets to finance their advertising campaigns and due to the lack of information of the consumers living further away from the center countries—these companies retain large market shares in the periphery, despite the fact their products are of lower quality than the ones sold in the center's markets.<sup>181</sup>

Consumers and consumer organizations have complained of the lesser quality of a range of products sold on the Eastern market—some for the same price and some for a lower price than products sold on the Western market.<sup>182</sup> These products are furthermore most often produced, based on the right to relocation bestowed to companies from high-wage countries

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179. See ELHAUGE & GERADIN, *supra* note 14, at 843.

180. For repetitive questions of members of the EU parliament to the European Commission on this subject, compare Diogo Feio, *Question for Written Answer to the Commission: Quality of Products Sold in the New Member States*, EUR. PARLIAMENT, <http://bit.ly/2bjfEUd> (last updated May 12, 2011) with Marc Tarabella, *Question for written answer to the Commission: Difference in the quality of the same product in different countries*, EUR. PARLIAMENT, <http://bit.ly/2caXNkV> (last updated July 3, 2013) (demonstrating repetitive questions).

181. Some of these products were also particularly coveted before 1989 on the Eastern side of the Iron curtain as they were difficult to obtain, which has given them an additional competitive edge over local products. MICHAEL LUND, *FROM KARL MARX TO TRADEMARKS*, [http://www.lnd.dk/baggrund\\_oesteuropa.html](http://www.lnd.dk/baggrund_oesteuropa.html) (last visited Oct. 24, 2016).

182. See, e.g., *Life, Lenor, Silan, Ornela – What?*, MED.OVER.NET (Aug. 8, 2007), <http://med.over.net/forum5/read.php?151,4209022> (consumer discussing the quality of various detergent brands available in the Eastern market).

by EU law in a *Viking* case scenario,<sup>183</sup> using cheaper labor in Eastern Europe, which enables them to cut prices further.

### G. *The Underlying Reason for Market Segmentation*

Prices in the Union cannot be equalized by the prohibition of vertical agreements, i.e., “by the market.” Price differentials as well as wage differentials throughout the Union depend on a number of factors, such as different tax systems or productivity. But one of the key factors for different wages and prices in the EU is the *difference in wealth between regions of Europe*, and this factor is widely absent from legal (and economic) analysis of antitrust law.

Companies from the center do not need to segment markets by vertical agreements. The territorial division of prices and different elasticity of demand is already prepared for them by the massive difference in development and wealth.<sup>184</sup> They adjust their prices according to a preexisting condition. Pricing is often made according to the level of economic development of a country or a region, either by companies<sup>185</sup> or by government regulation, as in the *GlaxoSmithKline* case.<sup>186</sup> Price segmentation is not caused by territorial segmentation of the market by the actions of a particular agent. Lower prices in the periphery are due to the hierarchical deep structure of the Union. The periphery has lower wages and lower prices of products, and the actions of a single producer, independent of its position on the market, have a very limited effect on this structural difference.

It would be therefore incorrect to conclude that markets in the Union cannot be or are not segmented because of free movement provisions or because of the prohibition of restrictions on parallel imports or exclusive distribution agreements. These provisions may sometimes lessen such segmentation, but they do not alleviate it. Keeping prices higher in the center and lower in the periphery may only sometimes be more difficult because of these provisions.

Market segmentation is not a consequence of a sporadic action of a single dominant firm or of an act of government (as is generally the case in international trade), as the latter action would be prohibited under the free movement provisions (of goods, services, capital, or workers). Rather, it is inherent in the structure of the Union internal market. Then the question is—who is allowed by the legal system to take advantage of this segmentation?

One of the goals of the single currency, the Euro actually was to enable direct price comparisons to be made of products in different coun-

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183. See Kukovec, *Law and the Periphery*, *supra* note 41, at 425-26.

184. See e.g., *List of European countries by GDP per capita*, STATISTIC TIMES, <http://statisticstimes.com/economy/european-countries-by-gdp-per-capita.php> (last updated Sept. 3, 2015).

185. See e.g., GLOBALBRANDPRICES.COM, [http://www.globalbrandprices.com/rankings/Coca\\_cola/](http://www.globalbrandprices.com/rankings/Coca_cola/) (last visited Oct. 24, 2016).

186. See Case C-501/06, *GlaxoSmithKline Services Unlimited v. Commission of the European Communities*, 2009 E.C.R. 2009 I-09291.

tries.<sup>187</sup> This would also lead to the lowering of price differentials in different countries. Such gaps were deemed to be fueled, in part, by different currencies. Nonetheless, the prices in the center simply reflect a higher living standard, and many have remained higher long after the adoption of the Euro.<sup>188</sup>

The European internal market does not only suffer from segmented consumer markets; wage segregation is an obvious correlative phenomenon that triggered the *Laval* and *Viking* judgments in the first place.<sup>189</sup> Wages in the periphery are much lower than they are in the center.<sup>190</sup> Just as parallel imports and the prohibition of vertical agreements such as exclusive distribution are not able to equalize prices in the Union, the free movement of workers is unable to (if one would at all accept this as desirable) equalize wages in the Union.

Wages and salaries remain higher in the center despite the fact there is a free movement of workers in the Union. So why do people from the periphery not just migrate and work in the center? Would Latvian workers find a job in Sweden if their Latvian employer had not been awarded a contract to perform works in Sweden, as in the case of *Laval*? Unless there is a deficit of a particular kind of workers in the center, workers from the periphery do not always easily compete with workers of the center, given the differences in language, education, and so on. There are large structural, formal, and informal barriers at play that prevent the movement of many workers, let alone the equalization of wages across the Union. The parallel importation of a cheaper workforce, if it happens at all, has little influence on the large disparity of wages or salaries in the Union. Migration of the workforce from the periphery can reduce wages in some isolated sectors, but this does not translate to a general equalization of wages across the Union.

Bela Balassa notes that national restrictions to migration hinder the movement of labor, and that their elimination is a necessary, but not sufficient condition, for achieving desirable labor movements. According to Balassa, numerous sociological, psychological, and economic obstacles impede migration. These stem from the migrants as well as the local population.<sup>191</sup> Differences in language, religion, customs, climate, educational, medical and shopping facilities, cooking habits, and, in general, the loss of the accustomed environment are some examples of sociological or psychological hindrances.<sup>192</sup> “Job and wage insecurity, loss of seniority, and inad-

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187. See e.g., *Why the Euro?*, EUR. COMM'N, [http://ec.europa.eu/economy\\_finance/euro/why/index\\_en.htm](http://ec.europa.eu/economy_finance/euro/why/index_en.htm) (last updated July 15, 2015).

188. See European Commission, Eurostat, *supra* note 100.

189. See *supra* Section II.

190. European Commission, *Labour Market Developments in Europe* at 143 (2013), [http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2013/pdf/ee6\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee6_en.pdf).

191. BELA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* 90 (1961).

192. *Id.*

equate housing facilities at the place of immigration” are some of the economic obstacles.<sup>193</sup>

The effect of free movement of workers provisions on the equalization of wages serves to further illustrate that perfect competition remains an elusive ideal and that there are numerous obstacles in the market unrelated to tariffs or to what is usually understood as a barrier. Competition law, by prohibiting exclusive distribution and allowing parallel imports, cannot create perfect equality of prices and thus cannot be understood as an excuse for allowing the practice of dumping on the internal market. In other words, the EU legal profession cannot absolve itself of its responsibility to protect the periphery from dumping by prohibiting limits on parallel imports and exclusive distribution agreements, and even less so by the mistaken assumption that dumping is not possible on the internal market.

The idea that there is a free market as a basis for parallel imports to equalize prices entails two false assumptions. Both assumptions build upon the error of the other. First, that there is such a thing as a free market without barriers. Second, that the European Union is already such a free market in which there is equal access to all and that everyone inhabits the same structural situation on the market.

Thus, it should be obvious that there is more at play here than the nonexistence of a “perfect” market in which all factors of production are completely free to move to the area where they are most valued.<sup>194</sup> It is the very structural differences inherent in the EU that reproduce the price inequalities that have been my focus thus far (structural differences which the creators of the Euro, by no coincidence, failed to account for).<sup>195</sup> This is to say that the purportedly single market of the EU is in fact a highly differentiated and segmented market regulated by the consciousness of the “single market” as seen from the EU’s center.

A “real” internal market free from barriers to trade is an illusion. The EU internal market is not a constant advancement of free movement considerations over social considerations, as EU lawyers from both political poles would like to see it. Rather, it is a complex set of entitlements allocated differently between different actors in the Union. [In reality, the European Union internal market] is, [as any market,] a single market in which some obstacles to some movements are sporadically reduced and some obstacles to some movements are added.<sup>196</sup>

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193. *Id.*

194. For a general discussion questioning the theory of perfect competition, see WHISH & BAILEY, *supra* note 7, at 7-10.

195. For commentary regarding the economic disadvantages of adopting a single European currency, see Martin Feldstein, *Europe’s Monetary Union: The Case Against EMU*, *THE ECONOMIST* (June 13, 1992); Martin Feldstein, *The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability*, 11(4) *J. ECON. PERSP.* 23 (1997).

196. See Kukovec, *Hierarchies as Law*, *supra* note 18, at 167.

The central question of analysis should thus be not whether a regime is or is becoming a freer trade regime or more akin to an internal market—a more private or a more public regime—but whose obstacles in the hierarchical structure are reduced and whose are increased.<sup>197</sup>

Factors of production are themselves a phenomenon with various emanations and regulation always affects them unequally. The legal system is a plethora of compromises that have a very specific effect on the movement of factors of production, but differently on different factors within each group of factors of production. These compromises result in entitlements that help some movements and deter others. Different capital, workers, goods, or services are mobile differently as a result of the hierarchical structure of society. People have different legal entitlements depending on their place in the hierarchical structure of society.

#### V. ARGUMENTS AGAINST DUMPING AND AGAINST LOW PRICING

Some international trade scholars would contest the idea that dumping is at all harmful, which would also cast doubt on my own construction of dumping. The desirability of using antidumping duties and prohibiting price discrimination has been contested by some international trade law scholars.<sup>198</sup> The bedrock assumption is that the companies engaged in dumping are behaving perfectly rationally by adapting their strategy to the demands of the particular markets.<sup>199</sup> Allocative efficiency is achieved under perfect competition because producers, assuming they are acting rationally and have a desire to maximize profits, will expand their production for as long as it is privately profitable to do so. Economic theory teaches us that the appropriate price for a rational producer to charge is the price at which marginal revenue from the sale of a product is equal to its marginal cost, even though the additional revenue does not cover the total cost of the product sold. This is why short-term, below-cost sales under such circumstances are viewed as rational and not viewed as predatory under antitrust laws.<sup>200</sup> Below-cost sales in the short term are often deemed as rational if marginal costs do not exceed marginal revenues and should therefore not be controlled.<sup>201</sup>

It is deemed rational that a company may wish to set prices above marginal cost to recover some fixed costs for those who are willing to pay more, while setting prices at or near marginal cost for those who can only afford to pay less to acquire the product or service in question. “So if marginal costs are, say, ten percent of the list price, and there is a customer who is unwilling or unable to pay more than fifty percent of the list price

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197. *Id.* at 168.

198. *See, e.g.,* Wu, *supra* note 58, at 169-72.

199. *See id.* at 111.

200. Davey, *supra* note 110, at 276.

201. *See generally id.* Mark Wu takes a similar position to Davey. *See* Wu, *supra* note 58, at 110-12.

for the product, it is in the interests of both the customer and the dominant company to grant the fifty-percent discount.”<sup>202</sup>

In this description, everyone benefits. The dominant company obtains revenues from the sale. The customer can afford to buy a product, which he or she otherwise could not. Goods and services are apportioned among consumers according to the price they are willing to pay. The transaction is precompetitive and economically rational and its prohibition would harm both consumers and producers. Economists thus do not tend to view price discrimination with any particular suspicion. Rather, they perceive its effects as positive or at least not obviously anticompetitive.<sup>203</sup>

The displacement of one competitor by another is not considered cause for concern according to international economic law and antitrust economic theory, assuming that the prevailing competitor's behavior is not predatory. The argument is that if the price is not predatory, it should benefit from a very strong presumption of legality, since it will generally be procompetitive and based on efficient market behavior. There is thus no reason to protect one set of competitors in preference to another set so long as competition in the market is not affected.<sup>204</sup> An objection to this analysis could be that “failure to prevent below-cost sales will allow a recession-bound economy to export recession to its trading partners.”<sup>205</sup> Nonetheless, William J. Davey argues that, given the interdependence of economies, it seems fairest to let the strongest companies survive, wherever they are located, and to assist other competitors to adjust.<sup>206</sup>

Such thinking in economic theory has resulted in a recent trend toward the normative maximization of costs (of the predator, or of the dumping company) above which pricing is not perceived as predatory,<sup>207</sup> or above which pricing is not perceived as dumping.<sup>208</sup> According to this thinking, the lower the boundary of permitted low pricing, the more the consumer will benefit and the more welfare will be created.

In this line of thinking, Mark Wu critiques the existing standards of dumping in international trade as inefficient and protectionist and argues for its change.<sup>209</sup> According to Wu, instead of requiring evidence of price setting below average variable cost, international law currently only requires evidence of price setting below the product's “normal value,” a legally constructed term defined as “the comparable price, in the ordinary

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202. See generally JACKSON, DAVEY & SYKES, *supra* note 103.

203. John Temple Lang & Robert O'Donoghue, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, 26 *FORDHAM INT'L L.J.* 83, 89 (2002).

204. See generally Davey, *supra* note 110.

205. *Id.* at 277.

206. *Id.*

207. Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory – And the Implications for Defining Costs and Market Power*, 112 *YALE L.J.* 681, 826 (2003).

208. Wu, *supra* note 58, at 111.

209. *Id.*

course of trade, for the like product.”<sup>210</sup> Most often, argues Wu, “normal value” equals the price charged by the foreign producer in its home market. Thus, he continues, under the existing standard, any firm that charges less for its product abroad than it does at home may be found guilty of dumping.<sup>211</sup>

Wu further believes that firms that participate in this type of pricing approach are behaving entirely rationally.<sup>212</sup> A firm may be simply deciding strategically to earn less profit in an export market than in its home market. This happens primarily when the firm seeks to establish reputation in another country, or when its goal is a higher market share. The firm may desire to exploit dissimilarities in the elasticity of demand across the countries. “Provided that the firm is pricing above its average variable costs, its behavior should not be considered problematic, and according to economic theory, no remedy is necessary. Moreover, the net effect for the importing country is often positive, since consumers experience welfare gains from lower prices.”<sup>213</sup>

Thus, Wu argues, governments who are using antidumping measures for imports sold above the average variable cost are acting as protectionists. They are “benefiting domestic producers at the expense of domestic consumers and foreign producers, without an economic justification for doing so.”<sup>214</sup> “Rational,” non-predatory behavior should therefore not be punished.<sup>215</sup> Hence, current antidumping laws are an economically inefficient and protectionist instrument, which harms global welfare and leads to unjust global consequences.<sup>216</sup>

This trend of thinking about low prices is also present in antitrust law. Unless price-cutting is contained to the narrow scenarios of predatory pricing, it is considered among the most desirable of business activities. Einer Elhauge argues that the last thing of interest would be to enable firms to use antitrust law to discipline rival price cuts.<sup>217</sup>

In the context of predatory pricing, Elhauge argues the benefit of lower prices and proposes an even lower boundary of permitted low pricing than Wu. According to Elhauge, if the capital-intensive firm has increased output to displace its rival’s output, we should look only to the higher variable costs of the allegedly predatory *increase in output*, not to the lower variable costs of producing the predator’s entire output.<sup>218</sup> Prices at or above those higher average variable costs cannot drive out a rival that is equally efficient at making that increment of output. The rival

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210. See WTO Antidumping Agreement, *supra* note 120.

211. Wu, *supra* note 58, at 111.

212. *Id.* at 102.

213. *Id.* at 111.

214. *Id.*

215. *Id.* at 112.

216. *Id.* at 106.

217. ELHAUGE & GERADIN, *supra* note 14, at 353.

218. Elhauge, *supra* note 207, at 713.

output can more efficiently be supplied by an increase in the capital-intensive firm's output, although the capital-intensive firm may be exceeding its optimal capacity.<sup>219</sup>

Reasoning in terms of the maximization of global welfare, in terms of maximization of the pie, follows the ideas of Ronald Coase, as well as of Guido Calabresi and A. Douglas Melamed,<sup>220</sup> in terms of the optimization of social cost. Coase rejected the Pigouvian formulation of the problem in cases such as factory's smoke emissions that have harmful effects on those occupying neighboring properties. The economic analysis of such a situation has preceded in terms of a divergence between the private and social product of the factory, which resulted in either taxing the factory owner according to the damage the smoke caused, or making him or her liable to those injured by the smoke. According to Coase, these courses of action were inappropriate and led to the results which were not necessarily, or even usually, desirable.<sup>221</sup>

Therefore, instead of attempting to somehow make the "private costs" faced by the factory owner match the "social cost" of his or her activity, Coase argues that the legal system should aim, in all cases of harmful effects, to maximize the value of production, taking into account the welfare and conduct of all affected parties.<sup>222</sup> We should consider a wide variety of mechanisms by which harm might be mitigated or avoided. The goal should be to choose the solution that yields the least costs. That cannot be achieved on the basis of theory. Instead, it "has to come from a detailed investigation of the actual results of handling the problem in different ways."<sup>223</sup>

However, efficiency and social cost are evaluated in a particular manner by those who argue for the benefit of low pricing in dumping (as well as in predatory pricing). The social benefit and optimization are considered in terms of a cost and benefit to an abstract company and an abstract consumer, which misses the complexity of the hierarchical structure of society. The existing debate on dumping and predatory pricing practices revolves, as in the discussions surrounding *Laval* and *Viking* judgments, in terms of a *universalized* interplay of low prices and protectionism, in terms of the universalized interests of companies and consumers.<sup>224</sup> As such, it does not give us a good sense of how antidumping law affects people's welfare in the European Union, of people in diverse hierarchical situations in the legal structure.

As the practice of goods dumping that I am describing is generally possible only by companies of the center and it affects consumers and

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219. *Id.*

220. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

221. Coase, *supra* note 51, at 2.

222. *Id.* at 18.

223. *Id.* at 18-19.

224. See generally Kukovec, *Law and the Periphery*, *supra* note 41.

companies of the periphery, abstract social welfare calculation in terms of an abstract producer and an abstract consumer is not sufficient to determine the desirability of the regulatory regime that is being constructed, and it leads to the mistaken perception of a desirability of low pricing.

When following the argument of cost minimization, the social cost should not be constructed in the abstract. Rather, the question to be asked is—whose efficiency considerations are taken into account and whose claims of injury are being challenged? From whose perspective do we minimize costs? The choice we make should not be between economic efficiency and protectionism (sometimes referred to as equity or justice in contrast to efficiency); rather, the choice is between different constructions of the legal system. In other words, instead of thinking in terms of a game between efficiency/low prices and protectionism, dumping and antitrust analysis should rather be made with a self-conscious awareness of one's understanding of injury inflicted on people in diverse structural positions in society at any moment in time and the consequences the existing understanding of harm entail. In this approach, the starting point of normative economic analysis should be the hierarchical structure of society, not the minimization of social costs based on premises of assumptions of people's equality and universalization.

Davey has argued that unless we let the strongest companies survive and assist others to adjust, it would require supporting domestic producers' government-protected entitlement to a certain market position.<sup>225</sup> However, those who are allowed to harm other producers in the current regulatory setting have a government-protected entitlement to a certain market position just as well. This becomes even more important when there is a structure at play enforcing who can inflict injury—when only companies of the center can profitably engage in the kind of dumping that I am describing. Generally, the lower the permitted low price in a dumping or predatory scenario is set, the greater the privilege of the companies of the center to harm companies of the periphery and become more efficient at their expense.

## VI. COMPETITION ON THE MERITS?

There is no real “internal market” that one could aspire to construct,<sup>226</sup> just as there is no state of “perfect competition.”<sup>227</sup> Both are a matter of choice and construction,<sup>228</sup> which cannot rely on reductionist notions of consumer or producer welfare. No stage of economic integration or legal construction is inherently more public, more private, more protectionist in the abstract. The question is rather, who is protected by law in a particular structural situation. This also diverts the focus of international economic law inquiry away from considering borders and related

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225. Davey, *supra* note 110, at 687.

226. Kukovec, *Hierarchies as Law*, *supra* note 18, at 167.

227. WHISH & BAILEY, *supra* note 7, at 7.

228. Kennedy, *supra* note 23, at 444.

measures as the main obstacle to trade. The dilemma of antitrust and trade law should not be understood as a choice between a consumer or total welfare standard or between efficiency and protectionism, but whose structural injury do we acknowledge and resist in legal and economic analysis.

Companies in the center start from a position of dominance,<sup>229</sup> which is further reinforced by the EU legal structure. The center companies' cost structure is more efficient also because of the privilege to harm bestowed on them and withheld from periphery companies. A competitor from the periphery's position differs because its ability to profitably engage in the dumping described is hindered, or even impossible. Dumping and price discrimination above average variable costs differently affects the cost structure of companies precisely because of their structural position as central or peripheral. Position enables economies of scale for companies of the center as a company's variable costs and average variable costs decrease when a company is able to lower prices profitably. Low export prices generate further sales and improve economies of scale, which in turn lower the costs of production.

On the other hand, dumping causes failing prices, declining sales, and increasing average variable costs of production for periphery companies. This prevents affected companies from expanding and consequently, makes it more difficult for periphery competitors to enter the center's markets.

If the government decides to set the price prohibited by competition law very low, this benchmark contributes to an upward cycle for companies from the center. If price discrimination and the consequent low prices in the periphery are permitted, the bigger the upward spiral for companies from the center. The same upward spiral for companies from the center creates a symmetrical, but inverse, downward spiral for their competitors from the periphery. For companies on the periphery, price discrimination

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229. The power of companies of the center is, for example, pronounced in the case of companies with brand names. The European periphery has very few brands known beyond its borders, whereas the famous brands come from the center. For example, most brands registered with the OHIM are from the companies of the center. See Statistics of Community Trademarks, at 44 (last visited Oct. 24, 2016), [https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/about\\_ohim/the\\_office/SSC009-Statistics\\_of\\_Community\\_Trade\\_Marks-2014\\_en.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_ohim/the_office/SSC009-Statistics_of_Community_Trade_Marks-2014_en.pdf). The European Union's most valuable brands come from the center. See *Eurobrand Global Top 100*, EUROBRAND (last visited Oct. 24, 2016) <http://www.eurobrand.cc/studien-rankings/eurobrand-2012/>. The power of branded companies is significant. Non-branded companies typically earn smaller gross margins and are constantly at risk of being undercut by cheaper rivals. Branded firms enjoy much bigger margins and more loyal customers. Non-branded companies typically earn gross margins of three to five percent and are constantly at risk of being undercut by cheaper rivals. Branded firms enjoy much bigger margins (fifteen percent or more). *Brand New*, THE ECONOMIST (Aug. 4, 2012), <http://www.economist.com/node/21559894>. Non-branded companies typically earn gross margins of three to eight percent, and are constantly at risk of being undercut by cheaper rivals. It should be noted that I am not using the term "dominance" in the sense of antitrust/competition law here. It should be noted, however, that the usage of dominance in this sense does not directly correspond to the technical term "dominance" of antitrust law.

and internal dumping lead to higher costs, lower sales, stagnation, and possibly exit.

Moreover, Wu's conception of harm is exacted on a universalized notion of a consumer who buys products, not a consumer who simultaneously works to earn money to buy these products, and it does not take into account the fact that dumping might be performed selectively, as in the European Union. Wu's reasoning gives, at least in the context of the EU legal structure, companies of the center benefit from a reinforced privilege to harm companies of the periphery, which in turn allows them to produce at even lower costs and harm companies of the periphery even more.

The argument that when companies dump, they are only behaving "perfectly rationally"<sup>230</sup> combined with a concern for administrability of the system<sup>231</sup> thus cannot be a sufficient normative guide for the construction of the legal structure. It is by all means perfectly rational for firms to wish to expand and harm other firms. But this does not mean that we should yield to their particular interests and support an existing specific pattern of simultaneous expansion and destruction in our societies that is increasing welfare for some and decreasing the welfare of others. Wu's normative guidance is that allowing low pricing coupled with an ex post facto "fairness" analysis is supposed to compensate for the possibility of methodological manipulations permitted for calculating "normal value" under existing law.<sup>232</sup> But Wu's normative analysis already has a particular normative twist; and, at least, in the context of dumping in EU law, it tends to harm the actors of the periphery.

Likewise, we might consider Baker and Salop's suggestion that regulatory agencies might forgo using scarce resources for matters where the bulk of harms are suffered by the rich. They cite luxury goods as an example, such as fine crystal products or yachts,<sup>233</sup> premium fountain pens, gem-quality diamonds, stock brokerage services, auctioning of high-end art, luxury automobiles, and skiing which are likely disproportionately used by the well-to-do.<sup>234</sup> Yet, what does an unfettered privilege to injure of the corporations in the European center producing luxury goods mean for the development of industry capacities in the periphery and for the penetration of the luxury-products market of peripheral companies? What privileges to harm will remain unnoticed in such analysis of antitrust and trade?

Thinking about consumers only as the spenders of money, not as workers or members of a particular community misses the daily dimensions of our lives and leads to misleading appreciation of welfare. Similarly, thinking about social dumping as a measure offering protection only

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230. Wu, *supra* note 58, at 111.

231. *Id.* at 117. Mark Wu's primary concern is that more and more countries are enforcing anti-dumping legislation and that thus the system cannot continue to operate as it has.

232. *Id.* at 166.

233. Baker & Salop, *supra* note 6, at 17.

234. *Id.* at 19 n.65.

to workers, also leads to a mistaken conclusion that social dumping harms workers and goods dumping harms companies. In reality, those conceptions harm both workers and companies. The question remains—which workers and which companies will be protected and which ones will be harmed by the legal system? Current legal and economic thinking tends to give preference to the interests of workers and companies of the center.

#### CONCLUSION

The existing antitrust and international trade debate does not adequately address the complexity of the global hierarchical structure and thus the complexity of privileges to harm that contribute to the reproduction of existing hierarchies in our societies. Current debates, like that between Salop and Baker with Crane, show both overstated optimism that current antitrust thinking can capture reality, while contributing to intellectual paralysis, limiting the potential for social transformation. Thus, caution should be raised about current antitrust and trade law's potential as a tool for either inequality or economic growth.

Whose justice and growth is being constructed? There are different ways to structure “competition on the merits” and choices with countless alternatives are made in global antitrust and international trade governance. If social transformation is to be taken seriously, rather than resorting to an unquestioned understanding of maximization of global welfare or fairness, the hierarchical structure of society needs to be identified and addressed. This analysis casts doubt on the desirability of the existing normative bases of global antitrust law and anti-dumping law. It argues, among other things, that the consumer welfare standard is incoherent and that low prices should necessarily be considered as beneficial. Yet, it defies a conclusion that the object of resistance is economic theory or economic thinking.

Crane's distributional analysis shows the unpredictable, unforeseen and complex distributional consequences of lawmaking. By contrast, Crane claims the antitrust system is reasonably competent at generating consumer welfare and economic efficiency by creating a larger pie.<sup>235</sup> This “will yield the best allocation of economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of democratic political and social institutions.”<sup>236</sup> However, this system rests on several incoherent assumptions and allows countless injuries that are unrelated to merit, innovation, or effort. The combat against the concentration of wealth, power, and prestige requires a step outside the existing antitrust and trade paradigm and needs to address the hierarchical structure of the global society—the disparity in the global allocation of privileges to harm.

Despite the complexity and difficulty of measuring the precise effects of our work, we can identify repetitive structures at play, structures that

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235. Crane, *supra* note 36, at 1177 n.13.

236. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958).

need to be articulated and addressed. “Dumping practices of the center” is a doctrine that addresses the privilege to harm that is missed both in economic analysis and in the debate about social justice and offers one analysis and explanation for the reproduction of hierarchies and concentration of power, wealth, knowledge, authority, and prestige in the center of the European Union, despite the EU’s promise of equal economic development for all. Unless such hidden hierarchies and injuries are identified, there is no potential for remedying them, neither by the tax and transfer regime nor by the legal system.

But it is not only the European Union that is hierarchically structured. Global society is a hierarchical structure, granting different opportunities to people in diverse positions in the hierarchical structure to injure others. Hierarchies cannot be alleviated, but they can be reversed and reconstructed.<sup>237</sup> The construction of dumping on the EU internal market is situated in a particular time and place, but it is an example of an analysis of the global hierarchical structure that I would propose for the future exploration of challenging the concentration of wealth, power, knowledge, authority, and prestige globally.

Paul Krugman<sup>238</sup> and Anthony Atkinson<sup>239</sup> claim that monopoly and anticompetitive market conditions are among the root causes of wealth inequality, but this is based on a mistaken understanding of global governance. Antitrust enforcement accounts for a tiny fraction of global governance. No field of law alone can capture the complexity or the magnitude of the global hierarchical struggle and of the reproduction of existing hierarchies in the world. The phenomenon is far larger and each of us is implicated in it in every moment.<sup>240</sup> Yet, the tools of antitrust and trade analysis can aid in the articulation of resistance to the existing hierarchical structure.

Reproduction of hierarchies is due to our constant bringing of the past into the present. In other words, the hierarchies and injuries of the past moment that remain unchallenged are the law of today.<sup>241</sup> Lawyers are constantly governing the world as any other person, but we have the analytical tools to articulate these countless injuries and challenge them.

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237. Kukovec, *Hierarchies as Law*, *supra* note 18, at 145.

238. Krugman, *Robots and Robber Barons*, *supra* note 26.

239. ATKINSON, *supra* note 11, at 126-27.

240. Kukovec, *Hierarchies as Law*, *supra* note 18, at 192.

241. *See id.* at 159; *see also* Kukovec, *Law and the Periphery*, *supra* note 41, at 412.