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An Outsider's View of *Dassonville* and *Cassis de Dijon*: On Interpretation and Policy

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My interest in the EC law on free movement of goods is long-standing and more than casual, but much less than scholarly. So I am delighted to contribute some remarks without pretending to expertise.

On Interpretation

Dassonville purports to interpret the Treaty of Rome. As interpretation, it has always seemed to me obtuse, or tendentious—or both—whether the Treaty is viewed as a treaty or as a constitution. The Court could have saved itself a lot of grief, and the volte-face of *Keck and Mithouard*, with a more thoughtful analysis at the start.

In *Dassonville*, the Court simply announces that all measures that have any tendency to reduce imports are 'measures having equivalent effect' to quantitative restrictions.[110] The implicit argument seems to be: 'Quantitative restrictions reduce imports. Therefore any sort of measure that reduces imports has "equivalent effect"'. This is a bad argument. There are many ways to describe the effects of traditional quantitative restrictions (embargoes and quotas). They do reduce imports. More particularly, they reduce imports without reducing domestic production or sales. More particularly still, they reduce imports, without reducing domestic production or sales, and their form is such as to ground a (rebuttable) presumption that they are not justified by any positive effects they may have on domestic non-economic values. We now have three descriptions of quantitative restrictions in terms of their effects. Which should the Court choose? The third, the most complete. The Court is going to condemn (presumptively) any measure whose effects fall within its chosen description of quantitative restrictions. So the description it chooses should be complete enough to explain why quantitative restrictions *themselves* are condemned (presumptively). The description the Court chooses in *Dassonville* fails this test. Only the third description passes this test. And even though it covers many fewer

[110] *Procureur du Roi v Dassonville* (Case 8/74) [1974] ECR 837, para 5. I ignore para 6, as many others have, including the Court. Even if para 6 tempers the rule of para 5 by saying that 'reasonable' measures will be allowed, that does nothing to limit the extraordinary range of measures that para 5 says courts will review for reasonableness.

measures than *Dassonville*, the third description still encompasses not only border measures other than core quantitative restrictions (which Articles 31 and 32 of the Treaty of Rome, now repealed, suggest were probably the main thing the drafters were thinking about), but also facially discriminatory internal measures (which they may have been thinking about, with GATT Article III in mind), and arguably even the sort of facially neutral measures on products/packaging/labeling covered by *Cassis de Dijon*.

In defence of *Dassonville*, one might argue that *Dassonville* and *Keck* were both right when they were decided, at least as policy, since the Single European Act intervened, creating a more effective legislator. But my argument below suggests that *Dassonville* was bad policy as well as bad interpretation, even when it was decided.[111] Alternatively, one might argue that it was necessary for the Court to state an extreme view in *Dassonville*, even if it would prove untenable in the long run, in order to get the attention of national regulators and also of private enterprises, who needed encouragement to challenge trade-reducing regulation (they certainly took the bait!).[112] But just announcing the narrower rule of *Cassis de Dijon* in 1974 would have got regulators' attention and encouraged private challenges, and it would have been much more defensible as interpretation, as well as maintainable over time.[113]

In the next paragraph I shall explain why the result in *Cassis* is more defensible than *Dassonville* as a reading of Article 28(30). But even if the result in *Cassis* is more defensible, the opinion is still very disappointing. The crucial paragraph 8 begins by saying that in the absence of harmonisation, 'it is for the Member States to regulate all matters relating to' alcohol, and 'obstacles to movement within the Community resulting from disparities between the national laws [on marketing alcohol] must be accepted,' . . . and then it takes it back, saying regulations are acceptable only if the Court approves their goal and confirms their necessity.[114] The Court offers no explanation of how such broad powers of review flow from Article 28(30). It offers only an *ipse dixit* cloaked in rhetorical prevarication.

How might one argue that the regulations covered by *Cassis*, when they exclude foreign goods, should be presumed on the basis of their form to be unjustified (thus making them 'equivalent' to quantitative restrictions)? The argument has to be cobbled together from claims that are partly explicit and partly only implicit in the Court's discussion after paragraph 8. The argument is that if goods are allowed to be marketed in one Member State, then they are unlikely to present any serious problems with health, or safety, or the like, and any other problems about consumer awareness that arise if the goods are marketed in another Member State can be dealt with by labelling. So we can presume that

[111] See especially note 131 below.

[112] The point about the need to encourage private parties to challenge regulation was suggested to me by Miguel Maduro.

[113] Just a few years before *Dassonville*, the United States Supreme Court announced an equally broad constitutional rule without the backing of any constitutional provision that explicitly limits state powers of economic regulation: *Pike v Bruce Church, Inc*, 397 US 137 (1970). But the *Pike* test was offered as a summary of more than a century of cases, and the old cases that established the 'dormant commerce clause' were arguably better grounded in the interpretive tradition of their day than *Dassonville* in 1974. In any event, by 1970 the Supreme Court's practice was much narrower than what *Pike* described, and it had been for decades, and it continued so after *Pike*. D Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091–1287.

[114] *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* (Case 120/78) [1979] ECR 649, para 8.

a flat exclusion from the other Member State is not justified; it is unnecessarily restrictive. I do not find this wholly convincing. I wonder whether the Member States are sufficiently homogeneous in their risk-preferences about health, safety, and the environment so that a presumption of equivalence is justified. In addition, I think the Court may be too cavalier in its argument about labelling. The Court ignores the fact that consumers often do not read labels, and the equally important fact that if they did study the labels of everything they buy, this could become a serious inconvenience.[115] The Court favours German consumers who want more choice, at the expense of others who want less choice and easier shopping. Normally, it is the province of the German government to say which group should prevail.[116]

Commentators often defend *Cassis* by arguments about 'double burdens' or discriminatory effect. The Court does not make these arguments, and rightly not. The Court recognises that low-alcohol cassis and high-alcohol cassis are genuinely different products (although it thinks any problem caused by the difference can be dealt with by labelling), and it appears to recognise implicitly that when the products are different, then the mere fact that some regulation affects them differently does not make that regulation discriminatory in any objectionable sense. To ground the claim that different treatment amounts to discrimination, we must argue that the products are in relevant respects the same. One way to do this is by finding protectionist purpose, which reveals that the regulating country itself sees no genuine regulatory distinction.[117] Alternatively, it can be done directly by establishing (or asserting empirical grounds for presuming) that the foreign product is equivalent to the local product in respect of the regulatory concern. But notice that if the foreign product is equivalent, then a regulation that excludes it is more restrictive than necessary, and this is a completely sufficient objection to the regulation, without regard to whether the regulation has discriminatory effect. So in the end, discriminatory effect plays no role (as the *Cassis* Court seems to have recognised), except as evidence that would be relevant to an inquiry into regulatory purpose.[118]

One final point. To this outsider, it seems the Community institutions have made a fetish of the idea that a product marketed anywhere in the Community ought to be marketable everywhere. In its Communication concerning *Cassis*, the Commission appears to say that it will proceed against national regulations that are illegal under *Cassis*,

[115] For an excellent discussion, see H-C von Heydebrand u.d. Lasa, 'Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got It Wrong?' (1991) 16 *EL Rev* 391–415.

[116] But don't we need the Court to protect French producer interests, the reader may ask. I shall explain why, counterintuitively, only German interests need be considered—but why the Court *might* still be right to intervene.

[117] Many people dislike purpose review. Some would say 'equivalent effect' in Article 28(30) was designed to exclude purpose review, although I doubt that. But the text makes it clear that considering purpose is an essential aspect of an 'effects' review that extends to discriminatory effect from facially neutral measures. See also note 122 below.

[118] Under the *Cassis* approach, it may seem that discriminatory effect does play a role; it may seem that we are inferring unnecessary restrictiveness from discriminatory effect, since we are inferring unnecessary restrictiveness from the fact that goods that are allowed to be sold abroad (which our suggested justification for *Cassis* presumes on empirical grounds to be equivalent) are being excluded, and that sounds like discrimination. But there is not necessarily any discrimination, even in effect; it might be that other foreign goods are still admitted, and that local producers who would like to produce to the foreign standard are being prevented, and that there is no net effect on foreign versus domestic market shares. All that matters is the presumption of equivalence (that is, the presumption that the foreign good satisfies the domestic regulatory concern) based on the fact that the goods are allowed abroad. No proposition about comparative treatment plays any essential role.

and that where national regulations are legal under *Cassis* but still exclude goods from another Member State, this problem must be dealt with by harmonisation.[119] But what is the problem harmonisation solves, unless it is assumed that the totally unimpeded circulation of every product marketed anywhere in the Community is more important than allowing different Members to have *justifiably* different standards? If the 'single market' requires such totally unimpeded circulation, we should not want a fully perfected single market.[120]

On Policy

In his famous opinion in *Leclerc-Siplec*, Advocate General Jacobs says 'the central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States'.[121] Taking this as a starting point for analysis, the next question is, what does 'justification' mean here, and what should it mean? I shall develop a thesis about what it should mean, but let me start with a specific question about what it does mean that has long puzzled me: what is the role of 'proportionality' in EC free movement doctrine?

Abstract discussions of 'proportionality' in EU law always describe a three-part test: (1) Does the regulation contribute to the achievement of some legitimate purpose?[122] (2) Is there is any alternative way to achieve the purpose to the same degree with less damage to whatever Community value(s) the regulation threatens? (3) Even if the regulation is the least-damaging way to achieve whatever it achieves, is it worth it? Does the national benefit outweigh the damage to the relevant Community value(s)?[123] Now, it is clear that in some areas of EU law, all three questions get considered. What is not clear to me is the role of the third question, sometimes referred to as 'proportionality in the strict sense', in the law of free movement of goods. In many free movement cases, a 'proportionality' test is stated explicitly, but only the first two questions are mentioned; and yet there are some cases that seem hard to explain except by reference to the third question.[124] Many sources seem thoroughly ambivalent. Consider the following paragraph from *Stoke-on-Trent*:

[119] *Commission Communication*, 3 October 1980 [1980] OJ C256/2; and see Craig and De Búrca, *EU Law: Text, Cases, and Materials* (Oxford, Oxford University Press, 1998) 639.

[120] The United States, often mentioned as a model, is not a single market in this sense. Incidentally, on economies of scale, see note 141 below.

[121] *Société d'Importation Edouard Leclerc-Siplec v TFI Publicité & M6 Publicité* (Case C-412/93) [1995] ECR I-179 at I-194.

[122] Note that this question requires ascertaining the regulator's actual purpose, unless we are prepared to justify a regulation by reference to a purpose that is asserted hypocritically. I should also mention *Cassis*'s second major innovation, 'mandatory requirements'. Some such tinkering with the Treaty text is unavoidable once we expand Article 28(30) beyond border measures and facially discriminatory internal measures, but it follows from the argument in the rest of this essay that the Court should have offered a negative list of illegitimate purposes rather than embarking on a positive listing of approved purposes. In practice, it may not have made any difference.

[123] Eg G de Búrca, 'The Principle of Proportionality and Its Application in EC Law' (1994) *Yearbook of European Law 1993*, 105–50, 113; F Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999), 1–21 at 1.

[124] Eg, the holding on non-approved bottles in *Commission v Denmark* (Case 302/86) [1988] ECR 4607.

> Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods. In that regard, in order to verify that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products.[125]

The metaphor of 'weighing' in the first sentence suggests a comparison of the value or importance of the national benefit with the value or importance of the Community cost, a comparison required only in connection with proportionality in the strict sense.[126] And yet, the second sentence of the quoted paragraph, with its focus on what is 'necessary' to achieve the aim, seems to contemplate only the second question and its less-restrictive-alternative inquiry.

If it is unclear whether courts actually ask the third question in movement-of-goods cases, *should* they ask it? Here the answer is clear. There is no need to worry about proportionality in the strict sense, no need to balance national interests against foreign interests. (So those movement of goods cases that do not ask the third question have got the theory right.) The reason is that, in the present context, regulation that optimises over all affected domestic interests (regulation that is 'domestically rational', as I shall say) also optimises over the interests of the Community as a whole (it is 'globally efficient'). In a nutshell: *domestically rational regulation is globally efficient.*[127]

I shall explain in a moment why the thesis just stated is true. Let me first explain why it is important, including why it makes the test of proportionality in the strict sense unnecessary.[128] First, the thesis entails that even if the goal of Article 28(30) is to eliminate national regulation that is economically inefficient from the *Community* perspective, it suffices to eliminate regulation that is *irrational from the point of view of the enacting country*.[129] Since foreign interests as such do not figure into the definition of the national interest, or of domestic rationality, there is simply no need for courts to attend to foreign interests. In particular, there is no need to balance foreign harms against local benefits under 'proportionality in the strict sense'. Notice that this argument does *not* undercut the 'less restrictive alternative' test. We often speak as if the point of that test is to prevent unnecessary harm to foreign interests, but in fact unnecessarily trade-restrictive measures

[125] *Stoke-on-Trent CC v B & Q plc* (Case C-169/91) [1992] ECR I-6635, para 15.

[126] A less-restrictive-alternative inquiry involves no comparison between benefit and cost, but only a comparison of the costs of different measures that would achieve the benefit. See D Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 *World Trade Review*, 3, 347–69.

[127] I am employing here the standard notion of economic efficiency (but remember that efficiency is about satisfying preferences, not just maximising production). The EU has always had non-economic goals as well as economic. But I assume that what the provisions on *free movement of goods* are currently thought to aim at *directly* is economic efficiency. Note that even to the extent we might want to entangle the Members' economies for non-economic reasons, we will achieve most, if not all, of the desirable entanglement if we just eliminate economically inefficient regulation.

[128] For a much fuller discussion of why the thesis is true and important, and of all the topics discussed in the remainder of this essay, see D Regan, 'What Are Trade Agreements For? – Two Conflicting Stories Told by Economists, With a Lesson for Lawyers', (2006) 9 *Journal of International Economic Law* 4, 951–88.

[129] This is true regardless of our definition of the national interest (national welfare), provided we define the national interest the same way when we are thinking about global efficiency as when we are thinking about domestic rationality.

also damage unnecessarily the interests of *locals* who would like to engage in trade but are prevented; such measures are *domestically* irrational.[130]

Second, if the real question about a measure is whether it is domestically rational, we should generally presume that the local political/regulatory process is more likely to make right choices than transnational courts. That is not to say the national institutions are always right. Producer interests tend to have exaggerated political influence, leading to purposeful protectionism, which is normally domestically irrational. The regulatory process may sometimes rely on inadequate science. And so on. The crucial question for the Court then becomes: what kinds of political/regulatory failure (remember, failure with regard to *domestic* interests) can it and the rest of the judicial system recognise sufficiently reliably so that they should intervene? And how should the intervention be structured so as to interfere as little as possible with desirable national regulation?[131]

I have no space to discuss further what rules are best, except to note that the answer will presumably be specific to the European Communities in some respects. Here are two possible examples. First, Miguel Maduro has argued in defence of *Cassis* that national regulation of products and packaging, even if not motivated by protectionism either historically or in the present maintenance of old laws, has often 'frozen' the market so that consumers are unaware of the potential benefits of access to foreign products. This can be viewed as a sort of malfunction of the political process; consumers are systematically unaware of how laws affect their own interests.[132] This is the best argument I know of for the approach of *Cassis*, and it has special plausibility in the EC context.

Second, I have been told that these days the ECJ often finds a national regulation in violation of Article 28(30) and then leaves it to the referring national court to decide whether there is an exception under Article 30(36) (and that the national courts do not consider proportionality in the strict sense). This is an option that is not available in all systems, and it makes excellent institutional sense once we understand that the real issue is domestic rationality, at least if we trust the national courts. National courts are much better positioned than the ECJ to review national regulation for domestic rationality, perhaps even with a smaller margin of appreciation for the regulator than a transnational court should allow. In effect, the contribution of European law is to identify cases in which the national courts must undertake serious review, whether or not they would do so under national law, and with the Community watching.

So finally, why is it true that domestically rational regulation is globally efficient? The short answer is that if we make a number of reasonable assumptions, this thesis is a mathematical theorem. I cannot offer a formal proof here.[133] I shall offer two quick

[130] There is a mild paradox in my view. I acknowledge that the only reason we have trade agreements is to protect foreign interests, *in the following sense*: there would be no trade agreements if national regulation did not affect foreign interests. But there is no inconsistency between that and my claim that when it comes to ascertaining precisely what national regulations have unjustified (inefficient) foreign effects and should be suppressed, it turns out that it is only regulations that are domestically irrational. So the *test* for justification can ignore foreign interests.

[131] Incidentally, since there is no need to balance or reconcile foreign interests with domestic, the existence or non-existence of an effective transnational legislature makes less difference than one might initially assume to what the Court should do.

[132] Personal conversation, and see M Maduro, 'Market Integration Through Law—The Law of Free Movement in the EU and the US' in D Halberstam and M Maduro (eds), *People, Power, and Politics: Comparing Constitutionalism in the EU and US* (Cambridge, Cambridge University Press, forthcoming).

[133] The basic theorem, in the tariff context, and stated in different terms, is proved in Kyle Bagwell and Robert W Staiger, 'An Economic Theory of GATT' (1999) 89 *American Economic Review* 1, 215–48 at 222–3.

intuitive explanations. But first I need to introduce the two assumptions that are most critical to an intuitive understanding. First, it must be true (as it is in the movement of goods context) that the foreign effects of any challenged regulation are all mediated by the grant or denial of market opportunities.[134] My thesis has no application to environmental law, for example, where our concern is with *physical* cross-border effects of national regulation or non-regulation.[135] Nor does it apply when a regulation is challenged on individual rights principles, where the issue is not efficiency or cross-border effects at all.

Second, I assume countries do not purposefully exploit their market power vis-à-vis other countries. What do I mean by 'exploiting market power'? Roughly speaking, I mean adopting a regulation in part *for the reason* that some of the cost of achieving the regulation's domestic benefits will be borne by foreign interests. I emphasise that whether there is market power exploitation in this sense depends on the *motivation* for the regulation. Almost anything a large country does will have effects abroad; often it will impose costs abroad. But the mere fact of harmful *effects* abroad gives us no reason at all to think the regulation is inefficient (even globally, from the point of view of the world as a whole), if it is not *motivated* to any extent by the fact that some of the costs are borne by foreigners. In the absence of exploitive motivation (which can be formally modelled by various assumptions about the regulator's objective function), regulation that is rational from the point of view of domestic national welfare is also globally efficient. That is what our theorem tells us.[136] Many readers may find it counterintuitive that motivation is so central for determining whether a measure is or is not globally efficient. But it is.[137]

Let us have some examples. The *locus classicus* for thinking about exploitation of market power is the tariff. A traditional 'optimum tariff' is exploitive in our sense. It uses market power to drive down the price foreign producers can charge for their exports. It is a tax on imports that is imposed *precisely because* part of the revenue raised by the tax comes ultimately from foreign producers. In contrast, a tariff motivated solely by protectionism (that is, by the desire to improve the lot of domestic import-competing producers), is not exploitive in our sense. It may be natural to think of the protectionist tariff as an attempt to help domestic producers at the expense of foreign producers, but in fact, the harm to foreign producers is no part of what is aimed at, neither as the ultimate goal nor even as a necessary means. That becomes clear if we remember that even a country with no market power can pursue a policy of protectionism. Since a tariff adopted by a country with no market power has no effect outside that country, the goal of protectionism must be understandable in purely domestic terms (most naturally as securing some target price for domestic producers). Hence even when there *is* market power and harm to foreign

[134] With regard to the other three of the 'four freedoms', the thesis does not apply to cases on the movement of persons; it will apply to some services cases and capital cases and not to others. The issue is always the nature of the cross-border effects.

[135] But notice that cases like the Danish bottle cases, which are 'environmental' cases in some general sense, *are* covered by the thesis: Denmark's regulation, which was the subject of the challenge, affected other countries only by the grant or denial of market access.

[136] As noted above (note 129), the theorem is true on any definition of national welfare, so long as we define national welfare the same way when we ask about domestic rationality and about global efficiency: if the regulation is domestically rational, it is globally efficient. Of course, how we define national welfare will matter greatly to whether the antecedent in the conditional statement just presented is true (and thus to whether the consequent is true as well); but that is another matter.

[137] The reader may think that motivation cannot matter ultimately, because efficiency is about effects. Well, yes and no. Efficiency is about satisfying preferences; so it is about effects *as they are valued*. Motivation is central because (rational) regulatory purpose reflects social valuation.

producers, the foreign harm from a protectionist tariff is merely incidental to the protectionist project. And what our theorem tells us is that while an exploitive 'optimum tariff' is both domestically rational and globally inefficient, a tariff motivated solely by protectionism cannot be both domestically rational and globally inefficient (even if the country has market power). The protectionist tariff can be domestically rational or not;[138] it can be globally efficient or not; but the two dimensions are logically linked. If it is domestically rational, it is also globally efficient.

So much for market power exploitation in the tariff context. What is market power exploitation in the context of setting facially neutral product standards, which is our main concern in this Chapter? In this context, a country exploits market power when it sets an inefficiently high standard *precisely because* some of the cost of securing the domestic benefit from the standard will be borne by foreign producers.[139] Such a policy will be domestically rational but globally inefficient. But if the regulator does not think about whether producers are local or foreign – if it just tries to set an efficient standard – then there is no market power exploitation. Even though the standard imposes costs on foreign producers, regulation that is domestically rational will be globally efficient. It is an empirical question, of course, whether countries engage in market power exploitation in general, and whether they engage in it in the specific context of setting product standards. My own view is that there is very little empirical evidence of market power exploitation in any context, even tariff-setting, and even less in the context of setting product standards.[140] This much we can say with certainty: a regulation that has the effect of excluding foreign producers from the domestic market entirely, which is the situation in many or most cases in the *Cassis* line, *cannot* be market power exploitation. No domestic benefit from the higher standard is being secured at foreign producers' expense if foreign producers do not bother to meet the standard at all.[141]

Now finally, the two intuitive explanations for the thesis (not competing explanations, just different approaches): (1) If countries do not purposefully exploit market power as importers, then domestically rational regulation will be designed to correct market failures

[138] The reader may remember from some introduction to international economics that protectionism is domestically irrational. This claim depends on taking a particular perspective on national welfare. In some trade models, protectionism is viewed as domestically rational (hence globally efficient, hence not something a trade agreement should try to suppress). Lest the reader doubt, my own view is that protectionism is generally domestically irrational (and globally inefficient), and that suppressing protectionism is the principal task of judicial review in this area.

[139] An inefficiently high standard is a standard whose cost to producers (wherever located) is greater than the benefit to the consumers or the victims of an externality. Notice incidentally that an 'inefficiently high standard' is *not* the same thing as 'a higher standard than would be set if all producers were domestic'. If all producers are domestic, the excessive political influence of producer groups is likely to lead to an inefficiently *low* standard. Ironically, some of the producers' being foreign, and having less political influence, may be just what is needed to achieve an *efficient* standard. But that is not market power exploitation.

[140] My view contradicts a central assumption of the standard formal theory of trade agreements; but I have argued elsewhere that the standard assumption is based more on the needs of the standard model than on empirical evidence. See Regan, 'What Are Trade Agreements For?', note 128 above, at 969–82.

[141] The other assumptions that make my thesis a theorem (aside from purely technical mathematical assumptions) are competitive domestic markets and constant returns to scale. These assumptions are idealisations, but they are standard in much of trade theory. More importantly, it seems particularly undesirable for courts to try to decide case-by-case how the results in movement-of-goods cases should reflect imperfect competition or possible economies of scale. Economies of scale are mentioned so often as a reason for wanting a single market that I should point out that substantial economies of scale will be made possible (probably all or almost all of what is desirable), if we merely eliminate national regulation that is inefficient even without regard to scale economies. We do not need courts to think about scale economies in order to achieve them.

in the domestic economy (including consumers' ignoring domestic externalities imposed by goods they buy from abroad). Such regulation guarantees that the national demand curve for imports correctly reflects all affected domestic interests. If the exporting country's (non-exploitive) supply curve similarly reflects all interests in that country, then, given that there are no physical cross-border externalities, the international price mechanism will generate an efficient result, just as it does in a competitive domestic market. (2) Alternatively: foreign producers are not harmed by a regulation unless there are domestic consumers who would deal with them but are prevented from doing so. But if there are such consumers, they are also harmed by the regulation. So domestic consumers will end up representing the foreign producers in the domestic political process (effectively or not, according to how well they represent themselves). I am not saying the interests of the consumers and the producers are identical. The interests are distinct, and if there is inefficient regulation, the total loss is the sum of the losses to consumers and producers. Still, absent market power exploitation, there can be no inefficiency-based loss to foreign producers without corresponding inefficiency-based loss to domestic consumers. Hence, if we eliminate the inefficiency-based loss to domestic consumers, we necessarily eliminate the inefficiency-based loss to foreign producers as well (not *all* the loss from regulation, but the inefficiency-based loss). In other words, domestically rational regulation is globally efficient.

In formulating movement-of-goods doctrine, the Court should be asking how courts can best restrain national regulation that is domestically irrational, while allowing regulation that is domestically rational. How well the Court is doing I leave it to EU scholars to say.