

**NELCO**  
**NELCO Legal Scholarship Repository**

---

New York University Law and Economics Working  
Papers

New York University School of Law

---

3-2015

*Philadelphia National Bank*, Globalization, and the  
Public Interest

Harry First  
NYU School of Law, [harry.first@nyu.edu](mailto:harry.first@nyu.edu)

Eleanor M. Fox  
NYU School of Law, [eleanor.fox@nyu.edu](mailto:eleanor.fox@nyu.edu)

Follow this and additional works at: [http://lsr.nellco.org/nyu\\_lewp](http://lsr.nellco.org/nyu_lewp)



Part of the [Antitrust and Trade Regulation Commons](#)

---

**Recommended Citation**

First, Harry and Fox, Eleanor M., "*Philadelphia National Bank*, Globalization, and the Public Interest" (2015). *New York University Law and Economics Working Papers*. Paper 405.  
[http://lsr.nellco.org/nyu\\_lewp/405](http://lsr.nellco.org/nyu_lewp/405)

This Article is brought to you for free and open access by the New York University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Law and Economics Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact [tracy.thompson@nellco.org](mailto:tracy.thompson@nellco.org).

*Philadelphia National Bank, Globalization, and the Public Interest*

Harry First & Eleanor Fox\*

Jobs, jobs jobs—nothing seems to be of higher priority for economic policy today. So it should have come as no surprise when Texas’ Attorney General, after joining the federal government’s suit to stop American Airlines’ acquisition of US Airways, decided to withdraw from the case because of the merger’s alleged positive impact on jobs in Texas.<sup>1</sup> At a news conference in the American Airlines Admirals Club at the Dallas/Fort Worth International Airport, the Attorney General announced an agreement with the merging airlines to locate the merged airline’s headquarters in the Dallas/Fort Worth metropolitan area and to ensure “that thousands of jobs will remain in Texas.”<sup>2</sup> The Attorney General noted: “Our negotiations confirmed that the airline will preserve competition in the marketplace, maintain important routes in Texas and protect jobs.”<sup>3</sup>

No surprise, perhaps. But was Texas right in considering the impact on jobs when deciding whether to oppose the merger?

The conventional antitrust approach today is to reject the relevance of a merger’s impact on employment when deciding whether to oppose a merger. Purity of analysis is

---

\* Respectively Charles L. Denison Professor of Law and Walter J. Derenberg Professor of Trade Regulation, New York University School of Law. A research grant from the Filomen D’Agostino and Max E. Greenberg Research Fund at New York University School of Law provided financial assistance for this Article. We thank Adam Shamah and Thiago Alves Ribeiro for their excellent research assistance.

<sup>1</sup> See Susan Carey & Brent Kendall, *Texas Drops Opposition to AMR Deal*, WALL ST. J., Oct. 2, 2013, at B3.

<sup>2</sup> See Press Release, State of Texas Reaches Agreement with American Airlines and US Airways on Proposed Merger, Oct. 1, 2013, <https://www.oag.state.tx.us/oagNews/release.php?id=4539>.

<sup>3</sup> Press Release, *supra* note 2. At the time of the merger American employed about 73,000 workers and had its headquarters in Fort Worth. The merger was expected to add about 30,000 US Airways employees, with a quarter of them located in Texas. See Carey & Kendall, *supra* note 1. The Justice Department and the remaining six states and the District of Columbia subsequently settled the suit, allowing the merger to proceed subject to a variety of conditions. There were no agreements concerning jobs. See *United States v. US Airways Group, Inc.*, No. 1:13-cv-01236 (CKK) (D.D.C. Aug. 25, 2014), available at <http://www.justice.gov/atr/cases/f305400/305489.pdf>. The district court subsequently approved the settlement, see *United States v. US Airways Group, Inc.*, 2014-1 Trade Cas. (CCH) ¶78,748 (D.D.C. 2014).

the objective of merger policy, carefully aimed at a merger's competitive effects, now sharpened to an assessment of a merger's potential impact on price and output (and, sometimes, innovation). But merger enforcement decisions are not necessarily so pure. Even the Department of Justice has found it necessary, from time to time, to defend its merger enforcement from complaints about the effect on jobs. In the AT&T/T-Mobile merger case, for example, the parties and some labor unions had contended that the merger would add jobs by increasing broadband access.<sup>4</sup> Au contraire, the Deputy Attorney General said at a news conference announcing the Department's decision to oppose the merger: "Mergers usually reduce jobs through the elimination of redundancies," . . . "so we see this as a move that will help protect jobs in the economy, not a move that is going in any way to reduce them."<sup>5</sup>

Job effects are not the only possible impurity in merger analysis and not the only impurity that antitrust analysis conventionally rejects. A variety of other public policies are today placed outside the pale of antitrust merger analysis—national or local economic development, effects on small business, the loss of local or national control of important enterprises, diversity of viewpoint, and international competitiveness. If these policies are to be considered in U.S. merger policy, they are placed within the domain of sectoral regulators<sup>6</sup> or specialized decision-makers,<sup>7</sup> not antitrust enforcement agencies.

---

<sup>4</sup> See Thomas Catan & Spencer E. Ante, *U.S. Sues to Stop AT&T Deal*, WALL ST. J., Sept. 1, 2011, at A1.

<sup>5</sup> Edward Wyatt, *U.S. Files Lawsuit To Block Merger Of Phone Rivals*, N.Y. TIMES, Sept. 1, 2011, at A1 (quoting Deputy Attorney General James M. Cole).

<sup>6</sup> See, e.g., 49 U.S.C. § 11324 (requiring approval of Class I railroad mergers only if "consistent with the public interest"; includes interest of employees) (Surface Transportation Board); 47 U.S.C. § 310(d) (requiring finding that transfers of station licenses serve the "public interest, convenience, and necessity") (Federal Communications Commission); 16 U.S.C. §§ 824b (requiring approval of mergers of electric power transmission companies on finding that the merger is "consistent with the public interest") (Federal Energy Regulatory Commission). For an example of a public interest submission, see *In re Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Transfer Control of Licenses and Authorizations, Applications and Public Interest Showing*, Federal Communications Comm'n, MB Docket No. 14-57 (April 8, 2014) (discussing, *inter alia*, how "businesses of all sizes will benefit," including small

In this Article we take a new look at the rejection of factors that are today considered to lie beyond a careful framing of competitive effects in antitrust merger analysis. To do so we focus on two contrasting cases—the U.S. Supreme Court’s foundational *Philadelphia National Bank* decision and the more recent litigation in South Africa involving Wal-Mart’s acquisition of Massmart, a South African firm.

We chose the *Philadelphia National Bank* case because that decision established the principle that “public interest” factors lie beyond Section 7 of the Clayton Act. In that case the Court wrote:<sup>8</sup>

We are clear, however, that a merger the effect of which “may be substantially to lessen competition” is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

We chose the Wal-Mart/Massmart case because it is a prime—and thoughtful—example of an effort now proceeding in a number of jurisdictions around the world to take public interest factors into account in merger enforcement. Indeed, the global spread of public interest considerations in merger analysis (and in antitrust analysis more broadly) has sparked our interest in reassessing their rejection in *Philadelphia National*

---

businesses and how the growth of the Internet has led to job creation) , *available at* <http://corporate.comcast.com/images/Comcast-Public-Interest-Statement-April-8.pdf>.

<sup>7</sup> See 50 U.S.C. App. § 2170 (establishing the Committee on Foreign Investment in the United States [“CFIUS”] to make recommendations to the President regarding any foreign government acquisition that “threatens to impair the national security of the United States). The Attorney General is a member of CFIUS, but acquisitions are reviewed by the National Security Division of the Justice Department, not the Antitrust Division. See U.S. Dep’t of Justice, Nat’l Security Div., FY 2014 Performance Budget, Congressional Submission, at 10, <http://www.justice.gov/sites/default/files/jmd/legacy/2014/08/10/nsd-justification.pdf>.

<sup>8</sup> *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 371 (1963).

*Bank* and inquiring into how such factors might appropriately be handled in jurisdictions that have chosen to consider them.

We do not advocate a ready embrace of public interest considerations, either globally or in the United States. These factors may too easily be used as dubious justification for competitively harmful mergers. On the other hand, we think that the Wal-Mart/Massmart case does provide insight into how jurisdictions that consider public interest factors might usefully do so. Jurisdictions may make legitimate political choices to consider the public interest beyond strict competitive effects. Indeed, for those jurisdictions that include such considerations in their competition law, categorical rejection of public interest factors by competition agencies is not an appropriate option.

To provide a sense of the importance of addressing the use of public interest factors in merger analysis, we begin with a discussion of their use in merger enforcement around the world. We then turn to an examination of how these considerations were raised and decided in *Philadelphia National Bank*. We follow with a discussion of the Wal-Mart/Massmart litigation. Based on the lessons learned from these two cases, we conclude with a discussion of what we see as the appropriate norms that jurisdictions should follow when taking account of public interest in merger enforcement, with particular emphasis on clear articulation of public interest goals, transparency of process, and quantification of costs and benefits.

## I. The Global Map of the Public Interest Debate

Many competition law regimes around the world authorize decision-makers to give regard to the public interest or to national interests. Many expressly allow public

interest factors in merger review, and even more implicitly allow use of non-competition conditions in settlements. A sample of the different approaches follows.

#### A. The European Union

The European Treaty of Rome, adopted in 1957 to establish the European Economic Community, included articles treating anticompetitive agreements and abuse of dominance but none treating anticompetitive mergers. Europe did not then perceive the need for merger control; firms were typically below efficient scale, mergers could improve efficiency, and cross-border mergers could improve market integration. But more was at stake. Merger control was regarded as the domain of each host nation. Mergers concerned the structure of industry, and the structure of industry was thought to be a matter for nations' industrial policy. France typified this view; Italy agreed with France, and when Spain and Portugal joined the European Common Market they too agreed. In many nations, including the UK, competition commissions were empowered to review proposed mergers, and their mandate was to do so in the public interest. Competition was not prime among the public interests.

In the mid-1980s, as the European Community became mired in Euro-stagnation, it embarked on the campaign "1992" – the project to tear down the barriers to a common market by the end of the year 1992. One of the obstacles to the creation of a single market was the persistence of Member State national champions, which often were created or entrenched through mergers. It became clear to European leaders that European competition standards were needed. France, Italy, the UK and Ireland pressed for an exemption on grounds of national industrial, regional and social concerns.

Germany and Denmark opposed the idea.<sup>9</sup> Commissioners Leon Brittan and Peter Sutherland ultimately convinced the skeptical Member States to abandon an industrial policy exemption, and the merger regulation was passed in 1989.<sup>10</sup>

The European Merger Regulation became effective in 1990. It applies to mergers with a community dimension (sufficient cross-border effects). In its original form it prohibited mergers creating or enhancing dominance. As amended in 2004, the Merger Regulation prohibits mergers that substantially impede effective competition.<sup>11</sup> The European authorities have exclusive jurisdiction vis-à-vis the Member States over mergers with a community dimension, with two qualifications: 1) authority over mergers with a special impact within a Member State can devolve to that Member State, and 2) a clause authorizes Member States to protect certain public interests.

The latter clause is Article 21 of the Merger Regulation as revised in 2004. Article 21 states that Member States may take appropriate measures to protect legitimate interests other than those taken into account by the Merger Regulation (competition/efficiency) to the extent that they are compatible with the general principles and provisions of Community law. "Public security, plurality of the media and prudential rules shall be regarded as legitimate interests." Any other public interest sought to be asserted must be communicated to the European Commission by the Member State, in

---

<sup>9</sup> See Thorsten Käseberg and Arthe Van Laer, Competition Law and Industrial Policy: Conflict, Adaptation, and Complementarity, Chapter 5 at pp. 17-18, in *The Historical Foundations of EU Competition Law* (K.K. Patel and H. Schweitzer, eds. Oxford Scholarship Online 2013).

<sup>10</sup> See Damien Geradin & Ianis Girgenson, *Industrial Policy and European Merger Control – A Reassessment* (October 3, 2011). TILEC Discussion Paper No. 2011-053, available at <http://ssrn.com/abstract=1937586> at 7 (“National governments regularly used merger control as an industrial policy tool to promote the emergence of “national champions” or to block takeover of national companies by foreign competitors.... Several Member States (France, the UK, Italy, and Ireland) blocked [an early] proposal because they believed that it would hinder the consolidation of national industries”).

<sup>11</sup> See Council Regulation (EC) No.139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004], OJ L24/1.

which case the Commission must assess the compatibility of the claimed public interest with the general principles and other provisions of Community law. National industrial policy and any other policy that imposes costs on or otherwise discriminates against other Member States are not compatible with the general principles of Community law.

Article 21 is a narrow gateway, not a wide derogation. European Union merger law is on a solid competition base. A skirmish that arose in the wake of the first European merger prohibition – de Havilland/Alenia – proved the rule that European industrial policy is not an available consideration in vetting a merger, not even Europe-wide industrial policy. In that case the Commission found that the acquisition by a French and Italian joint venture of a Canadian commuter aircraft manufacturer would increase dominance and was therefore incompatible with the common market. France, Italy and the Commissioner for the Internal Market urged, with fury, that the Commission must have the power to clear a merger that was "good for Europe." After a long and public contretemps, the Competition Commissioner won and the merger was enjoined.<sup>12</sup>

Nations not atypically oppose takeovers of basic or strategic assets by foreign firms; but such opposition contravenes European law and policy. In Abertis/Autostrade, a transaction between Autostrade, an Italian operator of motorway concessions, and Abertis, a Spanish company involved in the management of motorway tolls, the European Commission cleared the deal. Thereafter, Italy blocked it. The European Commission required Italy to remove its ban and to liberalize its regulatory framework regarding transfers of motorway concessions.<sup>13</sup>

---

<sup>12</sup> Commission decision of 2 Oct. 1991, Case IV/M.53, *Aerospatale/Alenia/de Havilland*, 1991 OJ L 334/42.

<sup>13</sup> See Commission decision of 22 Sept. 2006, Case COMP/M.4249, *Abertis/Autostrade*, 2006 OJ [C628].

At about the same time E.ON, a major German energy group, sought to acquire Endesa, the largest electric utility company in Spain. The Commission cleared the transaction. Spain responded by enacting a law designed to block E.ON's takeover bid and to facilitate an all-Spanish merger, and also with imposition of conditions on the E.ON takeover including a requirement that the firm's nuclear power plants using domestic coal must continue to do so. The European Commission held the specified conditions incompatible with the Treaty's free movement rules and that Spain therefore violated Article 21 of the Merger Regulation.<sup>14</sup>

Industrial policy is not always transparent and is capable of being smuggled into a decision that is facially "all antitrust." An example is Boeing's acquisition of McDonnell Douglas, a three-to-two merger of the last two American big jet producers in which the acquired firm had poor prospects for the future and the only other competitor was Europe's Airbus. The U.S. FTC cleared the merger while the EU came close to a prohibition – which was strongly urged by France. In the end, Europe did not prohibit the merger, but it imposed significant conditions. Policy makers in the United States accused the European Commission of industrial policy – European policy protecting Airbus; and policy makers in Europe returned the charge – American policy empowering Boeing.<sup>15</sup> If industrial policy helps to explain Boeing/McDonnell Douglas, it is the rare exception to the rule.

---

<sup>14</sup> Commission Decision of 26 Sept. 2006, Case No. COMP/M.4197, E.ON/Endesa, and Commission decision of 20 Dec. 1006, Case No. COMP/M.4197, E.ON/Endesa.

<sup>15</sup> *In re Boeing Company/McDonnell Douglas Corp.*, FTC file no. 971-0051 (July 1, 1997), statement of Chairman Robert Pitofsky & Commissioners Janet D. Steiger, Roscoe B. Starek III & Christine A. Varney, with separate statement of Commissioner Mary L. Azcuenaga; European Commission decision in Case No. IV/M.877/Boeing/McDonnell Douglas of 30 July 1997 OJ L 336/16. See Eleanor Fox, *Antitrust Regulation Across National Borders: The United States of Boeing versus the European Union of Airbus*, 16 *Brookings Rev.* 30 (Winter 1998).

The adoption of the European Merger Regulation in 1989 was a turning point in the debate on the role of industrial policy in merger analysis. It was a triumph of the community perspective over a nationalistic state-sovereignty perspective. Minds and the course of economic history were changed.

## B. China

The Anti-Monopoly Law of China (AML) was adopted in 2007 and came into force in 2008. Article 1 states the general purposes. These include: “safeguarding fair market competition” and “protecting the consumer and public interests, and promoting the healthy development of the socialist market economy.” Article 27 states the factors that “shall be considered” in merger review. The list includes “(5) The effect of the concentration on national economic development ....” Article 31 specifies that acquisitions of domestic companies by foreign investors “which implicate national security, shall also go through national security reviews ....” National security proceedings are conducted in parallel with the competition proceedings. National security reviews are mandated in the case of mergers in strategic and sensitive industries broadly defined, including products as diverse as oil and soya.<sup>16</sup>

China’s merger law is enforced by MOFCOM, the Ministry of Foreign Commerce. Between 2008 and December 2013, MOFCOM reviewed 740 proposed mergers, rejected one and approved 22 with conditions.<sup>17</sup> MOFCOM has apparently not justified any prohibition or conditionality on grounds of a public or national interest other

---

<sup>16</sup> The security review procedure was apparently modeled on the U.S. CFIUS review. *See* Harris et al., *Anti-Monopoly Law and Practice in China* (2011), p. 134.

<sup>17</sup> *See* MOFCOM, *MOFCOM Holds a Special Press Conference on Anti-monopoly* (March 4, 2014), available at <http://english.mofcom.gov.cn/article/newsrelease/press/201403/20140300507466.shtml>. In June 2014, MOFCOM rejected one more: an international vessel-sharing joint venture among three of the world’s largest shipping companies – Maersk Line, CMA CGM, and Mediterranean Shipping Company. *See* Ministry of Commerce, Public Announcement [2014], No. 46 of 20 June 2014 (the *Maersk* decision), <http://english.mofcom.gov.cn/article/policyrelease/buwei/201407/20140700663862.shtml>.

than competition, although it has mentioned public interest as consistent with competition concerns.

By one popular view in the West, China systematically applies national-interest criteria sub-silentio. Western competition experts point to a number of international mergers regarding which China has been much tougher than the U.S. or European authorities with respect to the same merger. Further, MOFCOM has not prohibited or conditioned any merger in which both parties were Chinese<sup>18</sup> and has imposed conditions on only one merger involving a Chinese state-owned enterprise, and this where the other party was a multinational.<sup>19</sup> These observers conclude that Chinese merger enforcement favors Chinese state-owned enterprises – a category that includes China’s largest, most powerful and privileged firms, which are also some of the largest firms in the world; and that it targets foreign firms in order to protect Chinese firms and to protect a flow of natural resources into China.<sup>20</sup>

The perspective that China’s merger policy is driven by discrimination against foreigners may be a simple view of a complex dynamic. The apparently lopsided statistics might be explained in part by the fact that Chinese firms have been slow to file notifications of their proposed mergers – a problem being addressed by MOFCOM— while foreign firms conscientiously file to get their mergers cleared around the world. In

---

<sup>18</sup> In 2011, MOFCOM opened its first investigation for monopolistic conduct involving two large state-owned enterprises - China Telecom and China Unicom. After the companies announced changes in their practices, the agency decided to suspend the investigation and not impose any fines. See Yan Sobel, *Domestic-to-Domestic Transactions – A Gap in China’s Merger Control Regime?*, ANTITRUST SOURCE, Feb. 2014 at 10.

<sup>19</sup> See Ministry of Commerce, Public Announcement [2011], No. 74 of 11 November 2011 (the *GE/Shenhua* decision), <http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107824342.html>.

<sup>20</sup> See D. Daniel Sokol & Christine Varney, *Why Does the Anti-Monopoly Law Bring Worries?*, FORBES CHINA, Aug. 14, 2013 (*in Chinese*), <http://www.forbeschina.com/review/201308/0027701.shtml>. See also Matthew Miller & Michael Martina, *U.S. Business Urge Tough Line Over China Antitrust Policy*, REUTERS, May 23, 2014, <http://www.reuters.com/article/2014/05/23/us-antitrust-china-usa-idUSBREA4M0AX20140523>; D. Daniel Sokol, *Merger Control Under China’s Anti-Monopoly Law*, 10 NYU J. LAW AND BUSINESS 1 (January 27, 2013), available at <http://ssrn.com/abstract=2207690>.

some cases, the tougher conditions imposed on global mergers may represent a more aggressive and regulatory tilt to China's antitrust. In at least one decision – prohibition of an alliance among the number one shipping company in the world with its two leading competitors, which together occupied 47% of the Asia-to-Europe container shipping market – China may have made a better call than the U.S. (Federal Maritime Commission) or the EU in assessing the transaction as inherently anticompetitive.<sup>21</sup> But in a number of cases, the tougher conditions imposed by China do not seem related to an anticompetitive aspect of the merger and appear to be an interlinked combination of antitrust and industrial policy. Below are some examples of MOFCOM's conditionality.

Marubeni, a Japanese company that exports grains to China, sought to acquire Gaviion, a U.S. company that stores and distributes grains and oilseeds. MOFCOM cleared the merger, but imposed hold-separate conditions on the merged firms.<sup>22</sup> The U.S. and EU competition authorities approved the same merger without conditions.

Wal-Mart sought to acquire Yihaodian, China's largest on-line supermarket. MOFCOM cleared the merger conditionally; it forbade Wal-Mart from using Yihaodian's on-line platform.<sup>23</sup> The U.S. and the EU approved the merger without conditions.

In *Uralkali/Silvinit*,<sup>24</sup> two Russian fertilizer firms with leading positions in the global fertilizer industry merged. China was one of their largest customers. MOFCOM

---

<sup>21</sup> See note 17 *supra*. See also “China Sends Shipping Consolidation Adrift,” *Wall Street Journal*, June 18, 2014. China has interests both as sellers and buyers. It has two big shipping lines and, as a prominent exporter, is one of the world's major customers of shipping lines. The alliance may have avoided price wars and raised prices, but it may also have saved costs (fuel, duplicate travel) and allowed strategic low prices to take market share from the Chinese competitors (a dichotomy – efficient but both predatory and exploitative – usually discounted by U.S. law).

<sup>22</sup> See Ministry of Commerce, Notice [2013], No. 22 of 23 April 2013 (the *Gaviion/Marubeni* decision), <http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml>.

<sup>23</sup> The requirement was apparently generated by the telecoms ministry, which oversees on-line business. See Michael Han, *MOFCOM Conditionally Clears Wal-Mart's Acquisition of Yihaodian*, Freshfields Bruckhaus Deringer briefing, [http://www.freshfields.com/en/knowledge/MOFCOM\\_Conditionally\\_Clears\\_Wal-Mart\\_Acquisition\\_of\\_Yihaodian/?LangId=2057](http://www.freshfields.com/en/knowledge/MOFCOM_Conditionally_Clears_Wal-Mart_Acquisition_of_Yihaodian/?LangId=2057).

cleared the merger conditionally. It required the firms to maintain their premerger sales practices in the Chinese potassium chloride market, to supply a full range of products in China in sufficient quantities, to continue to meet the demands of Chinese customers, and to continue to use traditional price negotiations.

In *Google/Motorola Mobility*,<sup>25</sup> wherein Google acquired a large patent portfolio, MOFCOM cleared the merger but required Google to treat hand-set OEMs non-discriminatorily (Chinese hand-set makers compete with Motorola Mobility) and to continue licensing Android free, as open source. Both the U.S. and EU decided that there was no competition problem, but undertook to monitor Google's use of the Motorola Mobility patents.<sup>26</sup>

In *Western Digital/Hitachi*,<sup>27</sup> a combination of two of the largest manufacturers of hard disk drives, MOFCOM allowed the merger with divestiture and required Western Digital to maintain Hitachi as an independent competitor worldwide and to establish firewalls between the merging parties under supervision of a monitor. The EU and the U.S. approved the merger with modest divestiture.

*Glencore/Xstrata*<sup>28</sup> combined one of the world's largest producer/traders of commodities with one of the world's largest mining companies. The U.S., South Africa and the EU cleared the merger, but the EU and South Africa had some serious concerns

---

<sup>24</sup> MOFCOM, Public Announcement [2011], No. 33 of 2 June 2011 (the *Uralkali/Silvinit decision*).

<sup>25</sup> See MOFCOM, Public Announcement [2012], No. 25 of 31 May 2012 (the *Google/Motorola Mobility decision*).

<sup>26</sup> Yee Wah Chin, MOFCOM again uniquely imposes AML conditions on a transaction in the smartphone sector, *Google/Motorola Mobility*, E-Competitions, No. 50367, January 2013-II. Available at <http://ssrn.com/abstract=2202026>.

<sup>27</sup> MOFCOM, Public Announcement [2012], No. 9 of 2 March 2012 (the *Western Digital/Hitachi decision*).

<sup>28</sup> MOFCOM, Public Announcement [2013], No. 20 of 16 April 2013 (the *Glencore/Xstrata decision*).

and imposed conditions.<sup>29</sup> MOFCOM allowed the merger, but required the divestiture of Xstrata's copper assets in Peru and required the merged firm to continue offering long-term supply contracts for copper concentrate to Chinese customers, for whom copper concentrate was an essential input.

China's first merger prohibition was of Coca Cola's acquisition of a leading Chinese juice company, Huiyuan. This was largely a conglomerate merger. At the time, MOFCOM made public only skeletal reasoning for its merger decisions. Analysts speculated that China desired to keep a strong trademark in Chinese hands.<sup>30</sup>

In sum, China applies some non-competition metrics in its merger decisions. How much is not transparent. China's institutional processes are so arranged, and MOFCOM is so intertwined with state industrial policy, that some opacity will probably continue, even though MOFCOM is increasing its transparency with more detailed decisions. The charge of intentional discrimination against foreign firms may be overstated, but the Chinese state-owned enterprises are apparently treated more favorably than other firms – Chinese and foreign. Industrial policy appears to be an inextricable part of competition assessment of the small set of mergers that matter to China.

### C. The World

---

<sup>29</sup> The EU worried that the merger would create market power in zinc to its detriment and it required Glencore to divest its minority stake in the world's largest zinc smelter and to terminate its exclusive take-off agreement with this smelter. See Press Release, Mergers: Commission Approves Glencore's Acquisition of Xstrata Subject to Conditions, 22 Nov. 2012, [http://europa.eu/rapid/press-release\\_IP-12-1252\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1252_en.htm). South Africa, meanwhile, was concerned about the merged firm's dismissal of almost 200 employees in South Africa, and required the firm to limit the dismissals of certain specialist and managerial employees and to provide re-tooling skills-training to certain other employees. See *Merger between Glencore Int'l PLC and Xstrata PLC*, Tribunal Reasons at 26-27, <http://www.comptrib.co.za/assets/Uploads/Glenstrata/Reasons-non-confidential.pdf>.

<sup>30</sup> See Valerie Bauerlein & Gordon Fairclough, *Beijing Thwarts Coke's Takeover Bid*, WALL ST. J., Mar. 19, 2009, <http://online.wsj.com/news/articles/SB123735859467667801?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB123735859467667801.html>.

The European Union and China are two of the most important antitrust regimes outside the United States. Their experience shows that public interest factors can play a role in some merger decisions in both countries, but their institutional approaches vary. The EU hews closer to the “pure competition” approach in the U.S., but the Merger Regulation allows limited leeway for the Member States to apply certain public interest factors when not inconsistent with the principles and concept of a common market, an approach that leaves industrial policy out of the policy mix. China has an explicit allowance in its competition law for certain enumerated public interest factors, but, so far, has not separated competition and industrial policy/public interest in its merger decisions, with a consequent loss of transparency.

These two approaches are replicated, in varying degrees, in many other jurisdictions around the world. The UK and Germany, for example, entrust only competition issues to the competition authority but empower a minister to trump the competition decision.<sup>31</sup> The competition law of Australia allows special authorization of anticompetitive acquisitions by the Tribunal if it is satisfied that the authorization is warranted by public benefits, which may include increase in exports and significant

---

<sup>31</sup> See Damien Geradin & Ianis Girgenson, *supra* note 10 at 10, discussing this “uneasy coexistence of independent antitrust agencies and political decision-makers”: “The Secretary of State [UK] retained the power to issue an ‘intervention notice’ in exceptional cases which involve ‘public interest considerations.’ When an intervention notice has been issued, the OFT (which conducts the initial merger review) cannot refer the transaction directly to the Competition Commission but must address a report to the Secretary of State, who then decides whether or not to refer the transaction to the Competition Commission. The Secretary of State is bound by the OFT’s antitrust findings but may clear the transaction, e.g., if the competition concerns identified by the OFT are outweighed by public interest considerations.... Similar arrangements exist in Belgium, France, Germany, Greece, Italy, the Netherlands, Spain, and Portugal.”

The structure of the UK competition institutions has changed but the procedure for a public interest trump remains the same. See Alex Chisholm, Speech, Public Interest and Competition-Based Merger Control n.19 and accompanying text (Sept. 11, 2014), *available at* <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control>.

import substitution;<sup>32</sup> but authorization is seldom sought or granted. Many competition laws of nations of sub-Saharan Africa include the public interest as one factor in merger analysis, sometimes specifying the admissible public interests.<sup>33</sup> The competition law of COMESA (the common market for Eastern and Southern Africa) authorizes public interest analysis in merger assessment but then essentially defines the public interest as competition.<sup>34</sup> Moreover, we note that the soft law and practice in numerous nations is to condition mergers to address a social problem, whether or not the merger raises competition concerns, as Namibia did in 2014 when it permitted a gold mine acquisition on condition of no layoffs of employees for two years.<sup>35</sup>

---

<sup>32</sup> See Competition and Consumer Act of Australia 2010, §§ 95AT and 95AZH. In *Re ACI Operations Pty Ltd (1991) ATPR (Com) 50-108*, the Commission provided a non-exhaustive list of public interest benefits: economic development (e.g. encouragement of research and capital investment), business efficiency, industrial rationalization (more allocative efficiency), employment, industrial harmony, assistance to efficient small business, improvement in the quality and safety of goods and services and expansion of consumer choice, supply of better information to consumers and businesses, promotion of equitable dealings, promotion of industry cost savings, development of import replacements, growth in export markets, and steps to protect the environment. See Russell V. Miller, *Miller's Australian Competition Law and Policy* (2d ed. 2012), pp. 334-37.

<sup>33</sup> Zambia's Competition and Consumer Protection Act authorizes the Commission to take into account "any factor which bears upon the public interest" in a merger analysis. It also provides a non-exhaustive list of such factors, including promotion of technical or economic progress, maintenance or promotion of exports or employment, and competitiveness of micro and small business enterprises. Act No. 24 of 2010, §31, available at <http://www.ccpc.org.zm/wp-content/uploads/2014/03/The-Competition-and-Consumer-Protection-1-21.pdf>.

Seychelles provides for a consumer trade-off. It takes into account off-setting public benefits such as the safety of goods and services and the efficiency with which goods are produced, supplied or distributed, and whether these benefits have been or are likely to be shared by consumers and businesses in general. Seychelles Fair Competition Act (2009), No. 18 of 2009, §40, available at [http://www.ftc.sc/index.php?option=com\\_content&view=article&id=49&Itemid=57](http://www.ftc.sc/index.php?option=com_content&view=article&id=49&Itemid=57).

<sup>34</sup> The COMESA Competition Regulations (Article 26(1) (b)) state that "the merger can be justified on substantial public interest grounds by assessing the factors set out in paragraph 4." COMESA's Competition Guidelines on The Application of Public Interest Criteria, however, state that "the only examples of public interest provided in CCR Article 26(4) are specific examples of pro-market public interests." That is, the public interest justification provided for *is* competition – lower costs, easier entry, and satisfying consumers. COMESA Competition Regulations (2004), Official Gazette, Vol. 17 No. 12, 20 November 2012. See COMESA Competition Draft Guidelines on the Application of Public Interest Criteria, April 2013, available at <http://www.comesacompetition.org/images/draft%20public%20interest%20guideline.pdf>.

<sup>35</sup> See Katy Oglethorpe, *Namibia Blocks Retrenchments in Mining Merger*, GLOBAL COMPETITION REVIEW, June 13, 2014, <http://globalcompetitionreview.com/news/article/36183/namibia-blocks-retrenchments-mining-merger/>.

This continued relevance of public interest factors to merger decisions throughout the world is a good indication that merger analysis cannot simply ignore the existence of these factors. Rather, closer attention needs to be paid to whether there are ways to consider public interest factors that are consistent with economic analysis while accounting for the social and political factors inherent in broader public interest concerns. To do that, however, we first need to see how antitrust law came to its more limited focus, and that requires a better understanding of the arguments presented in the *Philadelphia National Bank* litigation, to which we now turn.

## II. *Philadelphia National Bank* and the Public Interest

### A. Public Interest: Trial Presentation

In 1961 the Justice Department brought suit to stop the merger of the second and third largest commercial banks in the Philadelphia metropolitan region, Philadelphia National Bank and Girard Trust Corn Exchange Bank.<sup>36</sup> The resulting bank would have become Philadelphia's largest commercial bank,<sup>37</sup> and its loan limit would nearly have doubled, from \$8 million to \$15 million.<sup>38</sup> At the time Philadelphia was the fourth largest metropolitan area in the United States, behind New York, Chicago, and Los Angeles,<sup>39</sup> and the resulting bank—big as it would have been for Philadelphia—would still have been smaller than many large banks in New York and Chicago, with which it would be competing for corporate loans.

The merging banks vigorously disputed the Government's contention that the merger would adversely affect competition, but they also argued that the merged bank

---

<sup>36</sup> See *Philadelphia Nat'l Bank*, 374 U.S. at 330-31 (whether measured by assets, deposits, or loans).

<sup>37</sup> See *Philadelphia Nat'l Bank*, 374 U.S. at 331.

<sup>38</sup> See *id.* at 334 n.10; Brief for Appellees at 10, 21-22, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (No. 83).

<sup>39</sup> See <http://www.census.gov/population/www/documentation/twps0027/tab19.txt> (urban areas as of 1960 census).

“would attract new business to Philadelphia, and in general would promote the economic development of the metropolitan area.”<sup>40</sup> It is this argument that went beyond straight competitive concerns and implicated a broader set of public benefits that the parties claimed the larger bank would bring.

At trial the merging banks made their public benefits arguments primarily through the testimony of two witnesses. One was Richard Graves, the executive vice-president of the Philadelphia Industrial Development Corporation (PIDC). The other was Richardson Dilworth, the Democratic Mayor of Philadelphia.

The PIDC was a non-profit corporation set up by the City of Philadelphia and the Greater Philadelphia Chamber of Commerce to attract and retain business in the Philadelphia metropolitan area.<sup>41</sup> Graves pointed out that a particular concern to the City was the loss of industrial jobs—30,000 over a “comparatively short period.”<sup>42</sup> To address this problem the PIDC focused much of its effort on small industrial companies, which were undercapitalized and had limited operating capital.<sup>43</sup> To assist these companies the PIDC helped facilitate loans from commercial banks, in part by borrowing the money itself from these banks.

On direct examination Graves was asked whether he needed “small banks or large banks.” His response was that he always had more success at the “larger banks.” “There is an element of risk here . . . which a big bank perhaps can undertake but a very small bank might feel it should not.”<sup>44</sup> Of course, this testimony would not necessarily justify making the merging banks into an even larger bank, so counsel asked about the relevance

---

<sup>40</sup> 374 U.S. at 334.

<sup>41</sup> Transcript of Record at 3877-78, *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963) (No. 83). For current information about PIDC, see <http://www.pidc-pa.org/>.

<sup>42</sup> Transcript, *supra* note 41, at 3878.

<sup>43</sup> *See id.* at 3882

<sup>44</sup> *Id.* at 3888.

of a bank's lending limit. Graves responded that he was looking to place loans "well within" a bank's lending limit, but that "a lot" of companies in Philadelphia started small but grew to a point where they could be "cut off" by a smaller bank that could not handle the increased demand for money "in relation to the total demands" placed on the bank. Hence, bigger would be better.<sup>45</sup>

Graves was not only concerned about fostering small business, though. He was also trying to attract "big industries in the fields where we have been losing industries." He gave a specific example: "I went after a \$45 million aluminum plant to relocate it in Philadelphia. I couldn't say, in all honesty, that the reason I didn't get the plant was because there wasn't a big enough bank in Philadelphia. . . . It was a factor, and it is always a factor."<sup>46</sup> His conclusion: "I have no doubt at all that this merger is in the best interest of the economy of this city and its industrial potential and its industrial future growth."<sup>47</sup>

Mayor Dilworth, the second witness, began his testimony by pointing out that when seeking new business, Philadelphia was always bumping into the "constant hint that we are under the shadow of New York City." Even though Philadelphia was the fourth largest city in the country, "we haven't developed facilities like banking and other things the way we should."<sup>48</sup> Everyone in Philadelphia—"both large and small business, all the civic organizations, everybody that has contacted our office"—was in favor of the

---

<sup>45</sup> See *id.* at 3888-90.

<sup>46</sup> *Id.* at 3892.

<sup>47</sup> *Id.* at 3891.

<sup>48</sup> *Id.* at 3904.

merger. “[W]e just don’t quite understand why Washington wants to keep the Philadelphia area in short pants.”<sup>49</sup>

When asked about the benefits that a larger bank would yield to small business, Dilworth replied that he could answer only in a “general way.” His answer, though, only focused on “larger businesses,” which he judged as being “a little hesitant” to come to Philadelphia if they would need to go to New York for some of their banking needs. “[T]hey would be at the bottom of the ladder in New York,” he observed.<sup>50</sup> Indeed, he related his own experience as the beneficiary of a small trust handled by one of New York City’s largest banks. “It is a very unpleasant experience. . . . They have very little interest in you; you are just a poor relation from Philadelphia.”<sup>51</sup>

Dilworth offered two more specific examples of the effect on Philadelphia of not having a large bank. One involved development of the Port of Philadelphia, which had “enormous mass tonnage” of commodities but was still short of general cargo. A “big import and export firm” that was apparently considering using the port more told him that they used the First National Bank of Boston, not a Philadelphia bank, because the Boston bank was large enough to have foreign services “that none of our banks as yet have been able to develop.” The other was a case of a “large firm” that did not move its headquarters to Philadelphia from Chicago because it could not get in Philadelphia “all the banking services that it needed.”<sup>52</sup> Still, he added, this had occurred “a number of

---

<sup>49</sup> See *id.* at 3904-05.

<sup>50</sup> *Id.* at 3905.

<sup>51</sup> *Id.* at 3910.

<sup>52</sup> See *id.* at 3906.

years ago,” when he was in private law practice, and he could recall no other similar specific examples.<sup>53</sup>

In the defendants’ proposed findings of fact, and in their arguments to the trial court, counsel for the merging parties placed these arguments under a general heading of “convenience and needs.” This drew from the rubric used in the Bank Merger Act of 1960,<sup>54</sup> which they argued should inform analysis under Section 1 of the Sherman Act.<sup>55</sup> Counsel for PNB pointed to the fact that although the Philadelphia metropolitan area ranked fourth or fifth in various measures of economic activity, eight cities had larger banks and the largest bank in Philadelphia only ranked twentieth in the United States.<sup>56</sup> Without a bank large enough to meet the needs of large businesses, “a great deal of our bank business is shifted to New York.”<sup>57</sup> Counsel also argued that a larger bank would be able to invest in foreign services, “an important factor in the development of the port of Philadelphia.” Such a bank would also assist in attracting new businesses to locate in Philadelphia, something that Graves and Dilworth “were very, very definite about.”<sup>58</sup> Counsel for Girard emphasized that unless the merger were approved, Philadelphia “will remain in that position of inferiority to New York and allow all of the business which normally and rightfully belongs in Philadelphia to gravitate to that larger community.”<sup>59</sup>

---

<sup>53</sup> *See id.* at 3907-08.

<sup>54</sup> *See* 12 U. S. C. (1958 ed., Supp. IV) § 1828(c).

<sup>55</sup> The emphasis at trial, and before the Supreme Court, was on applying the Sherman Act, rather than the Clayton Act, to bank mergers. The question of the applicability of the Clayton Act to bank mergers was in some doubt, an issue that the Court settled decisively. *See* \_\_\_. [Justice Harlan dissent, Goldberg separate opinion; Clark draft, later withdrawn]

<sup>56</sup> *See* Transcript, *supra* note 41, at 3514-3515, 3589-90.

<sup>57</sup> *Id.* at 3590.

<sup>58</sup> *Id.* at 3595-96. The district court accepted this argument in its findings of fact. *See* Joint Appendix of Appellees to Motions to Affirm at 27b (Findings 205, 207), *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963) (No. 83).

<sup>59</sup> Transcript, *supra* note 41, at 3621.

The district court's opinion paid virtually no attention to these arguments. Given that the district court fully agreed with the defendants' arguments that the merger was not anticompetitive (indeed, that the merger would intensify competition<sup>60</sup>), there was no need to rely on other arguments, or to weigh up the value of the effects on Philadelphia, and certainly not to balance them against any adverse competitive effects resulting from the merger (not that counsel suggested doing so, either).

The only reference the district court made to the parties' broader arguments came at the end of its opinion. "The larger bank," the court wrote, will be better able to compete with the banks "of other cities and states that have been draining this area of banking business which might well be . . . handled here, and which cannot be handled under present circumstances. That it will benefit the city and area has been established clearly by a fair preponderance of the evidence, as has been set forth in the Findings of Fact of the defendants previously affirmed."<sup>61</sup>

Although neither the parties nor the court spoke in the language that we might use today, many of the "convenience and needs" arguments the parties advanced were in fact related to marketplace competition, such as the ability of the merging banks to compete effectively with New York banks and the efficiency benefits from being able to invest in the capacity to engage in foreign transactions. These arguments might today be advanced in terms of consumer welfare (or consumer and producer welfare). There would thus be no need to treat them separately from the competitive effects analysis.

---

<sup>60</sup> See *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 366 (E.D. Pa. 1962).

<sup>61</sup> *Id.* at 371. The district court broadly adopted the defendants' proposed findings of fact, in contrast to its painstaking review and frequent rejection of the Government's. See *id.* at 370. In their brief to the Supreme Court the parties quoted this paragraph in connection with their "convenience and needs" argument. See Brief for Appellees at 23, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (No. 83).

Not all of the convenience and needs arguments, however, would fit within today's conventional competitive effects analysis. Rather, these arguments implicate three effects identified above as part of broader public interest concerns.

First is jobs. An important aspect of Graves' testimony involved job loss in the Philadelphia area and the need to attract and retain businesses that could provide jobs. The example he gave of losing the aluminum plant to another region meant the loss of 3500 possible jobs, more than ten percent of Philadelphia's recent job losses.<sup>62</sup>

Second is a localized version of a "national interest" or "national champion" argument that we have seen raised in other cases to support mergers that might otherwise be anticompetitive or to oppose mergers that might make it harder for important national companies to compete.<sup>63</sup> Both witnesses indicated that Philadelphia was trying to compete regionally and nationally in an effort to have a strong local economy. Philadelphia was putting infrastructure in place, cooperative planning in the region was occurring, and civic projects were being built (with participating loans from a number of banks done as a matter of "civic commitment"<sup>64</sup>). At the "center city of every great metropolitan area," Graves testified, "is banking and finance as a service to the entire region."<sup>65</sup> In addition, as the Mayor of Philadelphia testified, there was a strong political desire to see Philadelphia thrive as a headquarters city in its own right, not in the shadow of New York. A larger bank, able to make larger loans and offer more services, could keep or attract headquarters to Philadelphia.<sup>66</sup> Thus, if the merger were to be allowed, the

---

<sup>62</sup> See Transcript, *supra* note 41, at 3901.

<sup>63</sup> See *supra* note 15 and accompanying text (discussing Boeing/McDonnell Douglas merger).

<sup>64</sup> See Transcript, *supra* note 41, at 3894 (Penn Center project).

<sup>65</sup> *Id.* at 3884.

<sup>66</sup> For a list of the major companies headquartered in the Philadelphia area at the time, see *id.* at 3161-62 (listing twenty-eight industrial companies, three merchandizing firms, two utilities, and two transportation companies). Although it is difficult to assess the effect on headquarters location that permitting the merger

new bank—the Philadelphia *National* Bank—would be able to hold its own with major banks in New York and elsewhere.

Third are the interests of small business. Graves testified that much of his efforts were directed at assisting small businesses that had trouble accessing capital at competitive rates. These were businesses that “started small” but could grow—if they could get access to capital from a bank with a larger lending limit that could more comfortably take on such risks.

#### B. Public Interest in the Supreme Court

In their brief to the Supreme Court the parties continued to frame their arguments in terms of “convenience and needs,”<sup>67</sup> but the Court’s opinion ignored that categorization. Instead, the Court recast these arguments into two components: “competitive justifications” and an “ultimate reckoning of social or economic debits and credits.”

The two arguments the Court recast as competitive effects were the banks’ increased ability to compete with New York banks and the banks’ ability to engage more effectively in foreign transactions. The former became an out-of-market procompetitive justification, with the Court rejecting a possible trade-off analysis between the two affected markets.<sup>68</sup> The latter was seen as an argument relating to scale economies and potential efficiencies from the merger. “But this attempted justification,” the Court

---

might have had, more than fifty years later many of the companies that were headquartered in the Philadelphia area are still headquartered there (*e.g.* Du Pont, Sun Oil, Campbell Soup, Pennsalt Chemical); some stayed until they went out of business (*e.g.*, Bethlehem Steel, Pennsylvania Railroad); others stayed until acquired by larger firms (*e.g.*, Rohm and Haas, Scott Paper, Philco); one stayed as the U.S. headquarters of the multinational firm that acquired it (Smith Kline & French). One company, Atlantic Oil, after acquiring Richfield Oil in 1966, moved its headquarters to New York and then to Los Angeles (in 1972).

<sup>67</sup> See Brief for Appellees, *supra* note 38, at 70-78.

<sup>68</sup> See 374 U.S. at 370. This aspect of the decision is considered further in Daniel Crane [this volume]

noted, “which was not mentioned by the District Court in its opinion and has not been developed with any fullness before this Court, we consider abandoned.”<sup>69</sup>

Into the social category went local economic welfare—bringing business to Philadelphia and stimulating Philadelphia’s economic development. The Supreme Court categorically rejected these considerations as “beyond the limits of judicial competence.”<sup>70</sup>

Omitted completely from the parties’ arguments to the Court, and from the Court’s opinion, were the concerns for jobs and the argument that larger banks could help small businesses get capital. It may be that the parties thought that the jobs argument was unnecessary and that the small business argument contradicted their argument that small businesses were served by small banks, and there were plenty of small banks left in the market.<sup>71</sup> The Court summarily dismissed the latter argument, asserting that the lessening of competition would actually harm small borrowers.<sup>72</sup> The Court’s only nod to the policy of protecting small business was in connection with an argument that small *banks* would thrive after the merger. After quoting the sentence in *Brown Shoe* that Congress was concerned ““with the protection of *competition*, not *competitors*,”” the Court observed: “In an oligopolistic market, small companies may be perfectly content to

---

<sup>69</sup> 374 U.S. at 335 n.10.

<sup>70</sup> *Id.* at 371.

<sup>71</sup> See Brief for Appellees, *supra* note 38, at 69 (“the 41 banks of the four-county area after the merger will provide a more than adequate number of alternative sources of credit for small and medium size borrowers”).

<sup>72</sup> See *id.* at 367 (“A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer’s alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed.”); *id.* at 369 (“If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower’s needs is likely to diminish.”).

follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive.”<sup>73</sup>

The way the Court recast the parties’ arguments and the categorical rejection of an “ultimate reckoning of social or economic debits and credits” were quite consistent with the Court’s two major goals in *Philadelphia National Bank*—to move from *Brown Shoe*’s multifactor test to a more readily-administrable approach and to anchor that approach solidly in microeconomic theory.<sup>74</sup> The Court thus put the economically tractable parts of the banks’ arguments into a manageable framework and then simply rejected the rest of the arguments as unadministrable—“beyond the limits of judicial competence.”

As a policy matter, both moves were wise. The move to economic analysis and away from unbounded social goals put antitrust on much firmer ground, increasing the chance of more successful merger enforcement. The broad rule of reason approach that prevailed before the 1950 amendments to the Clayton Act had undercut the ability of antitrust enforcers to make effective use of the Act and was a major reason for its amendment.<sup>75</sup> The Court in *Brown Shoe*, decided only one year before *Philadelphia National Bank*, had strongly upheld the Justice Department’s case, but had eschewed any “particular tests” for market definition or any “definitive quantitative or qualitative tests”

---

<sup>73</sup> *Id.* at 367 n.43 (emphasis in *Brown Shoe*).

<sup>74</sup> *See id.* at 362 (“And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration. This is such a case.”) (internal citation omitted).

<sup>75</sup> *See, e.g.,* *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (rejecting Sherman Act suit to prevent major acquisition by U.S. Steel). For a history of judicial and administrative enforcement of the Clayton Act from 1914 to 1950, see DAVID D. MARTIN, *MERGERS AND THE CLAYTON ACT* 104–220 (1959).

for assessing competitive effects.<sup>76</sup> The *PNB* Court’s focus on economics and administrability made effective enforcement more likely.

It is easy to forget today, however, that the *PNB* Court’s categorical rejection of broad social and economic effects did not read these broader effects out of merger law. The Court’s opinion remained faithful to what *Brown Shoe* had pointed out as the “dominant theme pervading congressional consideration of the 1950 amendments”—the concern for the “rising tide of economic concentration” in the economy.”<sup>77</sup> This Congressional concern, the Court had pointed out, rested not only on “economic grounds” but also on its “threat to other values.”<sup>78</sup> Concentration thus stood as proxy for a range of social and economic effects. By choosing a test that emphasized the extent of market concentration and its increase as a result of the merger, the Court in *Philadelphia National Bank* remained faithful to that legislative intent.

Over time, our economic approach to merger analysis has broadened beyond considering only concentration and its increase, but a separate concern for preventing increases in concentration *simpliciter* has been dropped from the equation.<sup>79</sup> This means that “stopping concentration” can no longer act as proxy for promoting other economic or social values, such as consumer choice or retaining local control.<sup>80</sup> For those who believe the antitrust law encompasses such broader values, a renewed emphasis simply on preventing concentration would be a way to return to the approach envisioned in the

---

<sup>76</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320-21 (1962).

<sup>77</sup> See *id.* at 315.

<sup>78</sup> See *id.* at 316.

<sup>79</sup> For a good review of these changes, see Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701 (2010).

<sup>80</sup> See *Philadelphia Nat’l Bank*. 374 U.S. at 316 (local control); *id.* at 345 n.72 (consumer choice). The Court in *Philadelphia National Bank* pointed to the concern for consumer choice when rejecting the banks’ argument that there were sufficient small bank alternatives in the market. See *supra* note 72 and accompanying text.

legislative debate over the 1950 amendments.<sup>81</sup> But another way to account for these values would be to take them into the equation more explicitly by articulating what these values are and thinking more clearly about their costs and benefits.

### C. An Assessment

*Philadelphia National Bank* rejects an “ultimate reckoning” of costs and benefits, but the record of the case shows that its categorical rejection of other economic and social effects was not the only approach the Court could have taken. A more cautious approach would have been to reject the banks’ case as insufficient. The testimony about job loss and small-firm access to capital was largely anecdotal, but, more importantly, was not linked to the need for a bank with increased lending limits. For example, one bank witness testified about a loan that was too large for a small bank to make, but the witness admitted on cross-examination that the borrower had ended up getting the loan from one of the merging banks, which was apparently already large enough to handle the risk.<sup>82</sup> Although the banks’ witnesses testified about the inability to attract firms to Philadelphia, they offered only two examples that related to the lack of a larger bank. One was from the Mayor’s private experience “a number of years ago.” In the other example the witness went out of his way to emphasize that the lack of a suitable bank was only one of a number of factors that influenced the company’s location decision.<sup>83</sup>

Nor was there an effort to quantify the benefits that Philadelphia might get if the two banks merged. Making Philadelphians feel less like country cousins to New Yorkers might have been important to civic pride, but the banks did not even offer an estimate of

---

<sup>81</sup> See Peter Carstensen, this volume. For a general articulation of a broader approach to antitrust, see Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981).

<sup>82</sup> See Transcript, *supra* note 41, at 3897 (\$300,000 loan).

<sup>83</sup> See *id.* at 3892 (“It was a factor. I can’t honestly say it was the single deciding factor.”).

what that increase in pride might be worth in economic terms or why this bigger bank would help. Even the benefits that might flow to the Port of Philadelphia from a bigger bank that could better engage in foreign trade—certainly a plausible economic benefit to the economy of the Philadelphia region—went unquantified.

This was not a case calling for impossible to make trade-offs. This was a case where the parties offered no evidence of the value of the benefits they thought would come from the merger and, more importantly, no real argument for why the merger was necessary to achieve those benefits. Had the Court treated these public interest benefits the way we now treat efficiency benefits—with the burden on the parties to first come forward with merger specific, quantifiable benefits—it would not have been necessary to decide whether these benefits were outside the consideration of Section 7.<sup>84</sup> The problem, then, was not judicial competence but judicial willingness.

Nevertheless, it is difficult to condemn the Court’s approach at a half-century’s remove. The goal of simplification of merger analysis was the critical one at the time, lest Section 7 never achieve its intended goals. No doubt it was better then to confine the contest over mergers to the variables with which lawyers, judges, and economists could readily work.

As we saw in Section I, however, along with the global spread of merger law has come an interest in considering the kinds of factors that the *Philadelphia National Bank*

---

<sup>84</sup> There is a technical argument for the Court’s decision to reject the relevance of these broader social and economic factors as a matter of law. The district court had broadly accepted the defendants’ proposed findings of fact, many of which supported its version of benefit to Philadelphia generally, and had included a conclusory paragraph indicating its acceptance of the defendants’ view. *See supra* note 61 and accompanying text. Had the Court found these arguments legally relevant, it would have been faced with evaluating how the district court treated them. Elsewhere in the Court’s opinion, however, it had refused to credit the district court’s reliance on “lay evidence” that the district court had accepted. *See* 374 U.S. at 367. It could have done the same here, even more easily, given the thinness of the record support for how the merger would benefit Philadelphia.

decision took off the table. This raises the question whether we are more able today to take these factors into account than we were fifty years ago. To answer that question, and to explore the problems that this type of analysis raises, we now turn to a review of one case in which competition authorities made a determined effort to bring public interest values into the equation, South Africa's decision in the Wal-Mart/Massmart merger.

### III. The Wal-Mart/Massmart Merger

#### A. Introduction

On September 26, 2010, Wal-Mart Stores made an offer to acquire fifty-one percent of a South African-based retailer, Massmart Holdings Ltd.<sup>85</sup> The parties duly notified the proposed acquisition to the South African Competition Commission, which recommended to the Competition Tribunal that the merger be approved without conditions.<sup>86</sup> On May 31, 2011, following six days of hearings, the Tribunal

---

<sup>85</sup> Wal-Mart uses the hyphenated form to describe the acquiring firm and the non-hyphenated form to describe its business. *See* In re Walmart Stores Inc. and Massmart Holdings Ltd., Reasons for Decision, Case No: 73/LM/Dec10 (June 29, 2011), at 2 n.1 (hereinafter Tribunal Reasons), *available at* <http://www.comptrib.co.za/assets/Uploads/Wal-Mart-and-Massmart-decision/73LMNov10-reasons-order.pdf>. For clarity of exposition, we use only the former.

<sup>86</sup> *See* In re SACCAWU and Wal-Mart Stores Inc., Merged Firm's Written Submissions, Appendix, Chronological Summary of Material Events, Item 92, CAC Case No. 110/CAC/Jul 11, to the Competition Appeal Court (Oct. 20, 2011), *available at* <http://www.comptrib.co.za/assets/Uploads/73LMNov10-Heads-of-Arguments/Merging-parties-Heads-of-Argument.PDF>. The Competition Commission is tasked with investigating notified mergers and, for "large" mergers, with making a recommendation to the Competition Tribunal. The Tribunal then acts as a court of first instance, assessing and adjudicating the legality of the merger. *See* Dennis Davis & Lara Granville, *South Africa: The Competition Law System and the Country's Norms*, in *THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES* 271-72 (Eleanor M. Fox & Michael J. Trebilcock eds. 2013). Under the Competition Act, the exact definition of "large" is left to ministerial decision in consultation with the Competition Commission. *See* Competition Act, Sec. 11, *available at* <http://www.compcom.co.za/assets/Files/pocket-book-2005-R.pdf>. The parties' notice was filed on November 3, 2010, and the Commission made its recommendation on February 11, 2011. *See* Chronological Summary of Material Events, *supra*, Items 57, 92.

approved the merger, but with conditions.<sup>87</sup> Appeal was taken to the Competition Appeal Court (a special division of the High Court), which, on March 9, 2012, upheld the decision to approve the merger.<sup>88</sup> The court, however, was dissatisfied with one of the conditions the Tribunal imposed and ordered the merged parties to conduct a further study and report back within three months.<sup>89</sup> Two reports were subsequently filed. The court reviewed both, entering its analysis and final order on October 9, 2012.<sup>90</sup>

Wal-Mart is the largest retailer in the world. At the time of the merger it operated in fifteen countries outside the United States<sup>91</sup> and employed 2.1 million workers worldwide, 1.3 million of them in the United States—the second largest employer after the Chinese army, one of the lawyers remarked.<sup>92</sup> Were Wal-Mart a country, its revenues would have made it the twenty-sixth largest economy in the world, two places ahead of South Africa.<sup>93</sup> Wal-Mart had no presence in South Africa

---

<sup>87</sup> See *In re Wal-Mart Stores Inc. and Massmart Holdings Ltd.*, Case No. 73/LM/Nov10, available at <http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/Wal-Mart-order-31.05.2011.pdf>

<sup>88</sup> See *In re SACCAWU and Massmart Holdings Ltd.*, Case No. 110/CAC/Jul11 (Competition Appeal Ct March 9, 2012) (hereinafter *Comp. Appeal Ct. Opinion*), available at <http://www.comptrib.co.za/assets/Uploads/Wal-Mart-and-Massmart-decision/110111CACJun11-Walmart-judgment.pdf>.

<sup>89</sup> See *id.* at 109.

<sup>90</sup> See *In re SACCAWU and Massmart Holdings Ltd.*, Case No. 110/CAC/Jul11 (Competition Appeal Ct Oct. 9, 2012) (hereinafter *Comp. Appeal Ct. Final Order*), available at <http://www.comptrib.co.za/assets/Uploads/110CACJun11111CACJul11-study.pdf>.

<sup>91</sup> See *Tribunal Reasons*, *supra* note 85, at ¶¶ 2, 4.

<sup>92</sup> See *Transcript of Hearing, In re Wal-Mart Stores Inc. and Massmart Holdings Ltd.*, Case No. 73/LM/Nov10, Before the Competition Tribunal (hereinafter *Tribunal Hearing Transcript*), May 10, 2011, at 228 (Testimony of Andy Bond, Wal-Mart witness) (number of employees), available at [www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-10-May-11.doc](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-10-May-11.doc); *id.*, May 16, 2011, at 1041 (statement of Adv. Kennedy) (Chinese army), available at [www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/16-May-11.doc](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/16-May-11.doc)

<sup>93</sup> See *Heads of Argument on Behalf of the Government Departments, Competition Tribunal, In re Wal-Mart Stores Inc. and Massmart (Pty)Ltd.*, CT Case No: 73/LM/Dec10, at ¶69 Annexure, available at <http://www.comptrib.co.za/assets/Uploads/73LMNov10-Heads-of-Arguments/Government-Departments-Heads-of-Argument.PDF>.

prior to the acquisition, however, other than a fruit-buying business operated by its UK subsidiary solely for export.<sup>94</sup>

Massmart was a wholesaler and retailer of grocery products, liquor, and general merchandise, operating through four divisions (Massdiscounters, Masswarehouse, Massbuild, and Masscash).<sup>95</sup> Fifty-five percent of its sales were in food and liquor.<sup>96</sup> It had the leading share in South Africa in sales of general merchandise, liquor, and home improvement products, and was second in wholesale food, but the largest of those shares was only twenty-two percent and it was only fifth in retail “formal” food sales, with about two percent.<sup>97</sup> Massmart also operated in several other sub-Saharan African countries.<sup>98</sup>

The Competition Commission concluded, without dispute, that the merger was “unlikely to substantially lessen or prevent competition,”<sup>99</sup> but the South African Competition Act specifically provides that in addition to an inquiry into competitive effects, a merger is to be tested for whether it “can or cannot be justified on substantial public interest grounds.”<sup>100</sup> Even more interestingly for our purposes, the

---

<sup>94</sup> See RBB Economics, *The Merger of Wal-Mart and Massmart: Economic Issues* at ¶ 3.5 (May 3, 2011) (hereinafter RBB Report), available at <http://www.comptrib.co.za/assets/Uploads/Case-Documents/73LMNov10-Walmart-Massmart-amended-RBB-report-non-confidential.PDF>.

<sup>95</sup> See Tribunal Reasons, *supra* note 85, at ¶ 7.

<sup>96</sup> Tribunal Hearing Transcript, May 9, 2011, at 140 (testimony of Grant Pattison, Massmart Holdings Ltd.), available at [www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-9-May-11.doc](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-9-May-11.doc).

<sup>97</sup> See RBB Report, *supra* note 94, at 10-13 (Tables 1-5).

<sup>98</sup> See Merging Parties’ Written Submissions, Competition Tribunal, *In re Wal-Mart Stores Inc. and Massmart Holdings Ltd.*, CT Case No: 73/LM/Nov10, at ¶ 5 (Tanzania, Malawi, Swaziland, and Zambia) (May 16, 2011), available at <http://www.comptrib.co.za/assets/Uploads/73LMNov10-Heads-of-Arguments/Walmart-Massmart-Heads-of-Argument.PDF>

<sup>99</sup> See Competition Commission’s Submission, Competition Tribunal, *In re Wal-Mart Stores Inc. and Massmart Holdings Ltd.*, CT Case No: 73/LM/Nov10, at ¶ 5 (noting fact that geographic markets are local and that there was no overlap between the activities of the merging firms) (May 16, 2011), available at <http://www.comptrib.co.za/assets/Uploads/73LMNov10-Heads-of-Arguments/Competition-Commission.pdf>. See also Tribunal Hearing Transcript, May 9, 2011, *supra* note 96, at 2-8 (describing Commission investigation and conclusions).

<sup>100</sup> Competition Act, *supra* note 86, Sec. 12A (1)(b).

South African Competition Act gives government Ministers a right to intervene in large merger proceedings and participate as a party before the Commission, Tribunal, and Competition Appeal Court. The Act also requires that notice of large mergers be given to trade unions that represent a “substantial number” of the merging parties’ employees.<sup>101</sup> As a result of these provisions, three government ministries intervened in the proceedings, along with three unions and a trade union federation.<sup>102</sup>

#### B. The Parties’ Narratives: What Is in the Public Interest?

When considering the public interest, the South African Competition Act instructs the Commission and Tribunal to consider the effect of the merger on: (1) a particular sector or region, (2) employment; (3) the competitive potential of small businesses or historically disadvantaged people; and (4) the international competitiveness of national industries.<sup>103</sup> The Tribunal had previously read this as an exclusive list, rejecting the possibility of an inquiry into “public interest” more generally.<sup>104</sup> Confined by the statute, the parties’ arguments focused primarily on employment effects and on the potential harm that increased imports would pose to small business and the clothing industry, although the arguments on employment effects and import substitution were eventually conflated.

The objectors had different concerns about the merger’s potential public interest effects. The unions were concerned about the effect on jobs and employee

---

<sup>101</sup> See *id.* Secs. 13A (2)(a),18(1).

<sup>102</sup> The ministries were the Economic Development Department, the Department of Trade and Industry, and the Department of Agriculture, Forestry and Fisheries. We refer to them collectively as the Ministers. The unions were the South African Commercial Catering and Allied Workers Union (SACCAWU), the South African Clothing and Textile Workers Union (SACTWU), and the Food and Agricultural Workers Union (FAWU); the federation was the Federation of South African Trade Unions (COSATU). We describe the Ministers and labor unions as “objectors,” “intervenors,” and “parties” for descriptive purposes, without regard to their legal status in the proceedings.

<sup>103</sup> See Competition Act, *supra* note 86, Sec. 12A (3).

<sup>104</sup> See Tribunal Reasons, *supra* note 85, at ¶ 30.

interests, both at Massmart and in the clothing and textile industries that might be affected by the merged firm's decision to import foreign-made apparel under its "George" private label. The Ministers were concerned about imports more generally and the effect of import substitution on domestic industry.

Despite their somewhat different concerns, the objectors merged their specific interests in an over-arching narrative focused on Wal-Mart's international reputation with regard to labor issues and its aggressive worldwide sourcing of inputs in the effort to lower its costs—which the objectors generally characterized as “the Wal-Mart model.”<sup>105</sup> With regard to the treatment of workers, the objectors argued that Wal-Mart would behave in South Africa as it had behaved elsewhere in the world. High on the list of places of bad behavior was the United States, where the objectors pointed to Wal-Mart's unwillingness to recognize unions, its alleged discrimination against women, and its alleged low pay scales.<sup>106</sup> In addition, Wal-Mart's famous ability to force suppliers to lower price, particularly suppliers in China, was stressed as a predictor of likely import substitution and harm to South African businesses.

The union intervenors also advanced a narrative of the “high cost of low prices.”<sup>107</sup> Even if Wal-Mart would bring lower prices to consumers, the unions argued that low prices are of no use to consumers who are unemployed through import displacement and are of little use to those whose wages are reduced because of Wal-Mart's hard-nosed wage negotiations. This led the unions to a “share the

---

<sup>105</sup> See Tribunal Hearing Transcript, May 13, 2011, at 829 (testimony of James Hodge, objectors' economics witness), available at [www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-13-May-11.doc](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-13-May-11.doc).

<sup>106</sup> See Tribunal Hearing Transcript, May 9, 2011, *supra* note 96, at 16 (Wal-Mart's record on unionization “sends some shivers...down the backs of the union.”) (statement of Adv. Kennedy, Union lawyer).

<sup>107</sup> See Tribunal Hearing Transcript, May 12, 2011, at 618 (phrase repeated by Wal-Mart lawyer, as putting the argument “snappily”), available at [www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-12-May-11.doc](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-12-May-11.doc).

wealth” narrative: Consumers are not entitled to all the benefit of low prices; some should be shared with workers.

Not surprisingly, the merging parties had quite a different narrative, but one that also drew on Wal-Mart’s international reputation. They embraced Wal-Mart’s reputation for low prices as bringing huge benefits to consumers and argued that Wal-Mart would increase jobs by opening new stores faster than Massmart was able to do on its own. To counter the intervenors’ narratives, they also argued that Wal-Mart’s lower prices would come from greater efficiencies in supply-chain management and the elimination of the middle-man importers that Massmart used. Low prices would not come from an increase in lower-priced imports, occasioned either by Wal-Mart’s power to get prices from foreign suppliers that were lower than Massmart (or any other buyer) could, nor from the increased use of private label imports, nor from reductions in wages and employment. Finally, the merging parties stressed rationality. Competition authorities should not succumb to a “visceral kind of fear” of Wal-Mart: “We must be rational agents and think through what are the real forces that are driving this acquisition and its impact in the markets.”<sup>108</sup>

The focus in both narratives on Wal-Mart’s reputation for low prices created problems for both sides. For the objectors, their witnesses were easily led into agreeing with Wal-Mart’s lawyers that consumer prices would be dramatically lower, rather than advancing an argument that lower costs would simply increase profit and not benefit consumers.<sup>109</sup> Further, the share the wealth argument required wealth to

---

<sup>108</sup> Tribunal Hearing Transcript, May 16, 2011, at 975 (statement of counsel for Wal-Mart), *available at* [www.comtrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/16-May-11.doc](http://www.comtrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/16-May-11.doc)

<sup>109</sup> See Tribunal Hearing Transcript, May 11, 2011, at 478 (Wal-Mart prices 8 to 27 percent lower than other major supermarkets) (testimony of Kenneth Jacobs) (union witness), *available at*

share. There would only be wealth from lower prices if the merger were approved, however, and the unions were arguing under the statute that the merger should be rejected on public interest grounds. On the other hand, the merging parties' embrace of low prices required them to explain why prices would go down. The higher the total amount of the price reductions the less credible would be their story of "better supply chain management" and "no increased import substitution."

### C. The Difficulties of Quantification: The Economists' Reports

In contrast to the defense presentation in *Philadelphia National Bank*, both sides in the Wal-Mart/Massmart case offered expert economists' reports and testimony to help make their case. The Ministers retained James Hodge, from the South African economics consulting firm Genesis Analytics.<sup>110</sup> The merging parties employed Simon Baker, founding partner of RBB Economics based in London.

One goal of Hodge's expert report and testimony was to quantify the effect of increased imports on jobs in South Africa. Hodge first pointed to the "economic logic" behind the argument that imports would increase because the current import-domestic procurement equilibrium would change, whether because of Wal-Mart's global purchasing power (\$400 billion in sales v. Massmart's \$7 billion) or improved procurement logistics, or both.<sup>111</sup> He then estimated the effect on jobs of a

---

[www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-11-May-11.doc](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/ct-wal-mart-and-massmart-11-May-11.doc)

<sup>110</sup> The SACCAWU called Kenneth Jacobs, Chair of the University of California Berkeley Center for Labor Research and Education to testify about Wal-Mart's effect on employment and its labor practices, mainly in the United States, but he did not prepare any independent economic study for the trial. See Affidavit of Kenneth Jacobs, In re Wal-Mart Stores Inc. and Massmart Holdings Ltd., CT CASE NO: 73/LM/Nov10, at ¶ 2.2, available at <http://www.comptrib.co.za/assets/Uploads/Case-Documents/Jacobs.pdf>; cf. Tribunal Hearing Transcript, May 11, 2011, *supra* note 109, at 478 (criticizing research for not being "personal") (statement of Wal-Mart lawyer).

<sup>111</sup> G:Enesis, Assessment of the Public Interest impact of the Wal-Mart-Massmart Merger at §2.2 and ¶¶ 25, 31 (April 19, 2011) (hereinafter Genesis Report), available at <http://www.comptrib.co.za/assets/Uploads/73LMNov10-Genesis-Report.PDF>.

hypothetical “very small” one percent increase in the post-merger percentage of Massmart’s sales from imports that would be taken away from domestic procurement.

To make his estimation, Hodge began by calculating the Rand value of the one percent drop in domestic procurement in the major categories of Massmart’s sales— general merchandise, food, and beverages. He then drew on an economic model of the South African economy, called the Social Accounting Matrix,<sup>112</sup> that provides multipliers for the total effects on employment per Rand increase in the value of production in various sectors of the economy (e.g., 8.4 jobs per R1m of general merchandise).<sup>113</sup> Assuming that Massmart’s increased imports were spread equally among all categories of its products, Hodge then applied the jobs multiplier to the value of *lost* domestic production from Massmart’s switch to imports in the three categories and concluded that there would be “roughly” four thousand jobs lost for a one percent substitution of imports for domestic production.<sup>114</sup>

In a footnote to his Report, however, Hodge qualified this conclusion. Pointing out that the multipliers in each of these categories were based on an employment/output elasticity of 1 (that is, a one percent change in output would lead to a one percent change in employment), Hodge cautioned that “[i]n reality the employment output elasticity is less than 1.”<sup>115</sup> This meant, he wrote, that his job loss estimates “were biased upward.”<sup>116</sup>

---

<sup>112</sup> For a version of the social accounting matrix, see James Thurlow & Dirk Ernst van Seventer, A Standard Computable General Equilibrium Model for South Africa, TMD Discussion Paper No. 100 (Sept. 2002), available at <http://www.ifpri.org/sites/default/files/publications/tmdp100.pdf>. Wal-Mart’s economist witness characterized this model as “cutting edge,” relying on “strong assumptions” that make the conclusions not “definitive.” See Tribunal Hearing Transcript, May 12, 2011, *supra* note 107, at 678.

<sup>113</sup> See Genesis Report, *supra* note 111, at ¶ 58.

<sup>114</sup> See *id.* ¶¶ 57, 58.1, 58.2.

<sup>115</sup> See *id.* n.43.

<sup>116</sup> *Id.*

Baker criticized Hodge’s job loss estimates for a number of reasons.<sup>117</sup> For one, the one percent shift in imports had no evidentiary basis; it was “plucked out of the air.”<sup>118</sup> For another, Hodge assumed that imports were spread pro rata over each sector. If there were going to be any increase in imports, however, it would more likely be in general merchandise (where import penetration is relatively high) rather than in food (where import penetration is “extremely low”). Switching the imports all to that sector would lower the job loss by 500, to 3500.<sup>119</sup> Third, there was the concessionary footnote regarding elasticity. If the employment/output elasticity were, say, .5 and not 1, the job loss would then fall to 1750. There can be no quantification “without a more robust estimate of the elasticity,” Baker cautioned.<sup>120</sup> Finally, Baker pointed out that an estimate of job loss would need to take account of the jobs that would be *created* by the merged firm’s lower prices—the “hundreds of millions, possibly billion[s] of Rand reduction in consumer prices” now available to consumers to “enhance their lifestyle” and to be “reinvested in the domestic economy.”<sup>121</sup>

There was little Hodge could do to respond to the first three arguments. All of his estimates involved assumptions which, if varied, would produce different results, particularly the unitary elasticity estimate used in the Social Accounting Matrix for the general relation between increased output and employment. On the other hand, he

---

<sup>117</sup> RBB also submitted an initial report and a report in response to the Genesis report. See RBB Economics, *The Merger of Wal-Mart and Massmart: Economic Issues* (May 3, 2011), available at <http://www.comtrib.co.za/assets/Uploads/Case-Documents/73LMNov10-Walmart-Massmart-amended-RBB-report-non-confidential.PDF>; RBB Economics, *Wal-Mart and Massmart: A Response to the Genesis Report* (April 29, 2011), available at <http://www.comtrib.co.za/assets/Uploads/Case-Documents/73LMNov10-Walmart-Massmart-RBB-response-to-Genesis-non-confidential-for-web.PDF>. The initial report was intended to respond to a “miscellany of contradictory complaints” that had been leveled against the merger at an earlier time. See *id.* at ¶ 1.

<sup>118</sup> *Id.* at ¶ 3.6

<sup>119</sup> See *id.*

<sup>120</sup> Tribunal Hearing Transcript, May 12, 2011, *supra* note 107, at 677-78,

<sup>121</sup> *Id.* at 678-79, 675.

could have pointed out that his hypothetical one percent increase in Massmart's imports was likely quite conservative and tried to suggest a more realistic figure, but he did not.

Baker's fourth objection—that Hodge failed to account for the effect on domestic manufacturing from the increased consumer spending that would flow from Massmart's lower prices—was more troublesome. Hodge tried to meet Baker's argument by pointing out that Baker did not account for the *decrease* in spending by those who *lost* their jobs, however many that might be—those effects should be on both sides of the equation or on neither.<sup>122</sup> But he also conceded that some of the merged firm's price decreases could come from synergies (that is, in efficiencies that increase productivity) rather than from import substitution, which would diminish the labor effect. And he agreed that a 5 percent price drop in prices from such savings (roughly R2.5 billion), if all spent on local products—a point that counsel for Wal-Mart got him to accept as likely—could amount to a gain of 20,000 jobs.<sup>123</sup> This gain, of course, would dwarf his earlier estimate of job losses.

The second important goal of Hodge's report and testimony was to quantify potential job loss if Wal-Mart lowered wages after the merger. This proved even more difficult. Hodge's report first concluded that Massmart's pre-merger wage levels were high relative to other South African retailers. His report then posited that Wal-Mart might lower those wages by 14 percent (the amount by which Wal-Mart's

---

<sup>122</sup> See Tribunal Hearing Transcript, May 13, 2011, *supra* note 105, at 886.

<sup>123</sup> See *id.* at 884-86 (discussing "second round effects").

U.S. wages were allegedly lower than other large U.S. retailers' wages). This would cause a R132 million annual loss to Massmart's workers.<sup>124</sup>

How sure could one be that Massmart, post-merger, would cut wages so substantially? Baker argued that Wal-Mart was constrained by labor markets and could not achieve results substantially different than its competitors. "You can't just [say that] Wal-Mart [is] not as nice as Massmart therefore wages will fall."<sup>125</sup> But Hodge demurred. Relations between different companies and their unions are not identical: "[E]conomics is no longer just some mathematical model which we solve and get a single outcome."<sup>126</sup> Still, even if Wal-Mart's wages were different than other companies', which Hodge averred they were,<sup>127</sup> the mere fact of difference was not much help in predicting how much different Massmart's wages would be once Wal-Mart controlled it.

Finally, Hodge made a two-part effort to undercut the positive welfare effects of Wal-Mart's lower prices. First, to the extent that lower prices are used by consumers for increased consumption, this will benefit the consumption sector of the economy over the productive sector; but it is the latter that South African government economic policy favored because it offers a greater prospect of sustained economic development.<sup>128</sup> Second, the Massmart divisions that would most likely see a decrease in consumer prices were those that served higher income consumers, but the

---

<sup>124</sup> See Genesis Report, *supra* note 111, at ¶¶ 78-79. At the Tribunal hearing, Hodge testified that a 10 percent drop in wages would cost "in the 100 millions" annually. See Tribunal Hearing Transcript, May 13, 2011, *supra* note 105, at 828.

<sup>125</sup> Tribunal Hearing Transcript, May 12, 2011, *supra* note 107, at 679.

<sup>126</sup> Tribunal Hearing Transcript, May 13, 2011, *supra* note 105, at 829.

<sup>127</sup> See *id.*

<sup>128</sup> See Genesis Report, *supra* note 111, at ¶ 91.1. See also Tribunal Hearing Transcript, May 16, 2011, *supra* note 108, at 1093 (government seeks to "move from consumption driven growth to growth grounded upon the productive sectors of the economy") (Ministers' Arguments).

potential job losers were the “most vulnerable members of society.”<sup>129</sup> Both effects, the Report argued, should be counted when “weighing up” the public interest benefits and harms from lower prices.<sup>130</sup>

The value of either of these effects, however, would be difficult to determine, and Hodge made no effort to do so, either in his Report or in his testimony. Indeed, there was even a question whether the distributional effects were so clear as between the accepted winners (consumers) and the potential losers (workers). Counsel for Wal-Mart agreed that “a very attractive distributional argument” could be made if poorer people were carrying “a very large burden for small gains to richer people,”<sup>131</sup> but he disputed the argument on factual grounds because the income levels of those who would gain through lower prices would not likely be much different than the income levels of the employees whose jobs might possibly be affected.<sup>132</sup>

The economists’ testimony thus demonstrates the difficulty of making predictions regarding broad post-merger effects and then trying to quantify those predictions. Counsel for Wal-Mart characterized Hodge’s estimate of job loss from import substitution as “the only effort frankly on any one’s part to seek to quantify some employment effect,”<sup>133</sup> but even that estimate was problematic. If one of the challenges of looking at public interest effects is to provide solid proof of their

---

<sup>129</sup> See Genesis Report, *supra* note 111, at ¶¶ 91, 92 (discussing effects on different income levels in society, based on LSM levels). For a description of the LSM (“Living Standards Measure”) categories in South Africa, see Living Standards Measure, South African Audience Research Foundation, <http://www.saarf.co.za/LSM/lsm.asp>. For LSM levels as of 2013, see <http://www.saarf.co.za/lsm-descriptions/2013/LSM%20Descriptions%20AMPS%20June%202013.pptx>.

<sup>130</sup> See Genesis Report, *supra* note 111, at ¶ 102.

<sup>131</sup> Tribunal Hearing Transcript, May 16, 2011, *supra* note 108. at 960-61.

<sup>132</sup> See *id.* at 960.

<sup>133</sup> *Id.* at 993.

existence and value, then the record in the Wal-Mart/Massmart case shows how difficult that task will be.

#### D. The Institutions of Public Interest Decision-Making

##### 1. The Competition Tribunal

Under South African competition law, the South African Competition Tribunal reviews large mergers, after a recommendation from the Competition Commission.<sup>134</sup> The Tribunal, an administrative body composed of lay members rather than judges, makes its decisions through an adjudicatory process.<sup>135</sup> The Tribunal has ten members, but decides its cases in three-member panels; the panel that decided the Wal-Mart/Massmart case was made up of the Tribunal's three fulltime members.<sup>136</sup>

Although the Commission recommended to the Tribunal that the merger be approved, the intervenors vigorously contested the legality of the merger. Indeed, prior to the hearing the merging firms fought over the efforts of the intervenors to get broad discovery and to postpone the hearings to enable them to present a fuller case.<sup>137</sup> The Tribunal allowed some discovery, but not all that the intervenors requested, and extended the dates for the start of the hearings, but only by two months.<sup>138</sup> The Tribunal then had five days of hearings, hearing the direct and cross-examination of ten witnesses, nine presented by the merging firms, unions, and

---

<sup>134</sup> See *supra* note 86

<sup>135</sup> See Davis & Granville, *supra* note 86, at 271.

<sup>136</sup> See <http://www.comptrib.co.za/about/members/>.

<sup>137</sup> For chronology, see <http://www.comptrib.co.za/walmart-massmart-merger/diary/>. For arguments over the discovery requests, see Tribunal Hearing Transcript, March 25, 2011, *available at* <http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/25-Mar-11-non-confidential.doc>.

<sup>138</sup> See Comp. Appeal Ct. Opinion, *supra* note 88, ¶¶ 52-65..

Ministers and one (the CEO of the leading supermarket chain in South Africa) called by the Tribunal itself.<sup>139</sup>

The legalistic procedures of the Tribunal, however, were complicated by a parallel political process initiated by the Minister of Economic Development. After the merger was notified to the Commission in November 2010, the Minister of Economic Development appointed a panel to research the merger; the panel concluded that the merger would seriously affect the welfare of local manufacturers.<sup>140</sup> In January, during the Competition Commission's investigation, the Minister met with Wal-Mart executives at the World Economic Forum in Davos, Switzerland, after which the Minister decided to organize meetings with the unions in an effort to broker an agreement between the unions and the merging parties that could be presented to the Tribunal. He also made clear his view that "[w]hat we should be seeking to ensure is that there is strong local procurement, that the South African supply base is supported and that our capacity to create jobs locally is highlighted."<sup>141</sup>

The Department-facilitated meetings with the unions were held in February, both before and after the Commission provided its recommendation to the Tribunal that the merger be approved without conditions.<sup>142</sup> The Commission's recommendation acknowledged the ongoing discussions, stating that the Commission expected an agreement would be reached before the end of the Tribunal's process and

---

<sup>139</sup> For transcripts of all the testimony, see <http://www.comptrib.co.za/walmart-massmart-merger/transcripts-of-hearings/>.

<sup>140</sup> See Comp. Appeal Ct. Opinion, *supra* note 88, at ¶¶36-37.

<sup>141</sup> See *Minister seeks Massmart/Wal-Mart, unions solution*, IOL Business Report, Feb. 16, 2011, available at <http://www.iol.co.za/business/markets/south-africa/minister-seeks-massmart-wal-mart-unions-solution-1.1027559#UoDa2uIlj5l>.

<sup>142</sup> See Merging Parties' Chronological Summary, *supra* note 86, Items 90, 92.

that it would be up to the Tribunal to decide whether to make the agreement a binding condition of the merger.<sup>143</sup> The Commission’s recommendation that the merger be approved without conditions, however, affected the ongoing negotiations, apparently lessening the willingness of the merging firms to make concessions to the unions. As a result the Minister decided to exercise his right to participate in the Tribunal hearing, even though he had not participated in the Commission’s investigation.<sup>144</sup>

The Tribunal viewed its adjudicatory mission as grounded in a concern for protecting competition. As the Tribunal put it: “If we are not for competition then who is?”<sup>145</sup> But the Tribunal also takes a prudential view of its competition-protecting role: “Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction.”<sup>146</sup> The Tribunal does acknowledge that the statutory public interest effects are within its competition law mandate, but, as it pointed out in its opinion, since the passage of the Competition Act in 1998, it had never condemned a merger on public interest grounds that was otherwise “unproblematic,” nor had it “rescued” a merger on public interest grounds that was problematic from a competition law perspective.<sup>147</sup> Although in the past it had rejected a complete balancing exercise between competitive and public interest effects (as an efficiency justification would require), it had also rejected the idea that the public interest analysis is “separate and distinct” from the competition analysis. This would be a “blinkered approach.”

---

<sup>143</sup> See Comp. Appeal Ct. Opinion, *supra* note 88, at ¶ 44.

<sup>144</sup> See *id.* at ¶¶ 45-46.

<sup>145</sup> Tribunal Reasons, *supra* note 85, at ¶ 115. Cf. Hillel, Sayings of the Fathers, I:14 (“If I am not for myself, who will be for me? And if I am only for myself, what am I? And if not now, when?”) (Joseph H. Hertz, Tr., 1945).

<sup>146</sup> Tribunal Reasons, *supra* note 85, at ¶ 32. Compare *Verizon Commun. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-16 (2004) (The Sherman Act . . . does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”).

<sup>147</sup> See Tribunal Reasons, *supra* note 85, at ¶ 34.

Instead, the Tribunal makes the public interest determination “in relation to” the competition analysis.<sup>148</sup>

The solution the Tribunal has adopted in charting its way between rejecting “unproblematic” mergers and “rescuing” bad mergers has been to impose “conditions” in particular cases that address the public interest concerns.<sup>149</sup> Even there, however, it has been cautious to leave to “other regulators” matters that were beyond the Tribunal’s expertise.<sup>150</sup>

The confluence of the Tribunal’s past positions, the failed political negotiations, and the subsequent participation of the Ministers and labor unions in the Tribunal’s adjudicatory process had important consequence for the progress of the case through the Tribunal and, eventually, the Competition Appeal Court. Despite the Tribunal’s record in public interest cases, the merging parties could not ignore the possibility that the Tribunal would prohibit this merger. This was Wal-Mart, after all, and the case was politically quite controversial.<sup>151</sup> This possibility required all the parties to muster specific evidence in support of their narratives of the merger, whether in the form of economic studies, or concrete business decisions (would the Shoprite supermarket chain desert its local pasta manufacturer and import from Turkey in response to the merged firm’s lower prices?<sup>152</sup>), or an examination of Wal-Mart’s behavior when making similar acquisitions in other

---

<sup>148</sup> See *id.* at ¶ 36 (citing earlier Tribunal decisions).

<sup>149</sup> See Competition Act, *supra* note 86, Sec. 16(2) (b) (allowing Tribunal to approve large mergers subject to conditions).

<sup>150</sup> See Tribunal Reasons, *supra* note 85, at ¶ 35.

<sup>151</sup> See DAVID LEWIS, ENFORCING COMPETITION RULES IN SOUTH AFRICA: THIEVES AT THE DINNER TABLE 123 (2013) (merger was “iconic and notorious”).

<sup>152</sup> See Tribunal Hearing Transcript, May 12, 2011, *supra* note 107, at 630 (testimony of William Ackermann, Shoprite executive).

countries (Chile being the main example<sup>153</sup>). This effort to prove a case led the objectors to push the merging parties to provide information that could help them predict Massmart's post-merger behavior and to quantify the impact on imports and employment. Although the objectors were only moderately successful in either effort,<sup>154</sup> having these proceedings occur in a competition tribunal rather than in a Minister's office made an important difference in the way the arguments were framed and presented, and increased the transparency of the process.

At the same time, the parties to the proceeding had to assume that the Tribunal would likely go no further than to impose post-merger conditions on Massmart. This led the objectors to advance a wide array of proposals, some of rather stunning sweep,<sup>155</sup> even while some took the position that the merger should be prohibited completely;<sup>156</sup> and led the merging parties to propose some very modest conditions, even while saying that they were not compelled to do so because the merger was not contrary to the public interest. Even the Tribunal was involved in proposing and suggesting various conditions,<sup>157</sup> the most controversial of which (some form of local content requirement for a limited time period) then became the subject of testimonial comment from both sides during the hearings.<sup>158</sup>

---

<sup>153</sup> See Tribunal Hearing Transcript, May 11, 2011, *supra* note 109, at 410-32 (testimony of Ostale Cambiaso); *see also id.* at 435-60 (testimony of Sophia Beatrice Scasserra) (Argentina).

<sup>154</sup> [E.g., couldn't get extent of Massmart's imports; did get a document setting out expected "synergies," which the Commission had not obtained, see Tribunal for criticism.]

<sup>155</sup> See, e.g., Tribunal Hearing Transcript, May 12, 2011, *supra* note 107, at 592 (proposing that Massmart have an 80% local procurement commitment) (union witness); *id.*, May 16, 2011, *supra* note 108, at 1070 (proposing that the value of Massmart's local origin procurement be held constant for five years) (union lawyer proposal).

<sup>156</sup> See, e.g., Government Dep'ts Heads of Arguments, *supra* note 93, at ¶ 25 (merger should be prohibited "if the merging parties continue with their obstinate stance that conditions to address the [import] concerns are wholly unworkable").

<sup>157</sup> See Tribunal Hearing Transcript, May 10, 2011, *supra* note 92, at 193-198 (Chairperson proposals)

<sup>158</sup> See, e.g., *id.*, at 198-206 (testimony of Massmart CEO critiquing local content proposal).

The Tribunal ended up on the modest side of conditions, ordering four conditions that basically tracked proposals that the merging parties had advanced during the course of the hearings.<sup>159</sup> One was a two-year freeze on further labor-force reductions (referred to as “retrenchments”). The second was a three-year commitment to continue recognition of the SACCAWU.<sup>160</sup> The third dealt with Massmart’s retrenchment of 503 employees in 2009 and June 2010, a point of controversy during the hearing. Massmart had argued that the dismissals occurred well before the acquisition was proposed, so were unrelated to the merger. The objectors argued that the retrenchments were, in fact, related to the acquisition because Massmart knew of Wal-Mart’s possible interest and was trying to trim its staff so as to be more attractive to Wal-Mart (“putting lipstick on,” as a Wal-Mart executive termed it).<sup>161</sup> This employee loss was far less than the general employment losses Hodge was predicting from import substitution, but it was also far more tractable. The Tribunal ordered the merged firm to give preference to rehiring these employees if jobs became available.<sup>162</sup>

The most controversial condition was aimed at the issue of imports. The merging parties had categorically rejected local content conditions, threatening to appeal or even

---

<sup>159</sup> For the Tribunal’s conditions, see *In re Walmart Stores Inc. and Massmart Holdings Ltd.*, Order, Case No: 73/LM/Dec10 (Annexure A) (May 31, 2011) *available at* <http://www.comptrib.co.za/assets/Uploads/Wal-Mart-and-Massmart-decision/73LMNov10-reasons-order.pdf>. For the merging parties’ proposals, see Tribunal Hearing Transcript, May 16, 2011, *supra* note 108. at 1018-19.

<sup>160</sup> The Tribunal rejected the unions’ proposals for more specific rights as too intrusive into the collective bargaining relationship for a competition authority to require. See Tribunal Reasons, *supra* note 85, at ¶69.

<sup>161</sup> See Tribunal Hearing Transcript, May 10, 2011, *supra* note 92, at 294.

<sup>162</sup> At the hearing the Competition Commission recommended that these employees be rehired. The Commission had originally recommended approval without conditions, but changed its view based on documents the intervenors had discovered during the Tribunal proceedings. See Commission Submission to Tribunal. See Competition Commission’s Submissions, *supra* note 99, at ¶¶ 9, 17. The merging parties rejected a rehiring condition during the hearing, stating, instead, that they would work with the union to implement a right of first employment as “opportunities arise.” See Tribunal Hearing Transcript, May 16, 2011, *supra* note 108. at 1022.

to walk away from the transaction if such conditions were imposed.<sup>163</sup> But the parties did volunteer to create a R100 million fund (about \$15 million at the time) to be expended within 3 years to develop local South African suppliers.<sup>164</sup> The Tribunal’s opinion carefully reviewed the proposals to require some sort of local content requirement, finding such an approach not “appropriate, proportional, rational, or enforceable”<sup>165</sup> and pointing out that such restrictions might raise price to consumers, in contradiction to the Tribunal’s “primary mandate.”<sup>166</sup> The Tribunal accordingly adopted the merging parties’ investment fund approach as a “more positive response to the domestic procurement concern.”<sup>167</sup>

If the Tribunal was cautious on the conditions it would mandate, it was silent about whether the merger should be prohibited on “substantial public interest grounds.” In the end, the evidence presented to the Tribunal with regard to potential consumer benefit and public interest harm acted more as support for assessing the proposed conditions than for assessing the merger’s legality.

## 2. The Competition Appeal Court

The lack of direct attention to substantive legality changed when the Competition Appeal Court reviewed the case and took on two of the difficult legal issues raised when competition law requires consideration of public interest effects: (1) Does “public interest” stand apart from competition law, with competition law confined to a narrow conception of consumer welfare? (2) No matter how one defines consumer welfare, how can consumer welfare and the various “public interests” be balanced so as to determine

---

<sup>163</sup> See *id.* at 1020.

<sup>164</sup> See *id.*

<sup>165</sup> See Tribunal Reasons, *supra* note 85, at ¶ 117.

<sup>166</sup> See *id.* at ¶ 115.

<sup>167</sup> *Id.* at ¶ 120 (characterizing it as “appropriate, proportional and enforceable”).

some net social welfare effect? The court answered the first by cautiously embracing a broader view of welfare than just strict consumer welfare, although this broader view did not appear to affect its decision on whether to prohibit the merger.<sup>168</sup> The court answered the second by choosing a balancing approach in which the different interests are weighed in an “exercise of proportionality,” with the public interests needing to be “substantial” before they can trump consumer welfare benefits.<sup>169</sup>

How to measure “substantiality”? For the court, the substantiality of the public interest effect depended, first, on the evidence presented, particularly on quantitative evidence.<sup>170</sup> It is here that the court revisits the difficulties that the economists had in assessing a major issue in the proceedings—the effect of imports on jobs. The court pointed out that the trade-off between consumer benefits and job loss “was bedeviled by the lack of precise evidence.”<sup>171</sup> Hodge’s testimony for the intervenors was based on assumptions that had to be “treated with considerable caution,” and was particularly undercut by his concession that a 5 percent decrease in Massmart prices after the acquisition would lead to 20,000 *more* jobs.<sup>172</sup> On the other hand, Baker’s testimony for the merging parties was based on what Wal-Mart and Massmart executives decided to tell him; and they would not give him data on their respective costs for imported goods.<sup>173</sup> The court concluded: “[T]he evidence, as made available to the Tribunal and which forms the record placed before this court, cannot justify the conclusion that the public interest considerations raised by the appellant would so trump the benefits which, it is common

---

<sup>168</sup> See Comp. Appeal Ct. Opinion, *supra* note 88, at ¶ 98 (“the Act should be read in terms of an economic perspective that extends beyond a standard consumer welfare approach”).

<sup>169</sup> See *id.* at ¶¶ 100, 114.

<sup>170</sup> See *id.* at ¶ 113.

<sup>171</sup> *Id.* at ¶ 105.

<sup>172</sup> See *id.* at ¶¶ 108, 119.

<sup>173</sup> See *id.* at ¶ 108.

cause, will flow to consumers, to sustain a decision that the merger should be prohibited.”<sup>174</sup>

Nevertheless, the court was not done. Although the merger was not prohibited, the court went on to consider whether the Tribunal had imposed appropriate conditions or whether the conditions should be modified. Here the court focused on effects on Massmart employees and effects on small and medium-sized businesses and jobs generally.

The court treated specific job losses directly tied to the merger in a somewhat different light than it did the arguments over import substitution and more general job loss. For such specific job losses the court held that retrenchments that take place proximate to a merger—even if done before—require justification, with the burden on the merging parties to provide it.<sup>175</sup> The court then reviewed the evidence, finding that the merging parties had not rebutted the inference that Massmart was trying to make itself a more attractive acquisition candidate to Wal-Mart.<sup>176</sup> The court accordingly held that the 503 fired employees should be reinstated.<sup>177</sup>

More important was the court’s review of the investment fund, proposed by the merging parties and ordered as a condition by the Tribunal. Once the court had decided that it could not prohibit the merger outright, there was no longer any reason to net the gains from the merger against the losses. Consumers would have the benefit of the gains (lower post-merger prices) while the court attempted to mitigate the losses. A win-win for all sides.

---

<sup>174</sup> *Id.* at ¶ 120.

<sup>175</sup> *See id.* at ¶ 140.

<sup>176</sup> *See id.* at ¶¶ 142-45.

<sup>177</sup> *See id.* at 2.1.2 (Order).

Thus, the court now recognized that, in fact, there will be “some shift away from local producers to . . . imports,”<sup>178</sup> and turned to the question of how best to protect the interests of those local producers adversely affected.<sup>179</sup> Competition law cannot substitute for industrial policy, the court wrote, but it can be used in a way that “gives tangible effect to the legislative ambition.”<sup>180</sup>

It is at this point that the court seizes on the affirmative benefits that the merger could bring to small and medium South African business if the fund were operated in a way that gave South African producers the training to operate more efficiently and to join Wal-Mart’s global supply chain. As the Tribunal had pointed out, imposing the local content requirements that the objectors wanted would have anticompetitive effects, both for the merged firm and for consumers, because such a requirement would lead to higher prices.<sup>181</sup> Getting South African manufacturers to be able to participate in global markets would not.

The court, however, did not think that the Tribunal had adequately considered whether the proposed fund would “give tangible effect.” How was the fund to operate? Was the amount for the fund too large or too small? What effect might the fund’s activities have on the capacity of small and medium sized business to actually participate in global markets (or at least compete for Massmart’s business)? Not being sure of the answers to these questions, the court ordered Massmart (the merger had already been consummated) to commission a study of these issues, to be done by three experts (one appointed by the company, one by the union representing Massmart’s employees, and

---

<sup>178</sup> *Id.* at ¶ 161.

<sup>179</sup> *See id.* at ¶ 154.

<sup>180</sup> *Id.*

<sup>181</sup> *See id.* at ¶ 164.

one by the three government Ministers) who would report back to the court within three months.<sup>182</sup>

This was an ambitious undertaking for a court, as later events proved. Massmart chose Mike Morris, an economics professor from the University of Cape Town; the Ministers chose Joseph Stiglitz, a nobel prize winning economics professor from Columbia University; and the union chose James Hodge, its economics expert at the hearings. Although the court assumed the experts would produce one report, that did not happen. The experts ended up disagreeing—Morris produced one report, Stiglitz and Hodge produced another.

The focus of Morris’s report was on how to create a fund that would help both Wal-Mart and small businesses by aligning their interests in ways that Wal-Mart might find useful to replicate in other countries.<sup>183</sup> By contrast, the Stiglitz/Hodge report was more concerned about Wal-Mart’s good faith, worried that Wal-Mart would just treat its contribution to the fund as money that it would otherwise have allocated to its corporate social responsibility efforts.<sup>184</sup> Although both reports agreed that the R 100 million that the Tribunal ordered was inadequate, the Stiglitz/Hodge report urged a very substantial expansion in funding (between R 500 million to 2 billion), broader goals (to help all producers of potentially tradable goods), and longer duration (to last five to ten years).<sup>185</sup>

Faced with disagreement among the experts, the court chose Morris’s less wary and less regulatory approach. The targets could be limited to small and medium-sized enterprises, an enumerated “public interest” under the Competition Act; broader

---

<sup>182</sup> See *id.* at 2.1.4 (Order).

<sup>183</sup> See, e.g., Mike Morris, Wal-Mart/Massmart Study for the Competition Appeal Court ¶¶ 8, 9 (June 9, 2012), *available at* [\\_](#).

<sup>184</sup> See Expert Report of Stiglitz and Hodge, Guidance on the Walmart-Massmart Merger Condition: Report to the CAC ¶ 20.3 (June 2012), *available at* [\\_](#).

<sup>185</sup> See *id.* at ¶¶ 45, 88.

industrial policy was best left to others.<sup>186</sup> The potential statutory remedy for non-compliance—unwinding the transaction—would be sufficient incentive for Wal-Mart to comply.<sup>187</sup> With regard to funding and duration, the court again relied on Morris’s projections of the fund’s needs, increasing the amount to R 200 million (plus an additional R 40 million that Wal-Mart had already committed) and extending the life of the fund to five years.<sup>188</sup> Reporting of results would be to the Competition Commission on a semi-annual basis, with the Commission given the responsibility of coming up with “adequate benchmarks” for assessing whether Massmart has promoted the core objectives of the fund: that “South African SMME’s [Small, Medium, and Micro Enterprises] benefit from integration into the merged entity’s supply chain, thereby ensuring that this sector remains competitive and hence viable, which, in turn, may enhance employment.”<sup>189</sup> There was no requirement, however, that these reports, or the Commission’s assessment, be made public.

#### E. Conclusion

The Wal-Mart/Massmart case well demonstrates the difficulties of incorporating public interest factors into merger enforcement, but it also shows that interests beyond a narrowly-conceived version of consumer welfare can be pursued from within competition law, rather than leaving those other interests to be dealt with elsewhere. South Africa’s competition law decision-makers tried to keep their public interest concerns somewhat focused, stressing the limited statutory list in the Competition Act. They insisted on concrete evidence of the public interest harms so that some sort of weighing up of those

---

<sup>186</sup> See *In re SACCAWU and Massmart Holdings Ltd.*, Case No. 110/CAC/Jul11 (Competition Appeal Ct March 9, 2012) at ¶ 14, *available at* <http://www.comtrib.co.za/assets/Uploads/110CACJun11111CACJul11-study.pdf>.

<sup>187</sup> See *id.* at ¶ 34.

<sup>188</sup> See *id.* at ¶¶ 38, 43.

<sup>189</sup> *Id.* at ¶ 36.

harms and consumer welfare benefits could be made. They brought into a judicialized process what might otherwise have been solely an exercise in political bargaining, giving representation to other government ministries and to labor interests and requiring them to present their arguments—and even their bargaining— in a more transparent way than would otherwise have occurred. They even came up with a competition-advancing remedy to deal with legitimate concerns over imports, outsourcing, and jobs.

If the Wal-Mart/Massmart case shows that *PNB*'s rejection of public interest factors in merger analysis is too broad, it still leaves a question of how wise the effort to incorporate public interest factors is. The insistence on quantification sets a high bar, one that may prove impossible to meet. On the other hand, the quantification requirement provides incentives to parties—and their economists—to come up with more sophisticated approaches for assessing broader economic harm. In the United States, courts' insistence on proof of anticompetitive effects of mergers beyond the assumed effects of the old structural model has led to ever more sophisticated approaches to unilateral and collusive price setting.<sup>190</sup> Similar results might be expected in this area if parties are put to the task.

Perhaps the more troubling aspect of the Wal-Mart/Massmart decision-making process is the endgame. The combination of political bargaining and the competition agencies' willingness to consider imposing conditions on lawful mergers they will not prohibit outright heightens the concern that the merger review process will be used as an effective penalty tax on merger transactions, particularly when large foreign companies

---

<sup>190</sup> See, e.g., Shapiro, *supra* note 79.

are involved.<sup>191</sup> The concern for penalty exaction exists in all merger regimes with discretionary decision-making, of course. One need look no further than the Texas example, discussed at the beginning of this Article.<sup>192</sup> The hope would be that the transparency of the process and the existence of competition law boundaries will help cabin that exercise rather than exacerbate it.

#### IV. Public Interest and Competition Law Norms

##### A. Fitting Public Interest Into Merger Assessment

The fit of public interest factors with merger assessment is a global issue. This is so both because the sharing of experience cross-border can lead to better standards at home – in the sense of more effective standards given a nation’s goals – and because every nation’s merger policy and practice may impact other nations’ consumers and producers. Convergence of substantive standards is a frequent subject of discussion among the members of the global antitrust community, but the “public interest” question is a left-out piece of the puzzle. Why? Perhaps because the two predominant trend-setting jurisdictions, the U.S. and the EU, may be overly focused on the dangers of incorporating “public interest” into competition law. Officials and policy-makers tend to regard the subject as off bounds, and they may prefer not to dignify it as a legitimate issue.

However wise this stance, by denial or disregard we close our eyes to the fact that mergers raise social issues in the eyes of the people every day – as witness the proposed

---

<sup>191</sup> See Morris Report, *supra* note 183, at ¶ 6 (Fund should be seen as something of general adoption or concern, “rather than a once off penalty tax on Wal-Mart/Massmart”). See also Daniel A. Crane, *Substance, Procedure, and Institutions in the International Harmonization of Competition Policy*, 10 CHI. J. INT’L L. 143, 149 (2009) (Wal-Mart case is an example of “a government’s use of merger control to exact concessions” from the merging parties; arguing that current international system raises holdout problem that permits competition authorities to extract disproportionate concessions favorable to its own jurisdiction).

<sup>192</sup> See *supra* notes 1-3 and accompanying text.

merger of Time Warner and Comcast;<sup>193</sup> and numerous jurisdictions, indeed probably most, allow some role for public interest in the antitrust merger vetting process. To deny the existence of the issue is to let the rules of a hundred jurisdictions bloom in the shade without regard to the rule of law or the interdependencies of world commerce.

We propose that the world community should recognize the widespread usage of public interest factors. We ask here: Should convergence projects on merger standards include discussion of public interest, and, for nations that choose to incorporate public interest factors, are there world norms that may or should emerge? It is not necessary for a jurisdiction to endorse a public interest test at home to have an interest in a global norms project, for we are all impacted by the use of public interest factors in vetting international mergers abroad just as we are all impacted by the use or not of an efficiencies defense in our neighbors' merger regimes.

The project of fitting public interest norms into merger assessment requires: (1) categorizing the variety of public interest factors used by various nations; (2) describing how nations use the factors and with what institutional process, particularly how transparently the authorities, commissions and ministries vet and incorporate the factors; and (3) inquiring into whether the nation pays the costs of public-interest led decisions or imposes the costs on others.

As we have seen, countries' policies on admissible public interest factors vary. When public interest factors are explicitly included in a competition statute, the clauses commonly include some or all of the factors mentioned earlier— jobs, national or local economic development, effects on small business, the loss of local or national control of

---

<sup>193</sup> See, e.g., Editorial, *A Cable Merger Too Far*, NEW YORK TIMES, May 27, 2014, p. A22 (“The merger will concentrate too much market power in the hands of one company ....”).

important enterprises, diversity of viewpoint, and international competitiveness. South Africa and Namibia include economic opportunity for historically discriminated against people. The public interests expressly allowed to Member States by the European Merger Regulation are security, prudential rules (financial), and media diversity. Security and other strategic interests are recognized by China and many other nations, and, if not protected in the merger control law, they are frequently protected by specialized laws.

Institutional arrangements to assess the public interests vary. In many jurisdictions the competition commission weighs the public interests, often after it completes the competition analysis. As the Wal-Mart case in South Africa shows, in some nations the competition authority may prohibit or condition mergers that are found to be against the public interest even if they are not anticompetitive. In other jurisdictions, the competition commission is entrusted only with the competition analysis and a minister may trump the result. If the industry is regulated, the sectoral regulator is normally called upon to decide whether the consolidation is “in the public interest” and it may consider “competition” to be one of the public interests. The degree of transparency and of process varies, from a high level, as in South Africa, to a low level, as in China.

Are the costs of trying to satisfy a public interest standard internalized or externalized? In the case of protecting jobs and small business and other internal market social problems, the home nation would normally bear the costs. One might expect higher local supermarket prices when Wal-Mart has special obligations to workers or suppliers, so the consumer pays. In the case of anticompetitive domestic mergers

permitted in the name of international competitiveness, the nation may likewise bear the cost of higher consumer prices at home for more efficiency in world markets.

On the other hand, public interest tests can impose harms on foreign actors and global markets. First, the special obligations on Wal-Mart to save jobs or small South African suppliers are a tax on the multinational firm. Second, domestic mergers permitted in the name of international competitiveness might increase market power (rather than efficient competition) in world markets. Third, an international merger prohibited or conditioned to protect domestic competitors handicaps efficiencies – not only in the domestic market but in world markets.

Fourth, we have assumed above that the competition officials or minister is sincerely trying to advance a public interest of the nation. A principal concern of public-interest skeptics is that the notional public interest is not a *public* interest at all but is a vested interest dressed in public garb; in which case both the internal market and external market costs may be high.

#### B. Global Norms

Against this array of motivations and cautions, and against the backdrop of *Philadelphia National Bank* and the *Wal-Mart/Massmart* decision, we suggest the following principles as possible global norms for nations that choose to admit public interest considerations:

1. Nations should specify the public interest factors that are admissible in their merger analysis. They should include only those factors that they regard as particularly important to their society and only those that can be expected to serve the social objective for which they are desired. An unenumerated “public interest” is a

prescription for too wide-ranging an inquiry, with the potential of undermining effective merger enforcement, a lesson drawn from the *Philadelphia National Bank* approach.

2. The use of public interest factors in antitrust merger analysis should be transparent, and a process for advocating for and against their inclusion and for consideration of their weight and priorities should be provided.<sup>194</sup>

3. In nations that apply public interest factors, the authorities or courts should provide a separate competition analysis and should complete this analysis before applying public interest factors.

4. In applying the authorized public interest factors, nations should quantify the costs and benefits and weigh the trade-offs to the extent possible and practical.

5. Public interest conditions should be imposed in market-friendly ways where possible; thus following the South African Wal-Mart example of providing a fund for building capacity of small suppliers, as opposed to imposing buy-national quotas on the merged firm.

6. In common markets, national industrial policy of member states that would give their firms power at the expense of their neighbors are not appropriately recognized as a public interest of the Community.

7. Nations should refrain from applying public interest factors that directly impair the commerce of other nations or handicap the efficiency of foreign firms (thus, they should seek to avoid negative externalities). Especially when applying public interest factors that encumber an international transaction, the merger system should

---

<sup>194</sup> Ministerial decision-making is least likely to be transparent. However, the processes of competition agencies and sectoral regulators are not always transparent. For a discussion of transparency in competition policy decision-making in nine jurisdictions and three international institutions, see *THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES* (Eleanor M. Fox & Michael J. Trebilcock eds. 2013).

afford transparency and due process especially in view of the increased possibility of discrimination against the foreign firm.

8. Nations should monitor the extent to which public interest conditions have achieved their goals.

9. Nations should strengthen the capacity of the institutions of their competition law enforcement to deal with the problems posed.

### Conclusion

Non-competition public interest factors – especially saving jobs, preserving entrepreneurial opportunities, and preventing excessive concentration or trend towards dominance even when not linked to higher prices<sup>195</sup> – pervade antitrust merger analysis across much of the world. Yet public interest is a step-child in the world of global norms and polite antitrust conversation in the West. We propose to recognize its pervasive existence and to begin to rationalize its usage, particularly through development of norms of transparency and proportionality, even though we recognize that the sub silentio use of these factors is hard to control. The fiftieth anniversary of the landmark case of *Philadelphia National Bank* provides the felicitous occasion to reexamine not only the namesake presumption for which the case is famous, but also to reexamine the minor actor that made a quick appearance upon the stage but yet made a lasting imprint upon the law – “This merger is good for Philadelphia.” We have tried to unbundle public interest factors, to place the issue and practices in world perspective, to bring the prevalence of public-interest regard to greater consciousness, to examine how public interest factors can be integrated into merger analysis, and to propose a framework for the

---

<sup>195</sup> The last two factors are often called competition factors, but not if the jurisdiction confines harm to competition to output limitation and price rise.

development of global norms for those nations and competition authorities that choose to consider non-competition public interests in competition merger assessment.